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# REVIEW OF AUSTRALIAN CONSUMER LAW



RETAILCOUNCIL

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## ABOUT THE RETAIL COUNCIL

The Retail Council is the voice of Australia's top retailers driven to achieve sustainable growth of retail in Australia for the benefit of the consumer, the industry and the economy.

Formed in 2006, the Retail Council represents members committed to advancing retail in Australia, fostering economic growth and supporting job creation. They are retail businesses that lead the industry delivering to customers across all types of retail goods and services and are leading employers who contribute to local communities and regional development and strongly interrelate with other Australian industries.

As an authoritative voice of Australia's top retailers, the Retail Council contributes to the development and support of public policy that would boost productivity, support employment growth, foster a competitive environment and ultimately make the sector stronger.

Retail Council members are part of an industry that is a top ten contributor to Australia's Gross Domestic Product (GDP) contributing more than \$134 billion (or 8%) of total economic activity through more than 127,000 retail operators nationwide and providing jobs to more than 1.25 million Australians.

## EXECUTIVE SUMMARY

The Retail Council welcomes the opportunity to make a contribution to the Australian Consumer Law Review ('the Review') being conducted by Consumer Affairs Australia and New Zealand ('CAANZ').

The Retail Council is broadly supportive of the strong consumer protections provided by Australia's current consumer law framework. These protections allow our customers to make informed decisions and be confident that they are purchasing safe and reliable products that will deliver what they expect. In the event that this does not occur, then consumers can have the confidence that the problem will be rectified in a timely and fair manner.

The overall theme of this submission is that the Retail Council is supportive of the intent of the current ACL but we have some suggestions on how the actual practical operation of the ACL could be improved. In short, changes could be made so that the operation of the ACL is improved, without compromising the intent of the laws to protect consumers from unscrupulous behaviours.

When considering consumer protection laws it is important to remember that the customer is the driver of all retail businesses. Every retailer wants to ensure that all their customers leave their store or website having had a positive experience and having purchased a safe and reliable product that is fit for purpose. No retailer wants to have customers that are unhappy with the service or products they received. As such, retailers are focused on ensuring that Australia has clear, consistent and comprehensive consumer protection laws and where the right balance is struck between fairness for consumers and the regulatory burden on retailers.

All consumer laws involve a trade-off. The benefits delivered to consumers need to be balanced against the cost of implementing a regulation or statutory requirement to businesses. It is in relation to this balancing act that some areas of the current ACL need to be adjusted so that the overall benefit is a positive one. Regulations that impose a net negative benefit are not in the interests of the overall economy and risk crimping future prosperity.

This submission follows the general structure of the Issues Paper that was released as part of the Review and is divided into four sections covering:

- Australia's consumer policy framework objectives
- Australian Consumer Law — the legal framework
- Administering and enforcing the Australian Consumer Law
- Emerging consumer policy issues

Based on these four broad areas, the Retail Council has made 13 recommendations for consideration as part of the Review to enhance current consumer protection laws

## Recommendations

1. Do not proceed with the expansion of unfair contract terms to certain small business contracts.
2. The ACCC should provide additional consumer information regarding what constitutes a minor failure and what constitutes a major failure.
3. 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.
4. Remove mandatory reporting for food from the ACL as it duplicates existing consumer protections and does not improve the safety of food products.
5. Increase the mandatory reporting timeframe for product safety matters from two days to four days.
6. Product safety alerts or recalls should be issued at national level only to improve consistency and reduce confusion for consumers.
7. The ACL should not include a general unfair commercial practice term.
8. The ACL should focus on prohibiting certain behaviours rather than only applying to particular business models.
9. Layby arrangements should need to be explicitly entered into by the retailer and customer, and not be automatic once a second payment is made.
10. Fines issued under civil penalty notices should be consistent no matter what the company structure or size of the offender.
11. State regulatory authorities should work together to develop a best-practice protocol to ensure matters are resolved as quickly as possible for all consumers in all states.
12. The ACCC should launch a new education campaign that addresses some of the areas of customer confusion identified by this Review.
13. The ACL should focus on the type of transaction and manner in which the sale is conducted when assessing the appropriateness of certain ACL protections.

# AUSTRALIA'S CONSUMER POLICY FRAMEWORK OBJECTIVES

The Retail Council is broadly supportive of the objectives of the Australian Consumer Law. The introduction of a national system of consumer protections has improved both consumer and business awareness about their rights and responsibilities.

It is important, however, that the ACL remains focused on consumers and does not further expand the definition of a consumer to also incorporate small businesses.

For example, the Retail Council remains opposed to the consumer protections around unfair contracts being also expanded to business-business contracts where one of the businesses is a small business, the contract is a standard form contract and it is worth less than \$300,000 (or \$1 million for multi-year contracts).

This expansion of the definition of a consumer around contractual arrangements encourages small businesses to not take appropriate care and advice when signing contracts. All businesses, including small businesses, have significant responsibilities when it comes to employing people, providing quality goods and services and interacting with customers. As such, small business owners should be strongly encouraged to operate in a professional manner including undertaking appropriate due diligence and obtaining professional advice when signing contracts. A business can reasonably be expected to approach contractual decisions with a greater degree of sophistication than a consumer. Consumers and small businesses do not have the same risk profiles and decision-making capacities when it comes to contract commitments and so it is not warranted, or desirable, that they should be able to access the same unfair term provisions around contracts.

**Recommendation 1: Do not proceed with the expansion of unfair contract terms to certain small business contracts.**

# AUSTRALIAN CONSUMER LAW — THE LEGAL FRAMEWORK

The Retail Council is comfortable with the overall intent of the general and specific protections in the ACL. Nevertheless, there is also scope for improving the clarity of some definitions within the ACL and improving the interaction of the ACL with other consumer safety legislation.

The Retail Council has a number of suggestions regarding how general and specific protections could be better implemented without diminishing the overall intent of the protections.

## Reduce ambiguity around minor and major failure definitions

Members have raised concerns that some of the language of the ACL needs to be clarified, in particular around the use of minor failure and major failure. Members report confusion amongst some customers about the difference between these types of failures and the different remedies that should be offered by retailers. There is a tendency for customers to assume that any failure is by definition a major failure and that a full refund or replacement should always be offered by retailers.

Increased consumer awareness about the difference between minor and major failures and greater clarity within the ACL would help resolve this current ambiguity. There is also scope to address other ambiguities within the area of minor and major failure, such as what constitutes a 'significant' cost of returning goods.

As discussed in greater detail later in the submission, there is also a lack of consistency in terms of advice from state-based consumer bodies about what constitutes a minor and major failure. Consumers are contacting these bodies for advice about the remedy they should request from a retailer and, in some cases, they are being told the failure is major when in the retailers view it is minor. This incorrect advice creates unrealistic expectations in customers.

**Recommendation 2: The ACCC should provide additional consumer information regarding what constitutes a minor failure and what constitutes a major failure.**

## Remove ambiguity around the reasonable time a product should last

There is similar ambiguity around the concept of a reasonable time that a product should last in order to be of acceptable quality, after which any failure falls outside the ACL protections for a minor or major failure. This timeframe will vary from product to product and so is not explicitly defined in the ACL. This issue is likely to become increasingly problematic the longer the ACL has been in place. Different expectations about a 'reasonable' life span are most prevalent in purchases of household appliances and furniture.

For example, some customers think that 5 years is a reasonable timeframe for a white good appliance to last and so would only claim that a product was not of acceptable quality if it failed in less than 5 years. But other customers expect that the appliance will last for 20 years and so when

their fridge or washing machine fails after 15 years they may return to the retailer or manufacturer and demand a full replacement because it has not lasted what they consider to be a reasonable timeframe.

As with minor and major failure matters, this issue is an area where customer views and retailer views can diverge and the two parties have different outcome expectations.

As the ACL matures these differing expectations are likely to become increasingly prevalent with retailers dealing with requests to replace items that are decades old because a customer believes they should have lasted that long. In some cases the item may no longer be available, particularly for technology-based items where development is fast.

The large number of different products available, and new products constantly coming onto the market, means that developing a definitive list what constitutes a reasonable time period that a product failure is covered by the ACL is not practical.

Nevertheless, it would improve the operation of the ACL if the ACCC were to engage with manufacturers and retailers to discuss this issue and develop a framework to help guide retailers and manufacturers when dealing with this issue. Possible sources of guidance could include when the tax system considers that an item has been fully depreciated or industry standard warranties offered with specific products.

**Recommendation 3: 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.**

### **Mandatory product safety reporting with respect to food should be removed from ACL**

The inclusion of food in the mandatory product safety reporting system has not improved consumer safety around food consumption and has resulted in duplication of reporting between the ACL and health-related reporting regimes.

Food retailers report a range of problems with the current system as it relates to food including:

- Providing appropriate staff resources to ensure that reporting can occur within two days.
- Gathering clear evidence to substantiate “serious injury or illness” in accordance with s.2 definition is difficult and often not obtainable. This is particularly the case when the source of a possible product safety issue that needs to be followed up is on social media, rather than via an in-store report.
- Unnecessary duplication occurs when there is a cluster of incidents (e.g. the 2015 berry situation) because the ACL requires the continued report of incidents even after regulators are aware and addressing the problem.



- Meeting the two-day timeframe for mandatory reporting, which does not allow for detailed investigation to be undertaken. This results in over-reporting of incidents because of the lack of appropriate investigative time.
- Dealing with a situation where the customer determines that there is a link between food and illness, which results in unreliable reporting data, wasted resources within the business (because of time/effort spent reporting and investigating incidents that are not caused by food product), and an unnecessary burden for regulator, supplier and retailer.

A recent example of the ineffectiveness of the system in adding to consumer safety was with respect to an outbreak of hepatitis A in some frozen berry products in 2015. When this outbreak occurred health professionals, retailers and manufacturers worked together to remove products from shelves, inform customers of risks and narrow down the source of the outbreak. This was a well-coordinated response that happened despite the ACL – not because of it. Health professionals already had the process in-hand and were working to a solution but under the ACL each time a customer came into a store and raised concerns about a berry product, the store had to complete the mandatory product safety reporting process in order to comply with the ACL. This was despite the fact that the outbreak was well understood and already being responded to. The mandatory product safety reporting mechanism did nothing to improve the protection of consumers and swamped regulators with notifications that they did not need.

These problems have already been recognised by the Government and regulators. In March 2015, the former Small Business Minister Bruce Billson introduced a Bill to remove the need for food businesses to alert the Australian Competition and Consumer Commission when they become aware of food safety problems. He noted that:

*Both the ACCC and Australian food safety regulators consider these reports to be of no added value in regulating the safety of food products. The food industry has informed the Government that this requirement places a disproportionate cost on industry.<sup>1</sup>*

Unfortunately, this Bill has not proceeded and food continues to be inappropriately captured within the ACL.

**Recommendation 4: Remove mandatory reporting for food from the ACL as it duplicates existing consumer protections and does not improve the safety of food products.**

### Mandatory product safety reporting timeframe is too short

Aside from the specific issues with food reporting outlined above, members also report concerns about the current two day reporting period for general product safety incidents. The current time period does not sufficiently balance the need to quickly address safety concerns against the need for retailers to have sufficient time to conduct internal reporting and investigations. This is resulting in over-reporting of incidents with no evidence that consumer safety is being improved.

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<sup>1</sup> <http://www.smh.com.au/federal-politics/political-news/foodrelated-deaths-and-illnesses-to-no-longer-be-reported-to-the-acc-20150318-1m25kd.html>

Product safety matters need to be adequately investigated before reporting to ensure that there is a genuine product safety issue. Undertaking inquiries within the two day timeframe can be particularly problematic on weekends when it may be difficult to follow-up with the customer or undertake specialist investigations.

A more realistic compromise, that finds the right balance between customer safety and practical business operations, would be four days. This would allow for the proper internal investigations to be conducted, including adequate follow-up with the customer, while also still ensuring that unsafe products are subject to a recall in a timely manner. This extra time would result in a better quality of investigation and thus a more informative product safety notification being provided to regulators.

In addition to these concerns about the timeframe around mandatory product safety reporting, members also raise questions about the usefulness of the system as a whole. For example in the experience of members there are very few product safety warnings that are ever followed up by the ACCC with the retailer and so it is not clear how the system in its current format improves consumer safety.

**Recommendation 5: Increase the mandatory reporting timeframe for product safety matters from two days to four days.**

### Inconsistency in product safety across jurisdictions

One of the key benefits of the ACL is that it is a national system. This is particularly beneficial for national retailers who operate business models that cross state boundaries. The regulation of the system, however, is done at a state level via state-based authorities. In addition, there are also other state-based regulators, such as the electrical safety regulators, that are involved in some aspects of overseeing the ACL. If these various ACL regulators react to safety concerns at different paces then it can create in confusion amongst customers and retailers.

The hoverboard situation that emerged in early 2016 is a good case study of the impact of regulators responding out of synch with each other. Hoverboards were a popular purchase for Christmas 2015 but only a few weeks later a number of house fires occurred which were linked with the recharging of hoverboards. Rather than using a national approach, states and territories reacted to these events at different paces which resulted in different rules for sales in different states and territories. For example, Victoria's electrical safety regulator issued a public warning on Jan 5 2016 and some specific hoverboards were recalled. In contrast a national ACCC-led interim ban on hoverboards that did not meet certain safety standards was not introduced until March 2016. This regulatory inconsistency, combined with extensive media coverage about the dangers of the hoverboards, created confusion amongst customers and retailers about the safety status of hoverboards.

Different responses to product safety matters from different jurisdictions also creates the potential of a competitive disadvantage if a retailer in one state is prohibited from selling a product but a competitor in another state can continue to sell the item.

**Recommendation 6: Product safety alerts or recalls should be issued at national level only to improve consistency and reduce confusion for consumers.**

### Do not adopt a general unfair commercial practice term

The Issues Paper raises the suggestion of including an unfair commercial practice term into the ACL. 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.

**Recommendation 7: The ACL should not include a general unfair commercial practice term.**

### The transaction, not business structure, should determine the applicability of the ACL

The ACL should be focused on the relationship between a customer and a business, rather than covering only a specific business type. The focus should be on preventing certain behaviours rather than outlawing certain business models.

Based on these principals, the Retail Council is not supportive of the ACL not being applied to a transaction because of the nature of the business structure. Neither does the Retail Council support the banning of certain business structures.

If, for example, a not-for-profit business is selling products to customers then they should be subjected to the ACL based on that supply arrangement, rather than excluded from the ACL because they are a not-for-profit. The customer may be unaware of the business structure of the company they have purchased from and so make a reasonable assumption that the purchase is covered under the ACL. There are also competition implications if exactly the same transaction results in different ACL obligations depending on the structure of the businesses involved.

Retail is dynamic and new business models are constantly emerging. Placing a ban on certain business models risks restricting future developments in the sector. A less blunt approach is to continue to focus on prohibiting certain behaviours rather than certain business models.

**Recommendation 8: The ACL should focus on prohibiting certain behaviours rather than only applying to particular business models.**

## Entering into a layby arrangement should not be implicit

Layby is an arrangement where a customer buys a product but they do not pay the full price of the product immediately. Instead customers make regular payments on the item until they have paid the full price. During the time the item has not been fully paid for it is held in the store. Once the item is fully paid for the customer collects the good and the transaction is completed. This type of payment model was popular prior to the wide-spread use of credit cards, when customers wanted to buy an item but could not afford to pay the full purchase price immediately. Despite the increased use of credit cards it remains popular with some consumers and some major retailers still offer the service.

Customers are made fully aware of the terms and conditions of the layby at the start of the arrangement. One of these terms is that if a customer changes their mind about a purchase they let the retailer know and they are under no obligation to make the full payment or complete the sale. This provision is designed to protect customers, especially those on a low income, from having to complete a purchase that change circumstances may mean they can no longer afford. In most cases the retailer simply returns the stock to the floor of the store and the item is purchased by someone else.

There is, however, an automatic provision in the layby terms which is creating a negative unintended consequence. Even if a customer does not want to enter into a layby arrangement they are deemed to have done so as soon as they make a second payment on an item from a store without taking the product home. Once this second payment has been made then all of the layby terms and conditions kick-in, including that the customer can walk away from the sale if they want to.

This automatic feature is creating problems for some retailers, especially those who sell custom-made items such as furniture. Customers put down a deposit, on what are often expensive items, and then the customer comes in and makes a second payment. The customer can then potentially walk-away from the sale leaving the retailer holding a custom-made item that they cannot sell to any other customer.

Retailers who have been caught in this position are now being forced to no longer accept additional payments, beyond an initial deposit. This is frustrating for retailers, since they cannot meet the needs of their customers that want to make an extra payment to spread the financial impact, and it is annoying for customers who are not aware of the automatic layby provisions and think the retailer is just being difficult.

The Retail Council supports the continuation of layby terms and conditions but these should only apply when the retailer and the customer explicitly enter into a layby arrangement. The layby provisions should not automatically start if an extra payment is made on an ordered product.

**Recommendation 9: Layby arrangements should need to be explicitly entered into by the retailer and customer, and not be automatically begun once a second payment is made.**

# ADMINISTERING AND ENFORCING THE AUSTRALIAN CONSUMER LAW

Retail Council members generally have good working relationships with the various regulators of the ACL and the nature of their large size means they are in regular contact.

In terms of proportionality, remedies and offence provisions, the ACL is similar to other comparable jurisdictions and the Retail Council does not believe penalties need to be increased. For example, penalties in the EU are higher but the population is also significantly larger and so the number of consumers effected by any prohibited behaviour would be significantly bigger than a similar offence in Australia.

The Retail Council has some suggestions about how the administration of the ACL could be improved. These include dealing with concerns about the consistency of operation and enforcement of the ACL. The system of consumer protections are unusual in that they are national laws but these are administrated by individual state and territory governments. The experience of Retail Council members is that while the laws are national, the application of them is not always consistent across the jurisdictions.

## Penalties should be related to the impact of the offence not the structure of the business

As a general principal any penalty imposed should be proportional to the offence committed. That is, the penalty should be linked to the offence rather than the business structure of the offender. Under the ACL, civil penalty notices or infringement notices result in different fines being imposed depending on the structure of the business – such as whether it is a limited or non-limited company. Ideally the law should be changed so that all penalties are linked to the impact of the offence rather than using a proxy for company size to determine the fine. The current use of business structure is not a good proxy for size. There are many large organisations that are not listed and many small organisations that are.

**Recommendation 10: Fines issued under civil penalty or infringement notices should be consistent no matter what the company structure of the offender.**

## Need for improved consistency across state and territories

As national retailers Retail Council members deal with consumer advice and advocacy groups in multiple states and territories. Our members report that there are differences between these agencies in terms of the advice provided to consumers, how investigations are conducted and how matters are resolved.

Our members report that consumers can get different advice for the same failure or issue depending on the state-body they speak to. This means customer concerns take longer to resolve than is

needed because the customer can start the process with unrealistic expectations about the remedy they will be offered. It also undermines the operation of the ACL itself which should treat all consumers and retailers the same no matter where they reside or operate.

The undertaking of investigations is also variable between states. Retail Council members report that the level of information provided by some state bodies when investigating matters is excellent but in other states it is not sufficient to quickly respond to customer concerns and resolve the issue.

Consistency and service levels for consumers could be improved if state bodies worked together to develop a national best practice model for providing information to consumers, conducting investigations and resolving disputes.

**Recommendation 11: State regulatory authorities should work together to develop a best-practice protocol to ensure matters are resolved as quickly as possible for all consumers in all states.**

### A new consumer education campaign is needed

Linked to this issue of consistency is the high level of confusion that consumers have about the ACL. Retailers frequently have to explain the ACL to aggrieved customers because they have misunderstood information that has been provided to them.

This can be addressed by re-working the ACCCs consumer awareness information, with particular focus on making sure consumers understand:

- that not all failures are automatically major failures,
- that a 'reasonable time period' for a product to last is based on more than just the consumers perception, and
- that a retailer may not be able to instantly provide a remedy and is entitled to investigate the circumstances of the failure before responding.

There may also be other areas of regular confusion that emerge as part of this Review which could be of particular focus in a new education campaign.

**Recommendation 12: The ACCC should launch a new education campaign that addresses some of the areas of customer confusion identified by this Review.**

## EMERGING CONSUMER POLICY ISSUES

As a key principal the ACL should remain as flexible as possible in terms of incorporating new retail models. This can be done by focusing on the type of transaction – i.e. solicited versus unsolicited or the sale of a new versus used good – rather than focusing on the type of retail model being used. This issue has already been discussed in this submission in terms of competition with not-for-profit retailers who are undertaking the same type of transaction as a for-profit retailer. It is also applicable when considering the sharing economy and new store formats, such as pop-up stores.

That is, it is the type of transaction that determines where it fits in the ACL coverage, not the structure of the retailer.

For example, it is important that the ACL is responsive to new developments in retailing, including pop-up stores. These stores operate like normal retail outlets but they are temporary in nature, usually operating for only a few weeks in a certain location. Like standard stores, the customer approaches the store if they are interested in looking at products or making a purchase. The store-operator does not approach customers who are passing by to encourage them to make a purchase. This is an important distinction and is why pop-up stores are not unsolicited selling operations – they are simply temporary store outlets.

As such, pop-up store retailing should be covered by the general provisions of the ACL and should not be subject to the special conditions around unsolicited selling – such as door-to-door sales approaches. This style of retailing involves the retailer approaching the customer and not the customer approaching the retailer and so there are special cooling off periods to ensure that customers are not pressured or encouraged into making a purchase that they did not intend to make.

The Retail Council does not support the exclusion of any prohibition of any particular retail model – as this risks inhibiting innovation in retail. Instead, the ACL should focus on the manner in which the sale is undertaken, rather than the type of store or business structure used for the selling. The manner of the sale will then determine if the customer needs additional protections, such as those provided for unsolicited sales already in the ACL.

**Recommendation 13: The ACL should focus on the type of transaction and manner in which the sale is conducted when assessing the appropriateness of certain ACL protections.**