

18 November 2020

Law Design Office
Treasury
Langton Cres
PARKES ACT 2600

By email: miscamendments@treasury.gov.au

Dear Mr Robinson,

Exposure Draft of the *Treasury Laws Amendment (Measures for a Late Sitting) Bill 2020: Minor and Technical Amendments*

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Measures for a Late Sitting) Bill 2020: Minor and Technical Amendments (Exposure Draft)*.

The Committee broadly supports the proposal in the Exposure Draft to amend the *Competition and Consumer Act 2010 (CCA)*, subject to some additional matters. The Committee suggests these additional matters should be considered by the Consumer Affairs Forum, Treasury and/or the Australian Competition and Consumer Commission (**ACCC**) in order to ensure that the amendments proposed in the Exposure Draft have their intended effect.

The Committee's comments on the Exposure Draft below are limited to those parts of the Exposure Draft that are relevant to competition and consumer law.

1. PROPOSED AMENDMENT TO THE DEFINITION OF CONSUMER

1.1 The proposed amendment

The amendment proposed to section 4B of the CCA is intended to ensure the meaning of 'consumer' in the Act remains consistent with the definition of 'consumer' as it appears in section 3 of the Australian Consumer Law (**ACL**). Prior to the introduction of the ACL, the definition of 'consumer' in section 4B of the CCA was applied to various consumer protection provisions in the Act, but these provisions have since been moved into the ACL, which contains its own definition of 'consumer'.

The definition of 'consumer' in section 4B of the CCA is drafted in slightly different terms to the definition which appears in section 3 of the ACL.

Section 3 of the ACL defines the term 'consumer', which applies in many, but not all, parts of the ACL. While this definition is substantively similar to the section 4B definition found in the CCA, there are some differences, namely:

- (a) Section 3(2)(a)(ii) clarifies that a person is taken to be a consumer if they acquire gift cards for the purpose of re-supply, if the re-supply is not in trade or commerce.
- (b) Section 3(10) provides that, if it is alleged in any proceeding under the ACL that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services. This presumption is also found in the CCA definition at section 4B(3); however, the presumption there applies to proceedings under the CCA more broadly.
- (c) Section 3(12) clarifies that a reference to the 'supply' of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer. An equivalent clarification does not appear in section 4B.

Both definitions provide that a person is taken to have acquired goods or services as a 'consumer' where the amount paid does not exceed \$40,000. From 1 July 2021, pursuant to the *Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020*, this monetary threshold will increase to \$100,000.

The Committee notes that outside of the definitions appearing in sections 4B of the CCA and 3 of the ACL, the CCA and the ACL also define the term 'consumer' for specific contexts. Those definitions are found at:

- (a) Section 51ACA of the CCA: the definition of 'consumer' in relation to an industry;
- (b) Section 56AI(3) of the CCA: the definition of 'CDR consumer' under for CDR data;
- (c) Section 2 of the ACL: the definition of 'consumer goods' in relation to the product safety regime; and
- (d) Section 23(3) of the ACL: the definition of 'consumer contract' in relation to the unfair contract term protections.

1.2 The Committee supports the proposed amendment

The Committee welcomes the amendment of the definition of 'consumer' in section 4B of the CCA to align with the definition appearing in section 3 of the ACL. The Committee acknowledges the benefits of consistency between these definitions to eliminate redundant language, confusion or the suggestion that different meanings should be attributed to the word 'consumer' in the CCA and ACL contexts.

The term 'consumer' is currently used in a variety of contexts in the CCA. The amended definition is unlikely to impact the interpretation and application of the term as used throughout the CCA, with one exception. The Committee notes that section 3(10) of the ACL, which prescribes a presumption that a person is a consumer, only applies to proceedings under the ACL. As a consequence, on the proposed wording in the exposure draft, this presumption would not be carried into proceedings under the CCA outside of the ACL. It is not clear to the Committee that this is intended.

In the Committee's review of provisions relating to proceedings under the CCA, the Committee considered that the proposed amendment may create uncertainty in relation to section 51(2A) of the CCA, which states:

In determining whether a contravention of a provision of this Part other than section 48 has been committed, regard shall not be had to any acts done, otherwise than in the course of trade or commerce, in concert by ultimate users or consumers of goods or services against the suppliers of those goods or services.

Section 51(2A) is contained in Part IV of the CCA and relates to exceptions for contraventions of restrictive trade practices.

On the wording proposed in the exposure draft, the presumption that a person is a consumer in relation to particular goods or services would not apply to the above subsection. This could result in the need for the Court, or the parties to a proceeding, to consider whether a person is a consumer for the purposes of section 51(2A) of the CCA.

The Committee notes that there are other provisions relating to proceedings under the CCA that use the term 'consumer' but do not raise the concern outlined above because in those contexts the word consumer is used in an adjectival sense.¹

1.3 The Committee suggests further steps are required to ensure the proposed amendment has its intended effect

While the Committee agrees with the proposed amendment, the Committee submits that the amendment warrants a small drafting amendment to ensure it is sufficiently clear that the presumption that a person is a consumer applies to proceedings under the CCA.

Accordingly, the Committee recommends the proposed amendment be revised to include a new subsection 4B(2):

4B Consumers

(1) *For the purposes of this Act, unless the contrary intention appears, a person is taken to have acquired particular goods or services as a consumer*

¹ These provisions are sections 45DD(3) and 155(2)(b).

if the person would be taken to have acquired the goods or services as a consumer under section 3 of the Australian Consumer Law.

(2) A reference to the Schedule in section 3(10) of the Australian Consumer Law is taken to mean a reference to this Act.

The Committee submits that its proposed amendment would clarify the operation of the presumption in section 3(10) of the ACL and its application to proceedings under the CCA.

2. PROPOSED AMENDMENTS RELATING TO MULTIPLE NON-MAJOR FAILURES

2.1 The proposed amendments

The Committee understands that the amendments proposed to sections 260 and 268 of the ACL in Schedule 2 to the CCA are intended to clarify the operation of the consumer guarantees in the ACL by making clear that multiple failures to comply with those guarantees can amount to a major failure.

In particular, the proposed amendments add an additional test to the definition of major failure in sections 260 (in respect of goods) and section 268 (in respect of services). This additional test makes clear that a failure to comply with a consumer guarantee will be a major failure if:

- it is one of a series of failures (i.e., two or more) to comply with a consumer guarantee; and
- a reasonable consumer would not have acquired the good or service at the time of supply, if they aware of the nature and extent of the failures to comply with the consumer guarantee, taking all such failures as a whole.

The Exposure Draft also includes a note to the effect that the two or more failures do not need to relate to the same consumer guarantee.

In effect, the proposed amendments will allow otherwise separate failures, as to subject matter and over time, to be considered cumulatively.

2.2 The Committee supports the proposed amendments

While the Committee believes that multiple non-major failures may already amount to a major failure under the CCA, it supports the amendments proposed to sections 260 and 268 to clarify this.

The remedies available to a consumer for a failure to comply with a consumer guarantee turn on whether that failure is 'major' or not. This means that the concept of what is, or is not, a 'major failure' should be clear. This is in the interests of both consumers and traders.

This proposal was recommended by Consumer Affairs Australia and New Zealand (CAANZ) in its final report on the Australian Consumer Law Review.² In that report CAANZ identified that various tribunals have differed in deciding whether multiple non-major failures can collectively amount to a major failure.³ This proposal removes any doubt and resolves the concern with respect to those differing interpretations of the provisions of the ACL.

Importantly, however, the proposed amendments would allow Australian Courts and tribunals hearing disputes between traders and consumers about the application of the consumer guarantees, to continue to balance all of the relevant factors in the circumstances of any particular dispute.

The proposed amendments are also appropriate for the following reasons.

The amendments, consistent with many other areas of the ACL, retain discretion and flexibility by not mandating any particular outcome. The amendments clarify that multiple non-major failures *could* amount, cumulatively, to a major failure, but they do not mandate that multiple non-major failures *must* or *do* in fact amount in any given circumstances to a major failure. This is because it is still subject to the test of whether a reasonable consumer would not have acquired the goods (although see below concerns around this definition). It is appropriate for each series of non-major failures to be assessed on a case-by-case basis.

The amendments do not prescribe an arbitrary number of failures that amount to a major failure. They appropriately leave open the possibility that in respect of some goods or services, two non-major failures may be sufficient to amount to a major failure, while in other circumstances multiple non-major failures may not amount to a major failure (again depending on the 'reasonable consumer'). The proposal aims to strike the correct balance between the interests of consumers and traders, providing scope for traders to pursue a reasonable number of attempts at repair, as appropriate, but seeking to prevent consumers from being trapped in a 'cycle of failed repairs'.⁴

The amendments do not require the multiple failures to occur within a similar, arbitrary period of time, relate to the same issue, result in the same problem or relate to the same consumer guarantee. Again, it is appropriate to retain the flexibility for each failure, or series of failures, to be assessed in their own circumstances, across the various appropriate considerations including timing, the nature of the failure and its consequences.

The amendments leave open the possibility that regard may be had to the prior use of a good when determining whether one or more failures amount to a major failure. As the ACCC has acknowledged, prior use may be a relevant consideration in determining whether a defect is major or minor. A repair may be an appropriate remedy where a consumer has had uninterrupted use of a good for a considerable

² CAANZ, *Final Report – Australian Consumer Law Review*, March 2017, at p.22.

³ *Ibid*, at p.21.

⁴ CAANZ, *Interim Report – Australian Consumer Law Review*, October 2016, at p.55.

period of time prior to experiencing any problems, and the repair will adequately address any defect.⁵

The amendments do not propose an arbitrary time limit on a trader's ability to repair a non-major failure (e.g., days out of service, with respect to motor vehicle repairs). This appropriately recognises that some repairs may take longer than others, notwithstanding they are each repairs of non-major failures.

The amendments are not industry-specific and will, appropriately, apply across the Australian economy. They may also assist in addressing concerns raised about the need for so-called 'lemon laws'.

2.3 The Committee suggests further steps are required to ensure the proposed amendments have their intended effect

The Committee suggests that further steps are appropriate to be taken by the Consumer Affairs Forum, Treasury and/or the ACCC, in order to ensure that the proposed amendments have their intended effect.

That intended effect, as the Committee understands it, is to:

- provide clarity in the law so that a consumer may establish a major failure where there are a series on non-major failures that collectively, would be sufficient to deter a reasonable consumer from purchasing the good or service;
- reduce costs and time spent in disputes between traders and consumer about multiple non-major failures; and
- improve the quality and safety of goods available in Australia, by encouraging traders to have better quality control processes in place.⁶

However, there is at least some risk that in the absence of further steps to supplement the proposed amendments, the proposed amendments shift the area of controversy between traders and consumers from *whether* multiple non-major failures can amount to a major failure, to *how many* non-major failures do amount to a major failure. While the Committee supports flexibility, it may be useful for consumers and businesses to be provided with some guidance.

It is also possible that if the complementary initiatives outlined below are not pursued in parallel with the amendments proposed in the Exposure Draft, the balance of the application of the consumer guarantees in the ACL will be unfairly skewed towards the interests of consumers. If this occurs, this may result in unreasonable increases in compliance costs for traders, which are ultimately likely to be borne by consumers in the form of higher prices or a reduction in the quality of goods or services.

⁵ ACCC, *New Car Retailing Industry – A Market Study by the ACCC*, December 2017, at pp.68.

⁶ *Ibid*, p.22.

On this basis, the Committee suggests the following complementary initiatives should also be pursued.

- (a) The definition of 'major failure' should be reconsidered. The Committee is concerned that the current definition over-captures faults. In ss 260 and 286, a major failure in respect of goods or services is defined as including one where a reasonable consumer would not have acquired the goods or services had the consumer been fully acquainted with the nature and extent of the failure(s). This definition is imprecise and frequently unhelpful. While this limb technically sets a minimum threshold for the type and number of faults which would amount to a major fault, it is arguable that a reasonable consumer would rarely, if ever, acquire new goods or services if he or she were aware that there was even one minor failure; at least not without some form of compensation.

This can be remedied by defining a major failure by reference to the ability of the supplier to remedy the failure. If the supplier or manufacturer fails to fix the fault or provide a faultless replacement in a reasonable time, the fault should be deemed 'major'. This would involve replacing the current 'reasonable consumer' limb in sub-ss 260(1)(a) and (2)(b) and 268(1)(a) and (2)(b) with the following: 'the consumer has required the supplier to remedy the failure within a reasonable time and the supplier has not done so.'

This may necessitate some consequential amendments, for example to s 259.

- (b) The ACCC should issue guidelines for traders and consumers on how many non-major failures might amount to a major failure. The guidelines could give indicative time periods and numbers for 'series' of non-major failures, and indicative reasonable periods of repair, for various categories of goods and services.

Of course, the guidelines would not be binding, they could not be exhaustive and other practical challenges would need to be overcome, but they may provide consumers with practical guidance as to what to expect and traders with practical guidance against which to manage their compliance obligations. The Committee considers that the ACCC providing such further guidance would be consistent with observations made by CAANZ about regulator guidance, during the Australian Consumer Law Review process.⁷

- (c) The Consumer Affairs Forum and Treasury should pursue an amendment to the consumer guarantees remedies to allow traders to give partial refunds in circumstances where the consumer has benefitted from the use and enjoyment of a good for a significant period of time before it failed, or during a period over which a series of non-major failures has occurred. By their very nature, non-major failures will allow appreciable continued use of the relevant product. Where a consumer has enjoyed such use or benefit, it is not fair or

⁷ See, for example, CAANZ, *Interim Report – Australian Consumer Law Review*, October 2016, at p.44.

reasonable that traders should be required to provide a full refund or replacement of the good.

The Committee considers that if this amendment were introduced it would increase certainty as to the regard to be had to prior use and reduce the circumstances in which disputes arise between consumers and traders as to whether a series of non-major failures (sometimes years apart) amount to a major failure. This is because traders are currently reluctant to provide refunds and replacements in such circumstances, where the cost of doing so is disproportionate to the cost of repairs (even multiple of them).

Allowing traders to provide partial refunds for goods already used and enjoyed by consumers would also bring the remedies available for goods into line with the remedies available for services under the ACL⁸ and would not prevent a full refund needing to be provided by a trader if the failure to comply with the consumer guarantee occurs only a short time after purchase.

In the alternative to allowing partial refunds it would be beneficial for the ACL to expressly state that prior use is relevant to whether a fault is major.

2.4 Application and transitional provisions

It is proposed that the amendments described above relating to multiple non-major failures to comply with the consumer guarantees will apply in relation to goods or services supplied under a contract *entered into* on or after the day the relevant Schedule (in which the amendments are made) commences.

The Committee supports the proposed application and transitional provisions. It is of course desirable that the proposed amendments do not have retrospective application (i.e., that they do not apply to existing contracts for the supply of goods or services, entered into before commencement).

However, it is not clear from the Exposure Draft, or the explanatory material accompanying the Exposure Draft, when and how the proposed amendments relating to multiple non-major failures will apply to existing contracts for the supply of goods or services that are renewed, extended and/or varied after commencement.

As many of the contracts to which the consumer guarantees typically apply are commonly the subject of renewal, extension and variation (for example, consumer contracts that remain in place on a rolling periodic basis, unless terminated or otherwise cancelled), in the Committee's view it is desirable to make the position with respect to renewed, extended and/or varied contracts, abundantly clear.

The Committee suggests that the application and transition provisions are clarified to make clear that the proposed amendments relating to multiple non-major failures apply in relation to goods or services supplied under a contract *entered into*,

⁸ ACL s 269(3) and s 265(3).

renewed, extended or varied (in respect of those terms that are varied), on or after the day the relevant Schedule (in which the amendments are made) commences.

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee Jacqueline Downes on 02 9230 4850 or at jacqueline.downes@allens.com.au if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read "Greg Rodgers". The signature is written in a cursive, flowing style.

Greg Rodgers
Chair, Business Law Section