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Consumer Policy Unit
Market Conduct Division
The Treasury
Email: consumerlaw@treasury.gov.au

Dear Sir/Madam

CONSULTATION REGULATION IMPACT STATEMENT: IMPROVING THE EFFECTIVENESS OF THE CONSUMER GUARANTEE AND SUPPLIER INDEMNIFICATION PROVISIONS UNDER THE AUSTRALIAN CONSUMER LAW

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on the *Consultation Regulation Impact Statement: Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law (CRIS)* by Treasury.

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. Ai Group has been engaged on matters relating to the Australian Consumer Law (ACL) for several years, especially with input mainly received by members involved in manufacturing, distribution and servicing of consumer electronics and home appliances, the provision of digital technology services and confectionery manufacturing during that time.

As previously stated during the CAANZ ACL Review, we consider that overall the ACL framework has been functioning well. We also stated that we supported minimal changes that will improve and clarify the application of the ACL, strike a fairer balance between the rights of consumers and industry, and hence benefit both consumers and industry in the long term. We continue to stand by that position.

For the purposes of this latest consultation, we are particularly interested in ways that the ACL can be clarified, with non-regulatory options considered in the first instance and how they can be effectively implemented such as improved education and guidance to consumers and industry. However, we do not support the automatic introduction of new or increased penalties and enforcement mechanisms, which can have unintended consequences, not necessarily addressing underlying issues, and impose unnecessary complexity, burden and costs for businesses and regulators. This is particularly important now, given this period of economic recovery from the pandemic.

Further, other methods of legal recourse already exist for consumers and regulators. For example, section 29(1) of the ACL prohibits false or misleading representations concerning "the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy", for which a pecuniary penalty may be imposed.

Therefore, in line with our previous recommendations during the ACL Review, we strongly support an approach along the lines of Option 2 raised under Parts A and B in the CRIS relating to education and guidance.

Additionally, there may be benefit in exploring and consulting on other options that have not been covered in the CRIS, especially where they may assist in providing further clarity for affected industry and consumers on the application of the ACL.

1. Problem with consumer guarantees reform

In our previous submission to the ACL review, we provided specific comments to proposals that CANNZ put forward, including in relation to clarifying consumer guarantees remedies. We would like to provide updated comments that would be pertinent to this consultation.¹

As part of the ACL Review, CAANZ suggested there were two issues associated with consumer guarantees reform relating to major failures; namely, CAANZ proposed consideration of:

- Whether a non-major failure within a short period of time should equate to a major failure; and
- Whether multiple non-major failures cumulatively should amount to a major failure.

Overall, we did not support amending the ACL to expand the definition of “major failure” to include these types of scenarios. While it would be unfortunate for the consumer to experience these types of incidents of failure, it would not be appropriate to apply a simple equation to address a complex issue. However, we supported improvements to regulator guidelines for the benefit of both consumers and suppliers, and increased and improved consumer awareness and education. These would be proportionate solutions to address complex situations.

Despite our concerns, Government proceeded with its consumer guarantees reform, including with respect to major failures, suggesting this would have the greatest net benefit and commenced operation in December 2020.

With the introduction of the major failure amendments to the ACL, we are concerned that our previous issues raised have created new or compounded on pre-existing issues for industry, as previously foreshadowed.

Below is a summary of our previous points with updated comments:

- **Contextual circumstances:** As CAANZ acknowledged, the legal test for a major failure depended on the particular facts of each situation. This is because not all failures are the same and could arise from a multitude of reasons, which could either be attributable to the consumer, supplier or outside the control of parties. And the law needed to be flexible to handle these different situations. Hence, a principles-based approach is appropriate in these circumstances. While this presents a degree of complexity under the ACL, it provided a fair and reasonable outcome for both the consumer and supplier.
- **Market distortion:** If the ACL were to be simplified by lowering the threshold for major failures, this would distort the policy intent in distinguishing these types of failures, while also creating additional uncertainty and potentially masking real issues. Relaxing the threshold for major failures creates a new power imbalance, favouring consumers to the detriment of suppliers. There is a serious risk that this will open the floodgates to unreasonable and vexatious claims. The largest suppliers would likely be able to deal with such an environment, albeit at significant cost in compliance, excessive risk aversion and cost-shifting in industry and unscrupulous consumers which would reduce their ability to invest in other priorities, and potentially resulting in overall higher prices to consumers as the costs of doing business increases. However, smaller suppliers are more likely to be put in an untenable situation where they cannot manage or control their risks at a cost that makes it worth doing business in Australia. At the margins this would reduce diversity, choice and competition and be against the long term interests of the consumer. While it is important to ensure consumers’ rights are protected, it is equally important that legitimate businesses are protected from spurious claims and not discouraged from doing business in Australia.
- **Third party responsibility:** Opening up the definition of major failures, especially to incorporate multiple non-major failures, would substantially increase uncertainty. For instance, there are certain products that are purchased which may require installation or other after-service support by a third party e.g. air conditioners, water heaters, solar-battery systems and televisions. Problems can arise outside the supplier’s control, but which could be

¹ Ai Group commented on a series of proposals previously raised by CAANZ during the ACL Review. However, for the purposes of this submission, we are focussing on consumer guarantees remedies.

construed as falling within an expanded definition of major failures, including for example: the product is incorrectly installed due to the poor performance by accredited installers, leading to increased customer complaints and safety concerns; or the product has internet or WiFi capability, but does not function with these features due to a consumer's own network settings. These examples highlight that the product itself may not be faulty at all. It would be unfair and poorly targeted to make manufacturers and suppliers effectively responsible for issues associated with product installation or other third party services not associated with manufacturers or suppliers. However, we are concerned that under a multiple failure regime, this would be the outcome. The examples highlight the need for reasonable limits on the liability of manufacturers and suppliers, and the need to address the performance of third party service providers.

- **Environmental considerations:** There may also be wider unintended consequences from changes to the ACL. One example is a likely increase in goods returned rather than repaired. Many consumers favour the replacement option over repair, due in part to the time it often takes to complete a repair – especially where the item needs to be transported elsewhere. Even where a manufacturer wants to re-use, re-furbish or otherwise re-purpose or recycle an item, in practice, there may be circumstances where it may not be commercially viable. Therefore, without a viable pathway to extend life, these goods may become waste. This is a substantial and growing cost and risk for manufacturers to manage. Expanding the circumstances in which goods are likely to be returned to manufacturers could create an unintended consequence whereby repair, refurbishment and re-use opportunities are undermined. It may also create a perverse incentive for manufacturers to reduce access to extended warranty options. While outside the formal scope of this review, landfill waste is a significant problem for industry, the public and all levels of government. Stockpiling of items banned from landfill is also of significant concern e.g. e-waste in some jurisdictions. While CAANZ may consider that it is tackling a narrow transactional issue for consumers, it may inadvertently create long term negative impacts in other areas that consumers value.

2. Need for improved guidelines, awareness and education

Not limited to the issue of major failures, we therefore recommended that a better solution was to improve the current level of consumer and industry awareness and appreciation of the ACL and its limits, including what constitutes major failures. We considered that CAANZ underestimated the potential of improvement in these areas to assist consumers, and overestimated the impact of a perceived power imbalance with suppliers.

The value of guidelines, and education and awareness campaigns (along similar lines to Option 2 under Parts A and B in the CRIS) can be substantial if they are implemented effectively. Consumers can be empowered by better information, and governments and regulators can play an important leadership role in helping consumers better understand their rights.

Well-developed guidelines will also assist suppliers in clarifying on issues arising from consumer guarantees. From a manufacturers' perspective, we previously provided anecdotal examples of where these problems have arisen in practice in the past in dealing with other entities and consumers that could benefit from further clarification.

Underlying these problems is the lack of clarity in key ACL definitions relating to consumer guarantees: "major failure", "failure", "acceptable quality", "durable", "reasonable time" and "reasonable costs".

As an example, one member recently commented that:

For higher level complaints, sometimes customers will seek damages on unreasonable grounds such as "emotional trauma" for direct financial costs. It needs to be clearly defined on what is considered to be acceptable as direct financial costs.

Therefore, such guidelines have the potential of providing further clarity in the following areas:

- Scope of responsibility for entities (e.g. manufacturer, retailer, transport and logistics, other third party intermediaries, and others along the supply chain) in handling consumer returned goods;

- Reasonable steps or processes for entities in handling consumer returned goods such as determining failure, including reasonable timeframes for any necessary assessments, and the provision of remedies, particularly repairs;
- Key ACL definitions relating to consumer guarantees; and
- Rights of the consumer on consumer guarantees, including the meaning of “failure”, the rights of consumers versus businesses for remedy selection, and when goods can be returned.

We appreciate that the above issues relating to consumer guarantees may be unique to specific industries and even products. For instance, the definition for durability of goods may vary by the type of product. Therefore, contextual circumstances are important and we propose industry-specific or product-specific guidelines. Development of such guidelines will need further consultation with consumers and relevant industry stakeholders.

However, clarifying definitions and processes through industry-specific or product-specific guidelines will only partly solve the above issues. The broader education and awareness programs for consumers and industry would also complement these guidelines.

Associated with this, we note that Treasury is also concurrently consulting on its *Consultation Regulation Impact Statement: Supporting business through improvements to mandatory standards regulation under the Australian Consumer Law*.² If the ACL were to be amended as a consequence of those proposed reforms, further guidance, education and awareness on changes to the ACL will also likely be important.

3. Lack of consideration of other options and solutions

In addition to Option 2 under Parts A and B, we note that the CRIS puts forward other options relating to maintaining the status quo (Option 1) and other options relating to some form of prohibition against suppliers and manufacturers (Options 3 and 4) supported by penalties and other enforcement mechanisms.

However, there should be other options that may not be listed in the CRIS that would be worth identifying and exploring further. For example, if it were required to amend legislation as an option, there may be value if it assisted industry and consumers in receiving better clarification. Such amendments would need to be properly consulted with stakeholders and assessed (including cost-benefit assessment).

For example, one member commented on a specific issue relating to depreciation deduction and strongly supported it being considered in determining a refund amount that accounts for the age or extent of use of a consumer returned product:

Current legislation does not account for depreciated refunds over the life span of a product like a TV. Typically the principal based legislation is deliberate in vague terminology only that refers to items lasting a reasonable period of time. The issue here is that if industry push for depreciated refunds (say) for a TV product, then industry may be required to officially state what the actual expected lifespan of a TV is i.e. the end residual value we expect a TV to lose all of its value after a specific period of time. There should be wording in the legislation that allows for depreciated refunds.

We are also cautious with proposals to increase regulatory enforcement powers and penalties without a proper assessment of whether regulators have sufficient resources funded by Government to execute their functions. For instance, there may be adequate regulations in place, but regulators may have insufficient resources. If regulators were to be provided with sufficient resources that contributed to addressing an identified issue, then this suggests that the regulations in place are sufficient. We suggest this would be a more prudent step and option to consider rather than immediately resorting to legislative amendments in the first instance.

² See: <https://treasury.gov.au/consultation/c2021-223344>.

Finally, Treasury should also have regard to Ai Group's more recent submissions on the Productivity Commission's inquiry into a right to repair, which includes matters that are relevant to discussions relating to consumer guarantees and supplier indemnity.³

If you would like clarification about this submission, please do not hesitate to contact me or our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,



Louise McGrath
Head of Industry Development and Policy

³ Ai Group submissions to Productivity Commission (January 2021, 15 July 2021 and 25 August 2021):
<https://www.aigroup.com.au/news/submissions/2021/right-to-repair-inquiry-and-issues-paper/>;
<https://www.aigroup.com.au/news/submissions/2021/right-to-repair-draft-report-consultation/>;
<https://www.aigroup.com.au/news/submissions/2021/right-to-repair-draft-report-consultation--supplementary-submission/>.