The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

9 September 2016

Ms Julie Abramson, Commissioner
Productivity Commission

Email: consumer.law@pc.gov.au

Dear Commissioner

PRODUCTIVITY COMMISSION ISSUES PAPER ON CONSUMER LAW ENFORCEMENT & ADMINISTRATION

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Productivity Commission's study into the effectiveness of the "single law, multiple regulator" model for the national consumer policy framework.

We note that the Commission does not intend to cover matters relating to the content and adequacy of laws and regulations under the Australian Consumer Law (ACL) or specialist safety regimes, given that such matters are currently under review by Consumer Affairs Australia and New Zealand (CAANZ). However, the Commission indicates that it will consider aspects of the content of the ACL where it has some effect on how the ACL is administered and enforced. In this respect, we consider the issues that we have raised in our submissions to CAANZ may likely give rise to other issues relating to the enforcement and administration of the ACL.

We have also brought to NSW Fair Trading's attention our members' concerns in regards to its recently established NSW consumer complaints register – a scheme which has been referred to in the Commission's issues paper. While these issues appear to be concentrated to NSW, other Australian jurisdictions may likely consider adopting a similar approach, leading to a potentially wider problem.

1. Australian Consumer Law Review

In our submission to CAANZ in June, our members considered that the ACL framework is functioning well for the benefit of consumers, but there are some aspects of the ACL that are too broad and could be improved through further refinement and clarification. That being said, there were some cases where our members maintain that the ACL has been incorrectly invoked against manufacturers in particular, and the balance has been skewed too heavily in favour of consumers without adequate consideration of the rights of businesses.

Our submissions to CAANZ focused on the following areas: returns and refunds; food safety; product safety; warranties (overseas and online purchases, extended warranties and warranty for defects); the meaning of "consumer"; infringement notices; unsolicited agreements; and emerging issues (bundled goods or services, third parties, innovation and pop-up stores).[1]

While our submission to CAANZ did not generally focus on the effectiveness of multiple regulators, below we elaborate further and provide examples where such issues could arise.

Ambiguity of definitions under the ACL

One of the main issues raised in our submission related to the handling of consumer claims about alleged failures of suppliers to comply with guarantees ("failure").[2] Our manufacturer members are of the view that a large proportion of returned goods either have no failure, or the failure was not caused by the manufacturer. In such circumstances, it would be reasonable for such goods to be returned to

[1] Further details about these issues are included in the appendices A and B to this submission.
[2] Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL) section 259.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

the consumer with no refund in accordance with the ACL.[3] However, in practice, a number of manufacturers are unable to do so.

These problems for manufacturers have been in part due to the lack of incentive or obligation in the ACL framework for: the retailer to initially assess whether a failure exists; and the consumer to only return a good that it genuinely believes was a failure caused by the manufacturer. There are also no proper systems in place to manage the assessment of failures.

In instances where a failure does exist, there has also been an increase in unreasonable claims made by consumers.

Underlying these problems is the lack of clarity for consumers and retailers on the definition of key ACL terms relating to returns and refunds: "major failure", "failure", "acceptable quality", "reasonable time" and "reasonable costs". And at a broader level, our members indicate that the wide definition[4] of "consumer" in the ACL creates too much confusion and uncertainty for suppliers and consumers.

In the absence of clear definitions under the ACL, a scenario could arise where ACL regulators may seek incorrect alternative sources for clarification. For example, "durability" and "acceptable quality" of an LED fitting under the ACL has a different meaning to the design life of LED fittings under the *Greenhouse and Energy Minimum Standards Act 2012* (Cth) ("GEMS"). The design life of an LED under GEMS refers to 25,000 hours, which is the median life expectancy of the product i.e. where half of all LEDs would be expected to fail before 25,000 hours, and half after. It does not mean that the LED light is expected to operate for at least 25,000 hours. Therefore, design life is not relevant for the purposes of clarifying durability or acceptable quality under the ACL.

However, clarifying definitions in the ACL will only solve part of the above problems. Amongst other things, consumers and retailers also need education on the appropriate circumstances for returning goods.

For ACL regulators, this raises questions as to whether they can provide clarity in these areas of uncertainty and do so in a consistent and balanced manner.

Food safety

As discussed in our submission to CAANZ, prior to the dissolution of the 44th Commonwealth Parliament, the Economic Legislation Committee accepted the removal of the ACCC mandatory reporting requirement for food related death, serious injury or illness from the ACL. This was on the basis that the requirement is not adding value, is unnecessary and adds to the compliance burden on businesses.

Operationally, the ACL reporting regime duplicates other established food safety regulatory reporting requirements of States and Territories which are considered adequate. During the Economic Legislation Committee's inquiry Food Standards Australia New Zealand (FSANZ), which is responsible for coordinating national food safety incidents and food recall, acknowledged that the ACL requirement is neither providing information that FSANZ would not otherwise obtain, nor did it provide an early alert to national food safety. Having FSANZ as the lead coordinator responsible for food recall situations avoids duplication and misunderstanding of responsibilities with other bodies.

Our confectionery manufacturer members support the removal of the mandatory food reporting requirement from the ACL on the basis that it has not led to improved food safety outcomes for consumers. This is a deregulatory measure about resolving duplication between Commonwealth, States and Territories agencies in favour of the State and Territory system that has been shown to be effective in protecting public safety.

Product safety

[3] Ibid section 262.
[4] Ibid section 3.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

In our supplementary submission to CAANZ on product safety, we identified the following issues: the definition of consumer products; the effect of trusted international standards; access to regulated standards; the effectiveness of the current approach to product recalls and remedies; and regulators' management of unsafe products under the ACL and specialist regulatory regimes.

Of particular interest to the Commission's review, we raised a number of issues directly applicable to the operation of multiple regulators, using the Infinity Cables recall matter as a case example.

The Infinity Cables recall matter highlighted the different interpretations between ACL regulators of what constitutes a consumer product and a need for policy makers to provide regulators with consistent guidance to the regulation of consumer products. Here, the ACCC defined a consumer product as one that is sold through a consumer outlet, and took regulatory action in the form of a mandatory product recall. However, in circumstances similar to the Infinity Cables matter, other ACL regulators have not classified other non-conforming building products as consumer products and therefore took no action for non-conformance.

The Infinity Cables matter is also an example of an issue falling within the scope of specialist electrical regulators and ACL regulators. Ai Group deals with a number of specialist regulators covering electrical products, building products, plumbing products, work health and safety, and border protection, to name a few. Ai Group believes that, where there is overlap between the remit of these specialist regulators and ACL regulators, consideration should be given to establishing publicly available protocols that govern the operation of regulators.

2. NSW Complaints Register

NSW Fair Trading has recently established a public consumer complaints register, which we understand is for the purpose of using complaint data to deliver better customer service and assist customers to make more informed decisions. The Productivity Commission's issues paper also refers to this NSW database as a mechanism for alerting consumers of likely problem areas, which leads to a further discussion about the lack of a shared national database for serious complaints and cases.

While we support the rationale for the NSW scheme, we have a number of concerns with its design which we do not consider reflects best regulatory practice and creates a disproportionate outcome. This design gives rise to broader issues with respect to a process that lacks procedural fairness, creates the potential for increased abuse of process by consumers and an unnecessary regulatory burden (including resourcing issues) on both the regulator and affected businesses, and unfairly causes reputational damage to businesses over frivolous and vexatious claims.

Particular elements of the scheme that give rise to our concerns include:

- There is no recourse for an organisation to dispute the validity of a complaint.
- The threshold for making consumer complaints is low – it does not limit complaints to reasonable and legitimate claims.
- There is no evidence required of the consumer to support an alleged problem.
- Complaints reporting are misrepresented by omitting additional and relevant information e.g. total number of sales, customer enquiries, and trading company name involved.
- Local distribution companies are being incorrectly held accountable for actions of third party importers and other third parties.
- Definitions in the ACL are currently ambiguous, as raised in our submission to CAANZ.

We have outlined our above concerns in a letter to NSW Fair Trading, as well as suggested constructive ways to improve the administration of its complaints register.[5] While discussions are still ongoing, we hope that NSW Fair Trading will provide a practical and workable solution to address our concerns.

[5] Further details about our concerns with the NSW Complaints Register are covered in Appendix C to this submission.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

There are also broader implications should our concerns with the NSW consumer complaints register not be sufficiently resolved. We understand that other Australian jurisdictions could adopt a similar approach to NSW or potentially use it as a model for a national database. However, given our strong concerns with the NSW approach, we consider that it should not be considered as a model for adoption in other jurisdictions or nationally, without proper consultation and improvements made to the current NSW approach.

Should the Productivity Commission be interested in discussing our submission further, please contact our adviser Charles Hoang in the first instance

Yours sincerely,

Peter Burn
Head of Influence and Policy

Appendix A – Ai Group submission to CAANZ on ACL Review

6 June 2016

Mr Aidan Storer
Manager
ACL Review Secretariat, The Treasury
On behalf of Consumer Affairs Australia & New Zealand, The Legislative and Governance Forum on Consumer Affairs

Email: ACLReview@treasury.gov.au

Dear Mr Storer

AUSTRALIAN CONSUMER LAW REVIEW 2016

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Consumer Affairs Australia & New Zealand's (CAANZ) consultation on its issues paper on the Australian Consumer Law (ACL) Review.

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. The input we received for this submission was mainly supplied by members involved in manufacturing, distribution and servicing of consumer electronics and home appliances, the provision of digital technology services and confectionary manufacturing.

Overall, our members are supportive of the ACL framework and consider that it is functioning well for the benefit of consumers. We are not proposing significant changes or further restrictions to the operation of the ACL. However, some aspects of the ACL are too broad and could be improved through further refinement and clarification.

Since the ACL was introduced, our members have observed that consumers have become more aware of their rights. However, many remain unclear about their rights and obligations under the ACL and further consumer education is still required. In some cases members maintain that the ACL has been incorrectly invoked by the consumer, and the balance has been skewed too heavily in favour of the consumer without an adequate consideration of the rights of businesses.

At this stage of the review our focus is on: returns and refunds; warranties; the meaning of "consumer"; infringement notices; unsolicited agreements; and emerging issues. We also look forward to providing further comments once the CAANZ's draft recommendations are available for consultation.

Returns and refunds

Our members have clear interests in maintaining positive relationships with retailers and consumers. For manufacturers, one important example is the handling of consumer claims about alleged failures of suppliers to comply with guarantees ("failure").[6]

With the introduction of the ACL, our members have noticed that it is now easier for consumers to return goods, as goods are returned at a higher rate. Consumers return goods for many reasons. These include: "reasonable" returns; instances where failure is not due to the actions of the manufacturer (e.g. the failure arises as a result of a third party good or service, or was caused by the actions of the consumer); and instances where no failure can been found.

No failure found and manufacturer not responsible for failure

Our manufacturer members are of the view that a large proportion of returned goods either have no failure, or the failure was not caused by the manufacturer. In such circumstances, it would be reasonable for such goods to be returned to the consumer with no refund in accordance with the ACL.[7]

---

[6] Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL) section 259.
[7] Ibid section 262.

However, in practice, upon receiving a returned good from a consumer, some retailers simply replace the goods and return them to the manufacturers without investigating whether a failure actually exists or what its cause may be. The manufacturer may have no practical ability to return the goods to the retailer. And where there is a failure that was not due to the manufacturer, it is often not viable to repair returned goods, leading to an increase in the number of goods being sent to waste. These returns are a substantial and growing cost for manufacturers.

This experience raises a number of issues about the operation of the ACL:

- There is no incentive or obligation under the ACL for retailers to undertake an initial proper assessment to determine whether a failure exists with a returned good or, if there is a failure, the cause for the failure before the retailer makes the decision to return the good to the manufacturer. For certain retailers, the easiest option is to simply replace and return the goods by default, irrespective of whether a failure actually exists. Manufacturers have reported mixed results in returning goods back to certain retailers under these circumstances.

- There are no proper systems in place to manage the assessment of failures being claimed for returned goods, where a subsequent assessment of failures by the manufacturer is impractical.

- There is no incentive or obligation on consumers to only return goods to the manufacturer if they genuinely believe the failure was caused by the manufacturer. This leaves open the potential for disingenuous claims for returning goods and seeking refunds or compensation.

Failure to comply with guarantees relating to supply of goods

Where a failure to comply with a guarantee for a good is found, the ACL provides consumers with a number of options they can take against the manufacturer depending on the extent of the failure.[8]

However, manufacturers have identified a number of issues that have arisen in practice:

- There has been an increase in unreasonable claims by consumers, which has been burdensome for manufacturers to respond to.

- Other legislative instruments (e.g. the *Greenhouse and Energy Minimum Standards Act 2012* (Cth)) may require the design life (typically determined by testing) of a good to be disclosed by the manufacturer. In the absence of a definition for "durable" within the definition of "acceptable quality" under the ACL,[9] this design life may be inappropriately used to clarify its meaning. For example, the proposed Minimum Energy Performance Standard for receptacles of LEDs requires a design life of 25,000 hours to be marked on LED fittings. This design life could be misinterpreted by a consumer to mean that the LED light is expected to operate for at least 25,000 hours. In fact the 'design life' is the median life expectancy of the product. Half of all LEDs would be expected to fail before 25,000 hours, and half after. Therefore, design life is not relevant for the purposes of clarifying durability or acceptable quality under the ACL.

- When a good is directly returned from the consumer to the manufacturer, some manufacturers fully refund the retail price to the consumer. The ACL does not clarify how the manufacturer could seek monetary contributions from other participants along the supply chain (including the retailer) to share the costs. That is, some manufacturers in practice have covered the retailer margin. This problem is even worse where third party intermediaries may be involved such as rental companies, resellers and overseas sellers.

Underlying these problems is the lack of clarity for consumers and retailers on the definition of key ACL terms relating to returns and refunds: "major failure", "failure", "acceptable quality", "reasonable time" and "reasonable costs". However, clarifying the legislation itself will only solve part of the problem. Consumers and retailers need education on the appropriate circumstances for returning goods, and a solution is needed to address the situation where manufacturers provide consumers with full refunds.

[8] Ibid section 260.
[9] Ibid section 54(2)(e).

Warranties

Overseas and online purchases

The increase in online and overseas purchases requires greater consumer awareness that warranties for such purchases only apply to the originating supplier, not the local supplier. In some circumstances, local suppliers have borne the cost of a good that has been purchased from overseas or online to protect their local brand and reputation, even though they are not obligated to do so.

Extended warranties

Our manufacturer members have seen retailers sell consumers extended warranties that appear to create no rights beyond manufacturers' existing obligations. Retailers should be required to clearly explain to consumers the specific additional value that they will provide under extended warranties.

Warranty for defects

The ACL currently requires mandatory text to be included in warranties for defects.[10] Further consideration needs to be given as to how that information is provided to consumers in light of changing consumer attitudes and expectations. In particular, consumers may now prefer to receive less documentation with a purchase and will look to suppliers' websites for detailed materials, such as user instructions and warranties.

In addition, the current mandatory text is only provided for warranties for defective goods, but does not refer to defective services. In the absence of a mandatory text requirement for warranties for defective services, consideration should be given to whether any requirement for mandatory text is necessary at all, especially in light of changing consumer expectations. Alternatively, consideration should be given to including a mandatory text requirement for defective services.

Meaning of "consumer"

When the Bill to introduce the ACL was tabled, the meaning of "consumer" was described as follows:[11]

> Many provisions of the ACL apply to all persons and are not limited to a defined class of consumers. However, some provisions of the ACL apply only to a defined class of ***consumer*** as it is not appropriate, in those cases, to extend protections afforded by the relevant provisions more broadly.

However, based on our members' experiences, the broad definition[12] of "consumer" in the ACL creates too much confusion and uncertainty for suppliers and consumers.

For instance, our manufacturer members have observed certain retailers making a claim as a consumer under the ACL in order to return goods. In some cases, manufacturers have rejected these claims.

Another scenario is with respect to goods or services that can be provided to different types of customers, ranging from disadvantaged customers to businesses. Currently, the ACL includes an arbitrary monetary threshold value of $40,000 for goods or services within its definition of "consumer".[13] This is a very simplistic approach and clearly does not address the fact that any type of customer could purchase goods or services within that $40,000 threshold, beyond the most disadvantaged customer.

We recommend the CAANZ consider more appropriate overseas approaches to defining the "consumer". For example, as noted in the CAANZ's issues paper, in the United Kingdom the consumer is defined to be a natural person that excludes companies or small businesses. Another option would be to maintain the current arbitrary threshold of $40,000, but exclude contracts with customers who supply an ABN, or at least incorporated companies and government entities. This amended definition for consumer would be extended to unsolicited agreements as discussed below.

---

[10] *Competition and Consumer Regulations 2010* (Cth) reg 90(2).

[11] Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 5 [1.2].

[12] ACL section 3.

[13] Ibid sections 3(1)(a)(i) and 3(3)(a)(i).

There are also issues associated with the meaning of "consumer" in the context of product safety. We intend to elaborate further on this in a supplementary submission.

Unsolicited agreements

The current ACL does not allow for consumers to receive their good or service until after the cooling off period expires under unsolicited agreements.[14] For suppliers that offer such agreements, some consumers have requested to receive their good or service sooner, but were unable to do so because of this cooling off period. To bypass this problem, these consumers have chosen to terminate their unsolicited agreements and entered into new agreements for the same good or service.

This suggests that the current requirements for unsolicited agreements are inflexible to the needs of consumers. One solution could be providing consumers with the choice to waive off the cooling off period under unsolicited agreements. Another option could be to allow the supplier to provide goods or services during the cooling off period, on the condition that the supplier could only receive payment from the consumer where the contract is not cancelled during the cooling off period.

Infringement notices

The ACCC can currently issue infringement notices where it has reasonable grounds to believe that the ACL has been contravened.[15] The circumstances for the ACCC to invoke this regulatory power should be more transparent and proportionate to the problem, for example when there is a clear and obvious breach of the ACL, as opposed to reasonable grounds of belief.

Removal of mandatory reporting for food

In March 2015, the Selection of Bills Committee referred the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* to the Economics Legislation Committee for inquiry and report. The purpose of the Bill was in response to the Government's commitment to removing regulatory burden and cutting red tape.

The Bill sought to amend the ACL to remove the requirement for reporting food related death, serious injury or illness to the Australian Competition and Consumer Commission (ACCC). This was a deregulatory measure about resolving duplication and not a compromise to food safety.

In its submission to the Economic Legislation Committee, the food regulatory agency Food Standards Australia New Zealand (FSANZ) noted that:[16]

> Since mandatory reporting commenced in 2011, there is no evidence that the reports have provided the state and territory enforcement agencies with information on food-related injuries, illnesses and death that they were not already aware of or would have been aware of via other sources. The reports have also not provided an early alert to a national food safety issue. The vast majority of reports are associated with alleged food poisoning that if investigated, would be very unlikely to be associated with the food being reported. Many reports also do not contain sufficient information to enable the relevant enforcement agency to undertake further investigations.
>
> FSANZ, therefore, supports the removal of this requirement for food from the Australian Consumer Law as it does not add value to existing reporting systems.

At that time, FSANZ had received approximately 4,750 food related mandatory reports since the reporting requirement commenced in January 2011.

The Economics Legislation Committee reported in May 2015 that, despite concern when legislation proposes to remove what is deemed to be a health and safety reporting obligation, it could not see any impediment to the passage of the proposed legislation and recommended the Bill be passed.[17]

---

[14] Ibid section 86.

[15] *Competition and Consumer Act 2010* (Cth) section 134A(1).

[16] Food Standards Australian New Zealand, Submission to the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth), 10 April 2015.

[17] Senate Economics Legislation Committee, Report on Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth) [Provisions], May 2015, 21 [2.68].

The Committee reported that the evidence before it indicated strongly that the current mandatory reporting requirements to the ACCC were unnecessary and added to the compliance burden on businesses.[18] The reporting regimes of the States and Territories were considered adequate, and the reporting obligations to the ACCC duplicated the work of the States and Territories and did not add value.[19]

The Bill has now lapsed with the dissolution of Parliament.

Without improved food safety outcomes for consumers, our confectionery manufacturer members consider that an amendment to remove the mandatory reporting requirement for food should be instigated through this review process. The removal of regulatory duplication should not compromise public health and safety and should enable government and industry resources to be redirected to more effective purpose.

Emerging issues

Bundled goods or services

The current ACL requires the total minimum price for bundled goods or services to be advertised by the seller. [20] However, this requirement can unintentionally confuse consumers. In some circumstances, the majority of consumers may not pay the amounts appearing in the advertisements. In those cases, it would be clearer for the price of the add-on product to be advertised with a sufficiently prominent explanation that the optional product is only available with the purchase of another product.

Third parties

Third party consumer goods and services such as apps are now often offered on incumbent platforms such as smart TVs. With an increase in these third party goods or services, there may be a potential for new failures of consumer guarantees. In these circumstances, more clarity would be welcomed on which parties should be responsible for resolving these failures.

Innovation

The ACL should not be changed or operate in such a way that would constrain further product development and innovation. In relation to the new online environment, the ACL is currently working well. Imposing further restrictions could result in unnecessary and disproportionate costs on businesses, and may impede innovation.

Pop-up stores

An emerging issue for the unsolicited agreements regime relates to pop-up stores. Section 69(1)(b)(i) of the ACL includes the term "a place other than the business or trade premises of the supplier of the goods or services". When read in conjunction with the other provisions under section 69 of the ACL, requirements under the unsolicited agreements regime can be interpreted to extend to pop-up stores. A pop-up store that professionally operates at a location that is not traditionally commercial in nature should not create a different customer experience to traditionally located stores and therefore should not be treated differently under the ACL. However, there could be a distinction drawn between staff operating at the location of the pop-up store and staff leaving the vicinity of the pop-up store to engage with customers. The latter scenario could be akin to unsolicited agreements.

---

[18] Ibid 20[2.65].
[19] Ibid.
[20] ACL section 48.

Other reviews

This review should avoid any overlaps in scope with other current reviews. For instance, the Productivity Commission (PC) is currently undertaking an inquiry into data availability and use, including the benefits and costs of making public and private datasets more available and examining options for collection, sharing and release of data. Further, we note that consumers are presently entitled to access their personal data under the *Privacy Act 1988* (Cth). With these in mind, the CAANZ should avoid making recommending changes which would result in a separate regime with the attendant additional regulatory burden for businesses.

The PC is also undertaking a separate research study of the enforcement and administration arrangements underpinning the ACL. We encourage the CAANZ and the PC to work closely together to avoid duplication of effort either for themselves or for stakeholders.

Product safety

Given the importance of product safety, we are in the process of consulting with our members and intend to make a supplementary submission on the associated issues.

Should CAANZ be interested in discussing our submission further, please contact our adviser Charles Hoang

Yours sincerely,

Peter Burn
Head of Influence & Policy

Appendix B – Ai Group supplementary submission to CAANZ on ACL Review on product safety

07 September 2016

Mr Aidan Storer
Manager
ACL Review Secretariat, The Treasury
On behalf of Consumer Affairs Australia and New Zealand
The Legislative and Governance Forum on Consumer Affairs

By Email: ACLreview@treasury.gov.au

Dear Mr Storer,

AUSTRALIAN CONSUMER LAW REVIEW 2016 – SUPPLEMENTARY SUBMISSION ON PRODUCT SAFETY

The Australian Industry Group is providing this supplementary submission to the issues paper for the Australian Consumer Law (ACL) Review with respect to product safety. It follows from our submission of 6 June 2016 to this review. We have addressed below selected issues outlined in the issues paper.

Definition of Consumer Products

In our submission to the issues paper in June, we identified an issue with the broad definition[21] of "consumer" in the ACL, which creates too much confusion and uncertainty for suppliers and consumers.

Further to our previous submission, we wish to highlight another situation where confusion with the definition of consumer has impacted on the regulation of public safety with respect to non-conforming building products. In particular, it is not clear whether a building product should be treated as a consumer product under the ACL.

Infinity Cables' products were discovered to be faulty with a potential risk to public safety wherever it was installed into buildings. The ACCC took an interest in this matter as approximately 50% of the product was sold through a particular consumer outlet[22]. The issue was dealt with through a mandatory product recall. This regulatory approach contrasts to the experience of other stakeholders who have been told by consumer regulators that a building product is not a consumer product (even though these have been sold through consumer outlets) and therefore no action would be taken[23] on the issue of non-conformance.

Ai Group supports the approach taken by the ACCC in the Infinity Cables matter where a consumer product is defined as one that is sold through a consumer outlet. However, the different interpretations of what constitutes a consumer product between regulators in circumstances similar to the Infinity Cables case illustrates the need for policy makers to provide regulators with consistent guidance to the regulation of consumer products.

Trusted international standards

Ai Group notes that the trusted international standards regime has been developed as part of the Government's Industry Innovation and Competitiveness Agenda, with the objective to reduce duplicative domestic regulation and red tape. Under the regime if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators would not impose any additional requirements, unless there is a good and demonstrable reason to do

---

[21] ACL section 3.
[22] Economics Reference Committee Non-conforming building products 13 November 2015 pg 47
[23] The Quest for a level playing field: the non-conforming building product dilemma 2013 pg 56

so.[24] These standards may be referenced in Australian regulation as deemed-to-comply solutions or as technical documents.

While Ai Group strongly supports the Government's agenda to reduce red tape, we are concerned that automatically embracing trusted international standards risks the removal of a critical element in Australia's regulatory framework. This element encompasses the participation of a balanced group of diverse stakeholders in a consensus-based environment to develop standards.

As a consequence, the regulator may choose a standard developed by an international organisation that has not had any Australian input or has not properly consulted with Australian stakeholders on the appropriateness of the standard in accordance with a set of predetermined criteria. In other words, the use of trusted international standards moves stakeholders from participating in a ***consensus-based model*** to a ***consultative-based model***, which significantly reduces the opportunity for the appropriate Australian industry expertise to shape the outcome for the benefit of the Australian market and consumers.

An Ai Group member made the following observation:

> *"In my limited experience with the development of overseas standards I have found that there is a significant difference between the consensus based / declaration of conflict approach taken within Standards Australia (and rigidly enforced by peers) and the approach taken in North America where we have seen clauses written into standards that clearly benefit limited numbers of manufacturers without genuine technical merit. I should point out that we are not talking about specific safety issues but it concerns me that the process is not as impartial as I have experienced in Australia."*

Ai Group believes that it is important that if trusted international standards are to be referenced in regulation the following criteria should be adhered to:

- widely accepted principles for developing standards are used;
- appropriate public consultation processes are observed;
- they must improve regulatory coherence and technical convergence (it cannot be assumed that because a standard is trusted internationally that it will automatically fit within the Australian regulatory and technical context); and
- Australia complies with its obligations under the World Trade Organization Technical Barriers to Trade (WTO TBT) Agreement, which requires Australia to influence and adopt international practice where possible to avoid introducing "Australian Specific" requirements where they add unnecessary costs or complexity.

Ai Group also recommends that a balanced group of stakeholders constituted in a working group or committee be assigned with the responsibility to review any international standard that is to be adopted under a "trusted international standards" regime.

Access to regulated standards

Ai Group notes the arguments that standards specifically referred to in regulation should be freely available and the suggestion that this would result in improved access and use of standards and improved quality and safety for consumers and the broader community. Clearly there are costs associated with the development and distribution of standards and we understand the need for the developers and distributors to be appropriately compensated for their efforts and expertise.

Ai Group notes the decision by the Australian Building Codes Board to provide the National Construction Code (NCC) free of charge (for electronic copies) from 2015 onwards. This decision was taken to increase the use and knowledge of the NCC by practitioners. In this case the states and territories have agreed to offset the revenue lost as a result of this decision. In our view this is an appropriate source of funding given the wide dispersal of the benefits across the community.

Ai Group also notes the report from the Western Australian Government *Joint Standing Committee on Delegated Legislation – Access to Australian Standards Adopted in Delegated Legislation* which

---

[24] Australian Government, *Industry Innovation and Competitiveness Agenda: An Action Plan for a Stronger Australia* (14 October 2014).

argued that standards called into legislation should be free. Clearly while standards may be made free to users, the costs of their development and distribution will still need to be met.

The effectiveness of the current approach to product recalls and remedies

Ai Group believes that the current approach to voluntary and mandatory recalls does work well however there are improvements that can be made.

Members differentiate between recalls involving installed and non-installed products.

For installed products (e.g. building infrastructure components installed by professionals such as switches and sockets, cables, protection devices, and fixed lights) the recall process is particularly complex and expensive as it requires the capacity to engage the entire electrical industry, from contractors to wholesalers and end-users.

Below is an extract of a member's experience with the ACCC's Consumer Product Safety Recall Guidelines (that outlines 13 supplier recall principles):

> *"the product safety framework provides a single national approach to issuing and enforcing recalls products. Recalls key action is to remove the product quickly and in optimised number from the market. Its effectiveness should be assessed and reported at every stage. For products of installation my feeling is that the results are questionable (at various stages):*
>
> - *remove the unsafe product from the marketplace:* ***Comment:*** *not effective or very difficult in most cases (few exceptions from reputable players) Rate of return generally low*
> - *notify the public:* ***Comment****: challenging*
> - *notify others in the domestic supply chain:* ***Comment:*** *challenging*
> - *facilitate the return of recalled products from consumers:* ***Comment:*** *not effective or very difficult in most cases (few exceptions from reputable players)*

The member's issues with some of the recall responsibilities (as outlined above) highlight the important need for industry and regulators to work together to ensure that non-conforming installed products along supply chains are identified and removed quickly. Ai Group also recommends that each of the 13 supplier recall responsibilities in the ACCC's guidelines be reviewed by consumer regulators to identify and profile leading practice examples from industry that can be encapsulated in a guideline.

Members encountering a recall for the first time have reported that there is inadequate guidance provided by regulators to assist them on whether they are required to embark on a recall for a product that has questionable safety attributes. Members have reported that the

> *"ACCC appears to be more concerned with fining people than actually giving assistance to companies that are in the position of having to initiate a recall."*

Ai Group recommends that consumer product regulators provide guidance, including in the form of case studies of organisations' experiences in the recall process.

A member has raised the issue of capacity to pay for recalls:

> *"The biggest factor in recalls is the "capacity to pay" for the repercussions of a defective product, particularly when the cost of remediation is far in excess of the original cost of the product. Is there a way of insuring against this? Should a portion of sales tax be accrued for such circumstances, and should this tax rate be varied in accordance with the "risk rating" of a supplier? For example, a small company that has been trading for less than 5 years is a higher risk than a company in service for 50 years. The size of the company is a factor. The prior history of the company's product failure rate is a factor. The insurances and coverage paid by a company is a factor. The type of product sold could be deemed to vary the "risk" factor. A number of criteria could form the basis of the risk factor that ultimately determines what tax is contributed to the "recall fund" that is then administered in the event of a defect. "*

We recommend that a cost-benefit assessment be undertaken:

1. To consider risk sharing schemes such as that outlined above including recall insurance;
2. To consider the inclusion of a requirement in the ACL for the manufacturer to disclose details of their recall insurance (if any) to improve transparency.

Ai Group also recommends that a guide to recall insurance should be written as a joint initiative between Government and industry. This guide should outline the key elements that suppliers should look for when examining recall insurance.

Regulators' management of unsafe products under the ACL and specialist regulatory regimes

The Infinity Cable recall matter is an example of an issue falling within the scope of specialist electrical regulators and ACL regulators. Ai Group deals with a number of specialist regulators covering: electrical products, building products, plumbing products, work health and safety, and border protection to name a few.

A member stated:

> *"Specialist regulatory schemes are designed with good intention. However, they often create bureaucracy for those that have integrity and want to comply, whereas those that don't have integrity will always slip through."*

Ai Group believes that, where there is overlap between the remit of these specialist regulators and ACL regulators, consideration should be given to establishing publicly available protocols that govern the operation of regulators.

Ai Group reiterates the need for both specialist and general regulators to be engaging in rigorous surveillance and check testing so that the market remains free of non-conforming products.

Should CAANZ be interested in discussing our submission further, please contact Mr James Thomson, Senior Adviser Standards and Regulation

Yours sincerely

PETER BURN
Head of Influence and Policy

Appendix C – Ai Group letter to NSW Fair Trading on Complaints Register

01 July 2016

Mr Rod Stowe
Commissioner
NSW Fair Trading
PO Box 972
Parramatta
NSW 2124

By email: commissioner@finance.nsw.gov.au

Dear Mr Stowe

Ai Group has become aware of NSW Fair Trading's scheme for a *public* Complaints Register. We support the rationale for the scheme and understand that the prudent use of complaint data can deliver better customer service and assist customers make more informed decisions. We believe that a company that is focussed on their customer's need by acting on feedback such as complaints is more likely to be sustainable in the long term. We do, however, have a number of concerns with the scheme.

Ai Group would like to meet with you to discuss our concerns as detailed below.

Ai Group enjoys an excellent working relationship with governments and regulators and our experience has shown that good policy outcomes can be achieved when regulatory initiatives are appropriately calibrated through robust consultation with stakeholders including industry. Disappointingly neither Ai Group nor the Consumer Electronics Supplier Association (CESA) where consulted during the development of this initiative. Between the two organisations our members represent 80% plus of the supply to the consumer electrical and electronic market.

Ai Group understands that the key points on the operation of the Complaints Register scheme are:

- a complaint is defined by AS/NZS 10002-2014
- only complaints made to NSW Fair Trading are recorded
- only businesses attracting more than 10 complaints per month will be published
- complaints will be logged against the recognisable "trading" or "brand" name
- only complaints made by a real person with a real interaction with the business in question will be recorded
- scheme commences on 1 July 2016
- there are no mechanisms for the business to dispute the validity of a complaint being made against them

Ai Group notes that there is likely to be significant media coverage when the scheme launches. Ai Group questions the fairness of the scheme given the risk to an organisation's brand from this initiative when there is no recourse to dispute the validity of a complaint – the process lacks procedural fairness.

The threshold for making consumer complaints is low – it does not limit complaints to reasonable and legitimate claims. In particular, the process for making a consumer complaint does not include an obligation for the consumer to provide any evidence of an alleged problem. This can open up the flood gates to frivolous and vexatious claims, leading to increased abuse of process by consumers and creating an unnecessary regulatory burden on the regulator and affected businesses.

Ai Group attended a meeting on 16 June 2016 in Sydney with one of our members, NSW Fair Trading and Consumer Affairs Victoria to discuss the operation of the Register and current

complaints data sets held. This meeting, along with other member consultations, has led Ai Group to form a view that the initiative could deliver improved and fairer outcomes with a number of changes.

1. Recognising the linkage between trading context and complaints

The *NSW Fair Trading Complaints Register Guidelines (pg7)* makes the statements:

"*Larger businesses may attract greater numbers of complaints due to the larger number of transactions undertaken.*"

"*Certain types of business may generate more complaints than others due to the nature of the products or services offered.*"

Ai Group agrees with these statements but notes that we do not see any mechanism in this scheme for taking these facts into account for larger organisations in terms of the publication threshold of 10 complaints per month. Ai Group believes that companies should be given the right to provide to NSW Fair Trading data that provides a trading context (e.g. sales volume, number of customer enquiries) that should be taken into account in the publication threshold. We recommend that a tiered approach to a publication threshold would better reflect the increased risk of complaints due to high sales volume. We note that not all companies may be comfortable providing trading information however those that are willing should be given the right to do so.

Member perspective:

If a member was receiving contacts from customers at say 50,000 per month, with actual complaints being only a very small percentage of this number, then why should the customer complaint rate to NSW Fair Trading be compared to a company that only has 500 customer contacts per month.

2. Brand / trading name does not always reflect the business structure

Companies should be given the right to make a case to NSW Fair Trading on what "trading" or "brand" names should be used for complaint logging purposes on the basis of business structure and / or ownership.

Many companies may share a brand but have independent operations and supply/distribution chains in Australia. Whilst a consumer may only discern a single brand there maybe no ability for the organisations that operate under the brand umbrella to collectively control variables such as product quality that can result in complaints.

3. Recourse for invalid complaints

Companies should be given the right to *challenge* the validity of a complaint when it relates to:

i. Parallel imports

Organisations may choose not to import certain products available to them from the parent company for a variety of reasons including compatibility with local conditions. They should not be held accountable for complaints made about these product if third party importers bring these same products into Australia.

Member perspective

We "may have chosen not to sell a particular product for a variety of reasons including for safety e.g. compatibility with local electrical requirements. However we cannot stop retailers, without our knowledge, purchasing product through international distributors. It should not be our responsibility to provide a warranty on a product where we have had no control of its distribution."

ii. Actions by a third party

Organisations should not be held accountable for complaints made in relation to the actions of third parties not controlled by them. These third parties may include installers, service agents and the like.

Member perspectives

"... products are often serviced by non-authorised agents. Subsequent failures or dissatisfaction (where the agent walks away) can then result in disputes between the Company and owner. NSW Fair Trading should make sure the complaint is properly allocated to the agent, and not the Company that has been dragged in after the event"

"Consumers who experience problems with our air conditioner products make the assumption that the fault is due to the performance of our product. It is not uncommon for us to spend considerable time and effort investigating and responding to consumer complaints only to find that the problem is due to the actions of an independent installer who we have no control over."

"From time to time we receive complaints about our TV and Recorder products failing to work. Upon our investigation we discover that the fault has nothing to do with our product but rather is due to changes made by Broadcasters. The consumer doesn't consider this, they see our brand name on the front of the TV and blame us for a problem not of our making."

iii. Ambiguity in the Australian Consumer Law

Ai Group, in our submission in the Australian Consumer Law (ACL) review, made the statement that there *"... is a lack of clarity for consumers and retailers on the definition of key ACL terms relating to returns and refunds: "major failure", "failure", "acceptable quality", "reasonable time" and "reasonable costs".* Against this backdrop the likelihood of a dispute between a consumer and a supplier is high increasing the chances of a complaint.

As a result of this initiative members are now having to resolve complaints with consumers even when they do not believe that they have an obligation to so. This results in an unnecessary cost burden to business.

4. Inclusion of a qualifier for published complaints

Ai Group believes that consumers may misunderstand the circumstances in which an organisation is listed on the Register. For example they may think that the organisation is named due to a legal breach or other regulatory action. Ai Group recommends (not withstanding our concerns) that a qualifier is included with the publication of any organisation's name that notes that:

- the listing does not imply that there has been any breach by or regulatory action against the organisation;
- the organisation may have resolved the complaint; and
- there may have been other circumstances that have resulted in the complaint that are not within the control or the fault of the organisation.

Ai Group noted in our ACL submission that:

"Since the ACL was introduced, our members have observed that consumers have become more aware of their rights. However, many remain unclear about their rights and obligations under the ACL and further consumer education is still required. In some cases members maintain that the ACL has been incorrectly invoked by the consumer, and the balance has been skewed too heavily in favour of the consumer without an adequate consideration of the rights of businesses"

Ai Group recommends that the *NSW Fair Trading Complaints Register* scheme is urgently reviewed to ensure that there is fairness for all parties.

I would welcome the opportunity to discuss this important issue with you further.

Yours sincerely

Mark Goodsell
Head NSW