



**Australian
Retailers
Association**

**Submission to the
Australian Consumer Law Review**

**THE AUSTRALIAN
RETAILERS ASSOCIATION**

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OVERVIEW

The Australian Retailers Association (ARA) welcomes the opportunity to provide recommendations to the Australian Consumer Law Review (ACL) 2016.

This submission focuses on the observations made and policy options put forward by the retailers with respect to consumer law.

The ARA broadly supports the intent of the ACL framework, however we do have concerns that layering more regulation could leave a more complex system without resolving fundamental issues within the consumer law system. We also see this review as part of the continued improvement of the ACL framework to include all new retail methods.

Retailers in Australia are facing a difficult operating environment. In the last ten years, the structure of the retail sector has shifted and evolved as a result of globalisation, advances in the digital economy and changes to business practice policies (such as online delivery, returns and payments).

The ARA offers support, information, and representation to around 5500 retailers across the nation, representing approximately 50,000 shop fronts. Working closely with all Government consumer affairs and fair trading offices, along with the Australian Competition and Consumer Commission (ACCC), the ARA ensures the long-term viability and position of the retail sector as a leading contributor to Australia's economy.

We believe that the ARA membership and retailers in general are well placed to comment on Australia's ACL framework, having direct exposure to its operations cost structures which are particularly important given the level of competition in our sector.

Australia has been a global leader in reform of the ACL framework. For this reason, we are proposing a cooperative approach with all key stakeholders to reduce regulation, lower costs for business and reduce or remove roadblocks through lowering costs.

The ARA believes that there are a number of issues that have been identified in our research that need to be rectified to ensure that Australia's ACL framework remains competitive and balanced to remove the harm of rising costs to retailers and consumers alike.

ARA POSITION

Consumer Guarantees

Specific consumer protections are under scrutiny and consumer guarantees remain the most prominent issue for retailers in terms of understanding and implementation. The Issues Paper gives particular attention to improving the clarity and certainty of the consumer guarantees regime, for example, by giving more guidance on terms such as "major", "reasonable" and "acceptable quality". We believe this clarification would alleviate much of the misunderstanding within the retail sector.

For these reasons "consumer guarantees" remain the main focus for retailers.

In terms of the regime's application, areas of concern include whether consumers are given enough information to assess the value of extended warranties at the point of sale, and the effectiveness of the indemnification provisions between suppliers and manufacturers.

Both these areas need addressing for retailers and consumers. On questioning, retailers feel more comfortable in refunding and rectifying when extended warranties apply. This is due to perceived and actual issues regarding indemnification between suppliers and manufacturers. While we recognise consumer groups have had concerns in regard to the upselling of warranties, we ask the review panel also

consider the benefit these warranties provide both the retailer and the consumer in efficiently resolving product issues.

Australia's consumer policy framework objectives

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

The framework is aimed to enhance consumer protection and reduce regulatory complexity for business. ARA believes the objectives are meeting the needs of vulnerable and disadvantaged consumers, and promoting proportionate risk-based enforcement.

The ARA has found flaws in the ease of access and understanding of rights and processes for businesses, and the effectiveness of the indemnification provisions between suppliers, manufacturers and retailers.

The ARA recommends the following changes;

Clearer definitions of terms such as “major”, “reasonable time” and “acceptable quality”.

Stronger guidance in return cost guidelines so manufacturers and suppliers clearly understand their responsibilities to stop attempts to push costs back to retailers and consumers.

Better instruction in supplier and manufacturer decision making processes on products meeting consumer expectations. With the responsibility sitting with retailers, manufacturers will often deem that a retailer had no right to rectify an issue without their approval and will refuse refunds or replacement, leaving retailers to deal with these issues without support. Larger retailers and buying groups have been rectifying this issue via contractual agreements with suppliers and manufacturers, however many retailers either remain unaware of this as an option or lack buying power to implement this outcome.

3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

After discussions with consumer groups, the ARA believes there is a possibility of a collaborative approach in developing guidelines and better enforcement allowing retailers to deal with supply chain issues. We believe this review could facilitate an outcome which would ease retailer concerns and burdensome costs in rectifying consumer issues.

Structure and clarity of the ACL

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

This complexity and uncertainty reflects the circumstances, particularly time imperatives, in achieving the Australian Consumer Law outcomes.

For those familiar with consumer guarantee concepts - terms like “reasonable time” and “reasonable expectations” make sense. However, for a layperson or retailer to understand the “reasonable expectation” for a \$2 spade’s longevity as compared to a \$200 spade’s is not clear.

There is also considerable confusion around whether a manufacturer’s warranty says 12 months and that consumer guarantees apply. Not only is there a need for clearer language, but specific advice is also necessary to assist retailers in rectifying these circumstances.

7. Is the ACL’s treatment of ‘consumer’ appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

ARA believes for fair trading and consumer protection applications, the existing definition of “consumer” for ACL purposes is appropriate. The threshold also meets the vast majority of circumstances a retailer would experience.

General protections in the ACL

8. Are the ACL’s general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The ARA believes general protections in the ACL have adequately served the interests of business, consumers and government administration. The sanction structure is measured and reasonable.

The ACL’s specific protections

10. Are the ACL’s specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The ARA also represents a number of direct selling retailers. There have been specific issues raised in terms of particular protections via their industry group Direct Selling Association of Australia (DSA), which the ARA supports.

Specific protections are uncertain in their application to unsolicited selling provisions. Their applicability to individual transactions often turn on a subjective assessment against deference of conventional evidentiary burdens to consumer biased rebuttable presumptions and reverse onus of proof.

It is an independent contractor who re-sells member products as a supplier. As opposed to agency relationships, in these wholesale arrangements members attract no vicarious liability for the actions of their distribution contractors.

There are many aspects of the unsolicited consumer agreement provisions that make them anticompetitive, unnecessarily complex and difficult to enforce. This has resulted in significant detriment to the direct selling industry and in particular to those sales models that are most affected by these provisions, namely network marketing businesses. The basic application of these provisions to any transaction that is not ostensibly store selling does not recognise potential consumer detriment in a fair and competitively neutral way across all retailing.

Proportionate, risk based enforcement

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

Retailers want certainty for their commercial activities. There is ample evidence that retailers are acting to keep consumers happy and wish to avoid a judicial or arbitration process - unless there has been a gross misrepresentation made.

Retailers, particularly smaller to medium retailers, report confusion on the regulator arbitration process and judicial processes (QCAT, NCAT, VCAT etc.). There appears to be a want and need from the sector for an easy to use system when retailers are left out of pocket by manufacturers and suppliers. Many smaller retailers can be left holding considerable costs while having to lodge a claim. Regulators also need to understand many retailers feel they cannot take action against a supplier if they have market power. One suggestion as to change in the resolution process would involve an automatic order being issued to the supplier and manufacturer to recompense the retailer once an order has been given, resolving the consumer issue.

Effectiveness of remedy and offence provisions

19. Are the remedy and offence provisions effective?

For consumers, yes. For retailers, consumer provisions need to be enacted to protect them from other businesses.

20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?

Yes. The ARA would not support any increase in the current penalties.

21. Is the current method for determining financial penalties appropriate?

Yes.

Access to remedies and scope for private action

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

Yes, businesses will not risk supply contracts to retrieve costs from suppliers and manufacturers.

28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?

The ARA has had several members who have had action taken against them via the CAT systems to claim out of pocket, wellbeing and other costs despite resolving the product issue and the consumer not engaging with the arbitrator. These ambit claims are sometimes undertaken with little regard to the cost to the retailer or even the complainant consumer. There is often limited advice available as to how to deal with

these claims, especially in States without Business Commissioners, which can lead the retailer to be considerably out of pocket.

29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

We look forward to the review suggesting options in this area. All sized retailers report major issues regarding cross border transactions and remedies in ACL, and while more retailers and consumers direct source, there are significant risks.

Selling away from business premises

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?

Pop-up stores are one of the many anomalies arising from the expanded reach of the unsolicited selling provisions. Issues such as ownership, permanency, purpose, products, services and other indicators of established business premises are not taken into account. Are stalls or booths at markets, kiosks, school fetes, non-adjacent presence of an established shopping centre retailer, conferences, tasting and purchase booths at airports, agricultural shows and many other instances “pop-up” stores? Secondly, what relevance does this have to unsolicited selling?

Is potential consumer vulnerability and disadvantage necessarily absent because it is an established business premises or sales are exempted under the monetary threshold or against the evidentiary burden a sale was not unsolicited?

If vulnerability and disadvantage is the issue, why should it matter where a transaction occurs? If it is accepted that high pressure selling can occur in any location, then should the unsolicited selling provisions underlying policy be applied to transactions in business premises, including pop-ups?

Online Shopping pricing

35. Are there any changes that could be made to the ACL to improve pricing transparency?

Retailers generally understand pricing obligations under the ACL, though some questions are raised in terms of obligations between online and instore pricing. Improved guidance in terms of clarity around online, regional or store sales would assist retailer understanding.

There have also been concerns around “was is now pricing”, particularly in the jewellery industry. Retailers may purchase a oneoff item and find that the product does not sell, the required information to prove how long the product has been in stock for require clarification, these products being a special one off may not have a sales history and documentation in many cases may be hard to prove relating to quantities sold.

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

Where regulators make that material available.

37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

ACL guidelines are still comparatively unused or unknown. These should be assessed on an ongoing basis.

A National Regulatory Regime for Product Safety

The ACCC will be responsible for recommending permanent bans, whilst the state and territory governments are still able to impose temporary bans within their jurisdiction. Recent “hover board” cases in the 2014 Christmas period exemplified the confusion and lack of consistency across States and Territories. The ARA represents the majority of retailers with a national footprint, however for these retailers and for the ARA there was confusion on which jurisdiction was doing what and on what manufacturer or product type.

The current system makes safety issues confusing to implement for retailers and dangerous for consumers.

In the event of a State based product safety alert, there should be a more consistent national approach and all states should recall product if there are safety concerns

Lay-by Sales

When looking at fair markets, the Australian Consumer Law review has raised the issue of lay-bys.

Lay-by remains a popular transaction means used by consumers to hold, reserve and part pay products.

The uniform system has simplified application by national retailers.

The main issue retailers have experienced has been around lack of understanding of what constitutes a lay-by, and that any multiple payments are a lay-by. We have also had retailers not understand that they cannot keep a deposit unless it is outlined in a lay-by agreement and is set as a reasonable cost.

Special order part payment has also emerged as a lay-by concern, highlighted by a number of transaction issues, and members would like to see this concern addressed or removed from the lay-by agreements as outlined below.

Special order part transactions

Retailers have reported a great deal of confusion, and in a number of cases financial loss, when it comes to product specially ordered or made to order falling under lay-by rules.

The instances given have been in musical, electronic equipment, wedding attire, and household good such as carpet and furniture - where the customer changes their mind before the purchase is complete.

Retailers found in many cases they have taken a deposit without a clear agreement on retaining reasonable costs, have not held a sufficient deposit to cover one off costs, or lack clear direction on what reasonable costs are in these situations.

As an example - a customer orders a one off wedding dress or bright purple unfashionable carpet with a considerable manufacturing cost, where it would not be possible to retrieve that cost at a retail price.

There has been an argument that one off specialty orders either need to be taken out of lay-by agreements for this reason or specific guidance given on how these types of transactions are dealt with.