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Manager
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Dear Sir/Madam

CONSULTATION RIS FOR PROPOSALS UNDER ACL CONSUMER GUARANTEE REGIME

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to Treasury (acting on behalf of Consumer Affairs Australia & New Zealand (CAANZ)) on its Consultation Regulation Impact Statement (RIS) relating to proposals under the Australian Consumer Law (ACL) consumer guarantee regime. We also thank you for the opportunity to meet with CAANZ about this Consultation RIS at a stakeholder roundtable held in Sydney on 3 April 2018.

1. General comment

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

Overall, we consider that the ACL framework is functioning well and support minimal changes that will improve and clarify its application; strike a fairer balance between the rights of consumers and industry; and hence benefit both consumers and industry in the long term.

Notwithstanding this, we note that the Consultation RIS proposes options for reforming the consumer guarantee framework under the ACL, in particular:

1. Increasing the threshold in the definition of "consumer" from \$40,000 to \$100,000 (CAANZ Proposal 1);
2. Clarifying the consumer guarantees remedies (comprised of two proposals – failure within a short period of time and multiple failures) (CAANZ Proposal 2);
3. Enhancing disclosure for extended warranties (CAANZ Proposal 3); and
4. Accessing consumer guarantees for goods sold at auction (CAANZ Proposal 4).

For the purposes of this submission, we have focused on CAANZ Proposals 1 and 2, which are of most concern to our members, and provided general comments on the other proposals.

Overall, we remain concerned with the direction taken by the ACL Review, particularly with CAANZ Proposals 1 and 2. On balance, there is a lack of sufficient evidence to support these proposals, and they will likely lead to outcomes that are not in the long term interests of consumers and industry. These proposals were not properly assessed in the ACL Review and we expect that the Consultation RIS process will enable this to be rectified. We look forward to working closely with policy makers, governments and regulators to address these in the near future.

We understand that CAANZ is also seeking quantitative evidence for the purposes of this Consultation RIS. Such information may be commercially sensitive to our members and confidential in nature, and Ai Group does not have access to it. For the most part, we have provided qualitative evidence which



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is relevant to this Consultation RIS. However, we wish to highlight that there may be quantitative information available from the Department of Environment and Energy (DoEE), particularly for a range of products covered in this submission i.e. televisions, computers, printers and computer products.¹ While DoEE uses this data for comparing different options for estimating the television and computer waste stream, this information could be reused for the purposes of CAANZ's Consultation RIS, albeit limited to these products. Treasury may wish to contact Mr Peter Brisbane at DoEE for further information about this.

2. CAANZ Proposal 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000

The Consultation RIS considers a number of options for change to the monetary threshold value for acquired goods or services in the definition of consumer, which is currently set at \$40,000. These include increasing it to \$100,000 and indexing this value.

Reasons provided by CAANZ for these proposed changes include: protecting small businesses as consumers of purchased commercial products; updating the monetary threshold which has remained unchanged since 1986 (although last reviewed in 2010) to make it fit for purpose by accounting for inflation; and reflecting a majority of stakeholder responses in the ACL Review which supported increasing the threshold.

At first glance, CAANZ's reasons and proposed changes appear reasonable and well-intentioned. However, our view is that the case for change has not been adequately substantiated. We are concerned that the proposals will instead result in unfair outcomes that are not fit for purpose. Alternative options could be considered further instead, as discussed further below. In any case, no change should be adopted without demonstration of net community benefits over the alternatives including no change.

As CAANZ notes, the proposed options could have a negative impact on suppliers including additional compliance and training costs, and financial loss. Most significantly, this may have negative impacts on consumers, through higher prices for goods or services, or – where cost pass-throughs are not practical – reduced consumer choice as businesses withdraw from the Australian market.

2.1 Problem with the inclusion of businesses in consumer definition

We wish to reiterate for the record that, as a matter of principle and public policy, businesses should not be covered under the ACL as consumers, and the focus instead should be on the most disadvantaged customer.

Generally, we support initiatives that promote business growth and competitiveness, including for small businesses. Legislation and regulation can, in the right circumstances, reduce transaction costs and facilitate exchange, for instance by reducing information asymmetries and giving buyers greater confidence in sellers. The neutral enforcement of the law of contract by the legal system has been extremely valuable in this regard. However, we are cautious about further government intervention in legitimate commercial contractual relationships between businesses, irrespective of size. As a matter of public policy, governments should respect the freedom for businesses to agree on legitimate contractual terms, unless there is persuasive evidence that intervention would effectively remedy significant existing problems or further boost exchange. Such evidence has not yet been provided.

If CAANZ still chooses to include small businesses under the consumer definition, we note that the proposed change to the threshold value is likely to harm them. As with any business, small businesses act as both purchasers and sellers. While CAANZ hopes to protect small business as consumers under the threshold, it also potentially creates a burden on the same small business as suppliers. CAANZ

¹ As part of the current *Product Stewardship Act 2011* (Cth) arrangements for these products, the DoEE takes into account various sources of data. According to the DoEE, it uses ABS household data and projections, Australian Customs and Border Protection Service import and export data, and behavioural information presented in its 2009 Decision RIS.



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will need to examine the cost impact on small businesses as suppliers, as well as other businesses, if it decides to change the threshold value.

2.2 Problem with the use of an arbitrary monetary threshold in consumer definition

A monetary threshold value is a blunt and arbitrary instrument that does not provide clarity to the broad definition of “consumer” in the ACL. Consequently, it creates too much confusion and uncertainty for consumers and suppliers.

While CAANZ wishes to capture small businesses as consumers, the application of the threshold value amounts to blanket coverage for all business purchases under that threshold value. This goes beyond the small business consumer that CAANZ hopes to protect using the threshold approach. As CAANZ states, it was never the intention to offer such a blanket protection under the ACL.

The arbitrary threshold creates another significant problem for suppliers: the absence of a limited liability provision in the ACL to protect suppliers from unlimited consequential losses. Even if the monetary threshold is set at a relatively low value, a failure in an inexpensive product may lead to other consequential losses that are disproportionately higher than the original purchase value of the good or service e.g. a failure in a \$400 printer that prevents a company’s tender to be delivered in time for a one billion dollar contract.

The supplementary explanatory memorandum associated with the previous introduction of the ACL suggests that this was not Parliament’s intent and was therefore a legislative drafting oversight. This issue was previously raised by the Law Council of Australia to Treasury in 2012, but appears unresolved – we would welcome clarification from CAANZ on this matter.² One option to address this could be to reintroduce a provision for limited liability for suppliers from consequential losses. However, we prefer the alternative discussed further below.

2.3 Problem with the application of indexation to an arbitrary threshold value

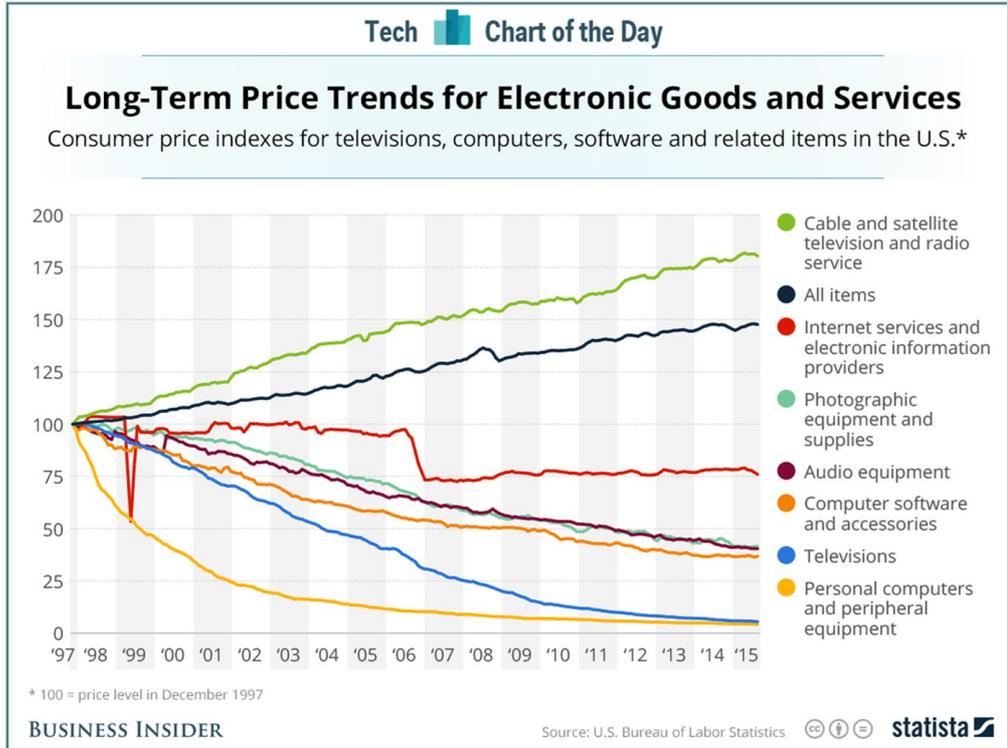
The proposal to index the threshold to reflect inflation is also flawed. As CAANZ observes, the relative prices of goods and services have not increased across all categories – in fact, many are declining as a function of technological advance and improvements (see charts 1 and 2).

The prices of computer and electronic goods and services have declined substantially since 1986. Under the indexation approach, the \$40,000 threshold in the consumer definition should have decreased. Therefore, neither increasing the current monetary threshold value in the definition for consumers, nor continuing to increase it by the wider price indices is appropriate for these product categories.

Increasing the threshold based on this incorrect premise would excessively widen the scope of products and volume of purchases to be brought under the ACL and create an unnecessary new regulatory burden and cost for suppliers.

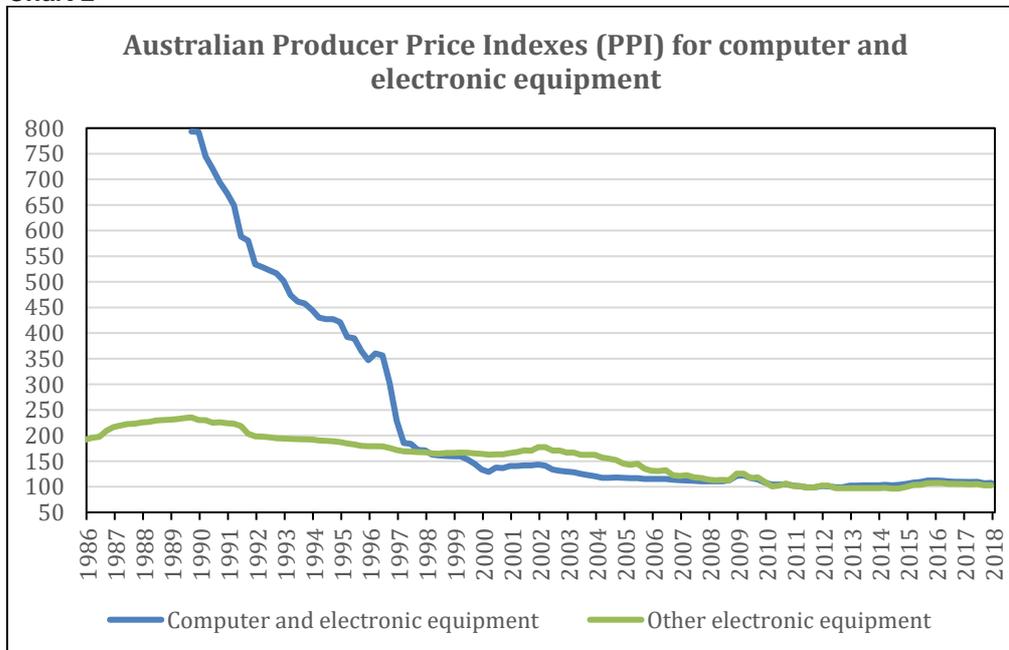
² Law Council of Australia submission to Treasury (2 April 2012): <http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2568%20-%20Manufacturers'%20liability%20for%20consequential%20loss%20arising%20from%20breaches%20of%20consumer%20guarantees.pdf>.

Chart 1



Source: Business Insider

Chart 2



Source: ABS 6247.0 Producer Price Indexes, Australia, Table 12 Output of the Manufacturing industries, division, subdivision, group and class index numbers

2.4 Proposed alternative solutions

For the above reasons, we do not support the proposed increase to the current threshold. We suggest two alternatives.

First, Australia could adopt the United Kingdom definition of the “consumer” as a natural person, which excludes companies.³ This provides more certainty and clarity for both consumers and industry.

Alternately, Australia could maintain the current threshold of \$40,000, but exclude contracts with customers who supply an ABN, or at least incorporated companies and government entities. For consistency, this amended definition for consumer should also extend to unsolicited agreements.

Either of these options would be fairer and more efficient than the status quo or CAANZ Proposal 1.

3. CAANZ Proposal 2: Clarifying the consumer guarantees remedies (comprised of two proposals – failure within a short period of time and multiple failures)

The Consultation RIS identifies two issues relating to major failures associated with consumer guarantees:

- (i) Whether a non-major failure within a short period of time equates to a major failure; and
- (ii) Whether multiple non-major failures cumulatively amount to a major failure.

Overall, we do 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 do support the improvements outlined at section 3.2 below to regulator guidelines for the benefit of both consumers and suppliers, and increased and improved consumer awareness and education. These are proportionate solutions to address complex situations.

3.1 Fundamental problems with the proposals

As CAANZ acknowledges, the legal test for a major failure depends 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 needs 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 provides a fair and reasonable outcome for both the consumer and supplier.

If the ACL was 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

³ The [Consumer Rights Act 2015 \(UK\)](#) states at Section 2:

(3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

(4) A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession must prove it.



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significant cost in compliance, excessive risk aversion and cost-shifting by retailers and unscrupulous consumers which would reduce their ability to invest in other priorities. 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.

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 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.
- The product has internet or WiFi capability, but does not function with these features due to a consumer's own network settings.

In the above examples, 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 the manufacturer. 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 the need to address the performance of third party service providers.

There may also be wider unintended consequences from changes to the ACL. One example is a likely increase in waste. In practice, upon receiving a returned good from a retailer, the manufacturer may have no practical ability to return the goods to the retailer. This is because some retailers automatically provide the consumer with a replacement, and the manufacturer therefore does not have an opportunity to assess, repair (if there is a failure) and return the good. And where there is a failure that was not due to the manufacturer, it is often not commercially viable to repair returned goods. These returned goods are typically sent to waste, and are a substantial and growing cost for manufacturers. Expanding the circumstances in which goods are likely to be returned to manufacturers would increase that waste even further.

While outside the formal scope of this review, landfill waste is a significant problem for industry, the public and all levels of government. This is why the *Product Stewardship Act 2011* (Cth), currently under review, was created. 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.

3.2 Need for improved industry-specific guidelines, awareness and education

A better solution is to improve the current level of consumer and supplier awareness and appreciation of the ACL and its limits, including what constitutes major failures. CAANZ is underestimating the potential of improvement in these areas to assist consumers, and overestimating the impact of a perceived power imbalance with suppliers.

The value of guidelines, and education and awareness campaigns 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.



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Well-developed guidelines will also assist suppliers, particularly retailers, in clarifying the following issues with consumer guarantees:

- 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. Once this occurs, the manufacturer may have no practical ability to return the goods to the retailer, as discussed above.
- When a retailer returns a good to the manufacturer, care is often not given to the handling of the good. There have been instances where goods have been damaged in transit because of inadequate or missing protective packaging. Some of these returned goods have missing parts. Some retailers apparently assume that returned goods from consumers should be automatically treated as damaged, even though the manufacturer has not had the opportunity to assess whether any major or minor failure exists.
- 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.
- On occasion, retailers offer discounted sales on goods (including second hand and damaged goods) and with this understanding consumers purchase these discounted goods at the point of purchase. Following the purchase of these goods, certain consumers have immediately sought a warranty claim from the manufacturer to repair the good. In this example, the manufacturer should not be forced to repair or refund the good. Instead, it should be returned to the retailer or seller who received money for such a purchase.

These problems have arisen 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 they genuinely believe was a failure caused by the manufacturer. There are also no proper systems in place to manage the assessment of failures.

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

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, we propose industry-specific guidelines. Development of such guidelines will need further consultation with consumers and industry.

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

4. CAANZ Proposal 3: Enhancing disclosure for extended warranties

As a general comment, we maintain our previous view that it would greatly assist consumers if retailers clearly explained to consumers the specific additional value that they are providing in addition to the current obligations required of manufacturers. In effect, extended warranties are essentially service agreements between retailer, manufacturer and consumer (as opposed to a standard warranty that is already covered under the ACL). Amendments to the ACL are probably required, including clarifying the period for which a standard warranty applies and potentially relabelling the term “extended warranties” to avoid confusion for consumers and industry.



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Consumers would likely expect that extended warranties operate beyond the requirements of the ACL for standard warranties, with the retailer providing a particular service such as repair. There would also likely be an expectation that the repair service provided by the extended warranty is conducted to the standard of service of a licenced repairer.

5. CAANZ Proposal 4: Accessing consumer guarantees for goods sold at (online) auctions

The Consultation RIS only focuses on whether the sale-by-auction exemption for consumer guarantees should be amended with regards to sales by online auction sites. However, the separate and broader question of consumer guarantees in relation to online purchases (in particular parallel imports) should also be addressed.

5.1 Online sales

With the increasing presence of online retailers, consumers now have a range of choices including whether they purchase from local or overseas suppliers. Some consumers may choose to purchase a product from overseas because they consider there is a price saving. However, consumers need to be aware that the benefit of purchasing locally (whether online or in store) is that the local price covers the local supplier's costs for doing business in Australia, including meeting local compliance costs (e.g. Australian product safety standards), providing parts for local models (as opposed to overseas models), and maintaining local service and support to consumers.

This is an important reason a brand sourced from overseas is priced differently to the same brand purchased locally. This is also why policy makers and regulators need to be conscious of the legitimate distinction between the trading name and the brand name.

Therefore, if the consumer chooses to purchase a product from an overseas source, local suppliers and distributors should not be held accountable for consumer guarantees of products purchased from an overseas supplier. The ACL should be clarified that any warranty for a product (including service and support) is the responsibility of the actual seller rather than assuming that it is always the responsibility of a local supplier or distributor of the same brand name.

5.2 Auction site sales

With respect to online auctions, consumers should be advised of "buyer beware" when purchasing second hand products. Consumers have the choice to take this risk and the product should not be covered under warranty. The ACL or guidelines should require online auctioneers to include a mandatory disclaimer for "buyer beware".

Should CAANZ be interested in discussing our submission further, please contact our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

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