



# 2017 AUSTRALIAN CONSUMER LAW REVIEW

## KEY TAKEAWAYS THAT EVERY BUSINESS SHOULD KNOW

Consumer Affairs Australia and New Zealand (**CAANZ**) has undertaken the first review of the ACL since its inception in 2011 and has released its final report. Herbert Smith Freehills have summarised below the key legislative proposals that all businesses should be aware of.



### CONSUMER GUARANTEES

CAANZ has proposed with respect to consumer guarantees that:

- where a product fails to meet the statutory consumer guarantees within a short specified period of time, a consumer is entitled to a refund or replacement or repair without the need to prove a 'major failure'.
- multiple non-major failures can amount to a major failure, including where the failures do not all occur in a similar period of time, do not relate to the same issue or do not result in the same problem.
- disclosure in relation to extended warranties should be enhanced by requiring:
  - agreements for extended warranties be clear and in writing;
  - additional information about what the ACL offers in comparison; and
  - a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed and in writing.



### PENALTIES

- CAANZ view the current maximum financial penalties as "insufficient to deter highly profitable non-compliant conduct and can be seen by some entities as a cost of doing business."
- CAANZ has proposed therefore that the maximum financial penalty be increased so that it operates as an effective deterrent. Aligning the penalty regime with that available under the competition provisions of the Competition & Consumer Act would result in a fine for companies which is the greater of:
  - the maximum penalty (of \$10 million); or
  - three times the value of the benefit the company received from the act or omission; or
  - if the benefit cannot be determined, 10% of annual turnover in the preceding 12 months.
- For individuals the maximum penalty would be \$500,000.
- CAANZ expressed the view that "penalties must be sufficiently high that a trader, acting rationally and in its own best interest, would not be prepared to treat the risk of such a penalty as a business cost."



## ONLINE SHOPPING

- CAANZ proposes enhanced transparency in online shopping by requiring that the headline price include all additional fees and charges associated with pre-selected options.

If this proposal is adopted, it would likely result in the headline price being higher than a minimum price (i.e. the price without any extras or pre-selected options).



## PRODUCT SAFETY

### General overarching obligation

- CAANZ proposes that:
  - Traders (including manufacturers, suppliers and retailers) be subject to a general overarching obligation to ensure the safety of their products before products are placed on the market.
  - Traders have an automatic defence to a breach of the general safety provision if they have complied with an appropriate product safety standard.
  - If there is no mandatory standard, traders be able to rely on a voluntary standard or another comparable means of compliance (eg a risk assessment).

### Voluntary recalls

- With respect to product recalls, CAANZ proposes that the obligations on businesses to voluntarily recall a product be clarified and strengthened by:
  - introducing a statutory definition of 'voluntary recall' so it is clear when a trader is required to notify the relevant authorities; and
  - increasing the penalties for failure or refusal to notify a voluntary recall.

### Strengthen powers of the regulator

CAANZ also proposes that the ACCC's compulsory information-gathering powers to obtain information from any person (including a customer) likely to have relevant information be strengthened.



## SCOPE OF THE ACL

CAANZ proposes that the scope of the ACL be expanded to include:

- Increasing the \$40,000 threshold for business purchases to \$100,000;
- Amending the ASIC Act to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products; and

Extending the ACL (and ASIC Act) unconscionable conduct protections to publicly-listed companies.



## UNFAIR CONTRACT TERMS

CAANZ also proposes that the unfair contract term protections be applied to contracts regulated by the *Insurance Contracts Act 1984* (Cth).

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In June 2015, consumer affairs ministers, through the Legislative and Governance Forum on Consumer Affairs, asked CAANZ to initiate a broad review of the ACL. The intent of the review was to assess the effectiveness of the ACL provisions, including the ACL's flexibility to respond to new and emerging issues.

CAANZ considers that this package of reforms "will strengthen and clarify the law, help consumers and traders better understand their rights and obligations, improve outcomes across Australian markets and help to future-proof the ACL."