

CONSUMER AFFAIRS AUSTRALIA AND NEW ZEALAND
SUBMISSION

Productivity Commission Study

Impacts of COAG Reforms: Business Regulation and VET

1. Consumer Affairs Australia New Zealand (CAANZ) is made up of Commonwealth, State and Territory officials with responsibility for consumer policy within their respective jurisdictions. It was formerly known as the Standing Committee of Officials of Consumer Affairs.
2. CAANZ generally welcomes, and agrees with, the discussion draft *Impacts of COAG Reforms: Business Regulation and VET* (the draft), to the extent that it deals with consumer law and product safety. However, CAANZ does not agree with two comments within Chapter 2 of the draft, namely comments about unsolicited selling and fundraising by charities and consumer guarantees applied to motor vehicles.
3. CAANZ also considers that some consideration could be given to savings in Government administration costs stemming from co-ordination and co-operation between consumer agencies under the Australian Consumer Law (ACL) and from reduced duplication of effort in consumer policy making.
4. CAANZ would also encourage the Commission to ensure that any 'Overview' or 'Key Points' documents published with their final report reflect the contribution of the ACL to the overall impact of the Seamless National Economy reforms. The overview and key points documents published with the draft do not, in the view of CAANZ, reflect accurately the positive contribution of the ACL to the impact of the SNE reforms.

Unsolicited consumer agreements and fundraising by charities

5. Prior to commencement of the ACL, all States and Territories of Australia, except for NSW and Victoria, prohibited a trader from accepting payment for an unsolicited sale during the cooling-off period. Accordingly, when the ACL adopted best practice from State and Territory laws, in accordance with recommendation 4.1 of the Productivity Commission's *Review of Australia's Consumer Policy Framework*, a decision was taken to retain the pre-existing position from the majority of the States and Territories. This means that the status-quo was retained in all States and Territories other than NSW and Victoria, in respect of accepting payment for goods and services.
6. The prohibition on accepting payment was generally thought to act as a *de facto* prohibition on supply, as few traders were willing to supply goods during the cooling off period whilst accepting the risk of non-payment, particularly for goods with a value of more than \$100. Accordingly, section 86 of the ACL extended the prohibition on payment to also cover prohibition on supply.
7. Australia's consumer ministers recognised that the prohibition on supply and payment for unsolicited consumer agreements imposed by section 86 of the ACL would impose transitional costs on unsolicited sellers. Accordingly, a one-year transition period was put in place to allow traders to continue to comply with pre-existing State and Territory laws from 1 January 2011 to 1 January 2012.

8. On 1 November 2011, the COAG Legislative and Governance Forum on Consumer Affairs (CAF) voted on a proposed amendment to the ACL to allow goods with a value of up to \$500 to be supplied immediately when an unsolicited consumer agreement is made. A regulation to give effect to this decision was made on 24 November 2011 to be effective from 1 January 2012.
9. As a general proposition, some may consider that the ACL provisions related to unsolicited consumer agreements are less prescriptive than the State and Territory laws that they replaced. More specifically, a number of factors limit any adverse effect of section 86 of the ACL on fundraising activities conducted by charities:
 - a. The unsolicited consumer agreement provisions of the ACL do not apply to all transactions involving less than \$100;
 - b. Fundraising activities engaged in by charities will often not be considered to be 'in trade or commerce'. Accordingly, the unsolicited consumer agreement provisions of the ACL do not apply to those activities;
 - c. The new \$500 threshold will further limit the applicability of the unsolicited consumer agreement provisions of the ACL to fundraising activities engaged in by charities.
10. The Australian Government recently released a discussion paper dealing with charitable fundraising. That paper considers the applicability of the unsolicited consumer agreement provisions of the ACL to charitable fundraising and seeks public comment on whether these provisions should continue to apply to charitable fundraising.

Consumer guarantees and motor vehicles

11. The consumer guarantee provisions of the ACL are based closely on the *Consumer Guarantees Act 1993* (NZ).
12. The circumstances in which failure of a component in a vehicle could give rise to a right to return are limited. Most relevantly to the issue mentioned on page 35 of the draft, the right of a consumer to seek a refund or replacement only arises where the trader has failed to comply with the guarantee and the failure cannot be remedied, or is a major failure.
13. The main circumstances in which a car might be subject to rejection for a major failure relate to failure to satisfy the guarantees of acceptable quality, where it is not of acceptable quality because it is unsafe and where it is substantially unfit for purpose.
14. The ability to reject a good as not being of acceptable quality or because it is unsafe is subject to a reasonable consumer test, either with the section 260(a) definition of 'major failure' or under the definition of 'acceptable quality' if a rejection is based on a good being 'not of acceptable quality because they are unsafe' under section 260(e) of the ACL. The ability to reject a good as unfit for purpose is subject to the failure with the

goods not being capable of being remedied easily and within a reasonable time (under section 260(c)).

15. Some automotive industry representatives have made representations to consumer Ministers arguing that the consumer guarantee provisions of the ACL may allow motor vehicles to be rejected by consumers in response when relatively minor safety issues arise. Such a position appears to reflect a theoretical concern but not the reality of the Australian or New Zealand experience to date.
16. First, close to 20 years of experience with substantively the same provisions has not led to evidence of the unwarranted rejection of motor vehicles in New Zealand. On the contrary, a comprehensive review of New Zealand cases has shown that the only instances of the relevant tribunals allowing for rejection have been in response to severe and prolonged problems with motor vehicles.
17. Secondly, automotive industry representatives have been unable to provide consumer Ministers with any examples of unwarranted rejection being allowed by any Court or Tribunal either over the past 19 years in New Zealand, or over 12 months since the ACL commenced.
18. It hard to envisage that a consumer would choose to reject an entire vehicle in instances where repair costs are small relative to the value of the product and the repair could be completed in a short period of time. Furthermore, the ability to reject a vehicle as not being fit for purpose is explicitly subject to the problem with the vehicle not being capable of being remedied easily and within a reasonable time.
19. The Explanatory Memorandum for the consumer guarantee provisions of the ACL indicates that New Zealand precedent should be persuasive for Australian Courts when applying these provisions, given the similarity between the two sets of laws. New Zealand tribunals have suggested that a reasonable consumer would expect some minor issues to occur with a complex good like a motor vehicle, with the effect that such issues do not give rise to a right to reject, even for a brand new vehicle.

Government administration costs

20. CAANZ officials note that the draft includes an estimate of an increased cost to government of \$25 million per year associated with altered governance arrangements and new enforcement powers given to the ACCC.
21. CAANZ officials suggest that consideration should also be given to potential cost savings associated with co-operation and reduced duplication of effort between consumer agencies that has been made possible by the ACL. Three examples of cost savings involve the appointment of a 'lead agency' for national consumer issues (such as the Qantas and Tiger Airways groundings), co-operation on policy development and the development of national guidance and education materials.

22. Over time enhanced co-ordination and co-operative arrangements have the potential to deliver significant cost savings that are not reflected in the draft. CAANZ officials consider that it is possible that the net effect of the reforms on government administration costs will be positive over the longer term.

Estimated impacts on business compliance costs

23. Comments on page 35 of the draft report relate to the compliance costs of introducing unfair contract terms provisions and consumer guarantees. CAANZ officials consider that the regulatory burden relating to the introduction of unfair contract terms provisions and consumer guarantees are likely to be largely once-off for most businesses.
24. The suggestion that firms may need to devote greater resources to training and compliance programs may be overstated given that businesses would already have compliance programs in place. The minimal change from pre-existing fair trading laws would mean that most businesses do not need to make significant changes to business practices.

Other comments

25. On page 21 of the draft, the quantitative data is referred to as 'ex ante'. CAANZ considers that this may understand the likely variability of the data. CAANZ considers it important that readers of the report are made aware that all estimates made in the report are speculative, as the report will likely be perceived as an important source of quantitative data on the impact of the reforms.
26. Part 2.2 of the report does not mention that consumer protections extend to small business due to the definition of 'consumer' in the ACL. A discussion of reduced risk for business when transacting with other businesses might be appropriate under the heading 'consumer demand' on page 36.