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Competition and Consumer Protection Legal Update

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Proposed changes to the Australian Consumer Law

by Practical Law Australia Competition and Consumer Protection

Significant changes to Australian consumer law were recommended by Consumer Affairs Australia New Zealand (CAANZ) in April 2017 following a two year review. CAANZ proposed 19 amendments to the Australian Consumer Law (ACL), 11 to be implemented without formal regulatory impact assessment, provided consumer affairs ministers agreed to their implementation. On 31 August 2017, Consumer Affairs Ministers agreed to a package of 14 legislative reforms to improve the operation of the ACL. Exposure draft legislation and regulations have just been released for consultation, with submissions due by 28 February 2018. This update briefly summarises the effect of the proposed amendments in the draft legislation and regulations.

ACL review and consultation period

Significant consumer law changes were recommended in April 2017 in the Australian Consumer Law Review: Final Report (ACL Review Report), following a two year review of the Australian Consumer Law (ACL) by Consumer Affairs Australia New Zealand. The ACL Review Report proposed 19 amendments to the ACL, 11 to be implemented without any formal regulatory impact assessment provided consumer affairs ministers agreed to their implementation.

On 31 August 2017, Consumer Affairs Ministers agreed to a package of 14 legislative reforms to improve the operation of the ACL. [Exposure draft legislation and regulations](#) reflecting those proposed reforms have just been released for consultation, with submissions invited by email in Word or RTF format to consumerlaw@treasury.gov.au due by 28 February 2018.

This update briefly summarises the object and effect of amendments in the draft legislation and regulations.

Proposed changes to ACL, ASIC Act and CCA

The [exposure draft Treasury Laws Amendment \(Australian Consumer Law Review\) Bill 2018](#) (ACL Review Bill) amends the ACL, and makes related amendments to the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), and the *Competition and Consumer Act 2010* (Cth) (CCA), to give effect to recommendations in the ACL Review Report.

The amendments are intended to clarify and strengthen regulatory investigative power and consumer protections relating to consumer guarantees, voluntary recalls, unsolicited consumer agreements, product safety, false billing, unconscionable conduct, pricing and unfair contract terms.

In summary, the proposed amendments:

- Facilitate “follow on” private damages claims by permitting parties bringing damages claims under the ACL to rely on admissions of fact and findings of fact made in other proceedings (usually prior ACCC enforcement proceedings). Evidentiary requirements are eased by amendment to [section 137H](#) of the CCA (similar changes were made to [section 83](#) of the CCA from 6 November 2017 in relation to competition law claims).
- Extend the unconscionable conduct protections in the ACL to publicly listed companies by amendment to [section 21](#) of the ACL, [section 12CB](#) of the ASIC Act and [section 131](#) of the CCA.
- Ensure that the unsolicited services provisions of sections [40](#) and [162](#) of the ACL operate as intended, by amending the definition in [section 2\(1\)](#) of the ACL to include services that were not actually supplied.

- Amend [section 69](#) of the ACL to confirm that an agreement entered into in a public place may be an unsolicited consumer agreement, and in that way expand the operation of the obligations and prohibitions relating to unsolicited consumer agreements.
- Expand the operation of the obligation to specify a single total price for certain goods and services in [section 48](#) of the ACL, by requiring that additional fees or charges associated with pre-selected options are included in the headline price.
- Strengthen the powers of the Commonwealth Minister and ACCC inspectors to obtain information about product safety from suppliers, by amending [section 133D](#) of the CCA to allow them also to give disclosure notices to third parties.
- Expand regulators’ investigative powers by amending [section 12GND](#) of the ASIC Act and [section 155](#) of the CCA to extend ASIC and the ACCC’s respective investigative powers to enable those regulators to undertake investigations to determine if a term in a contract may be unfair.
- Clarify the obligations on a person engaged in trade or commerce under a voluntary recall by amending:
 - [sections 2\(1\)](#) and [128](#) of the ACL to define voluntary recall; and
 - [section 224](#) of the ACL to increase penalties in relation to voluntary recall notification requirements.
- Give courts power to require a person in contravention of the ACL to engage (at the person’s expense) a third party to give effect to a community service order (for example, where the person in breach is not qualified or trusted to give effect to the order), by amending [section 246](#) of the ACL.
- Expand the operation of the consumer guarantee obligations in [sections 60 to 62](#) of the ACL by amending [section 63](#) of the ACL, so that the exemption for services supplied where goods are transported or stored applies where the consumer is a business but does not apply where the consumer is not a business.
- Amend [section 12DC](#) of the ASIC Act to ensure that the terminology used in the consumer protection provisions in the ASIC Act that apply to financial products and services relating to land are consistent with similar provisions in the ACL.
- Amend [sections 12BA, 12BAB, 12BEA, 12DM, 12DMA](#) and [12DMB](#) of the ASIC Act to make it clear that all the ACL-related consumer protections in the ASIC Act that apply to financial services also apply to financial products under the ASIC Act.

Comparison of key features of proposed law and current law

The [exposure draft explanatory materials](#) provide the following summary of the intended effect of the [ACL Review Bill](#).

New law	Current law
Evidentiary burden	
Expanded “follow-on” provisions allow private litigants to rely on admitted facts from earlier proceedings.	Findings of fact made by a court in certain proceedings against a person may be used in certain other proceedings against that person under the Act. Admitted or agreed facts by the person may not be relied on.

Unconscionable conduct	
Unconscionable conduct against a person is prohibited, including where the person is a publicly listed company.	Unconscionable conduct against a person is prohibited except where the person is a publicly listed company.
Unsolicited consumer agreements	
The operation of unsolicited consumer agreements in section 69 of the ACL is clarified but not altered to make clear that an unsolicited consumer agreement applies where a dealer meets a consumer away from the supplier’s business or trade premises, including a public place.	Section 69 of the ACL defines unsolicited consumer agreements.
Amounts included in the single price	
Fees or charges associated with preselected options must be included in the single price.	The single price for the supply of a good or service must include charges payable by a person except a charge that is optional.
Product safety	
A definition for “recall” is included in the ACL to clarify when the notification obligations under a voluntary recall must be met.	A person who voluntarily recalls a consumer good must make certain notifications but recall is not defined.
The ACCC is able to require information about unsafe products, including from third parties.	The ACCC can only require a supplier to provide information about unsafe products.
Unfair contract terms	
ACCC and ASIC’s investigative powers allow for investigations of possible unfair contract terms.	ACCC and ASIC’s investigative powers do not allow for investigations of possible unfair contract terms.

Proposed changes to regulations

The [exposure draft Competition and Consumer Amendment \(Australian Consumer Law Review\) Regulations 2018](#) amends the *Competition and Consumer Regulations 2010* (Cth) (CCR) to give effect to two proposals included in the ACL Review Report by:

- Prescribing alternative mandatory text to be included in warranty documents for the supply of services and services bundled with goods by amending [regulation 90](#) of the CCR.
- Removing the requirement for suppliers of services to disclose cooling off rights to consumers where these rights do not apply to those services by amending [regulation 83](#) of the CCR.

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