

28 February 2018

Shelby Schofield  
Consumer Policy Unit  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Ms Schofield

### **Australian Consumer Law Review: ACL Amendments**

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**CCC**) welcomes the opportunity to provide this submission on the Australian Consumer Law Review: ACL Amendments (**Amendments**).

### **Proposal**

After s 128(1) of Schedule 2, insert:

(1A) The corrective action is any corrective action taken by a person engaged in trade or commerce to mitigate safety risks of the consumer goods, which may include action taken to remove the consumer goods from distribution, sale or consumption.

### **Response**

The proposed definition at s 128(1A) is too broad and will impose an unnecessary and impractical burden on business.

Section 128(1) clearly sets out when a notification obligation is triggered and no further definition is necessary. In particular, that section provides that notification to the ACCC is required if a person 'takes action to recall consumer goods' because:

1. the consumer good will or may cause injury to any other person; or
2. a reasonably foreseeable use (including a misuse) of the consumer goods will or may cause injury to any other person; or
3. a safety standard for the consumer goods is in force and they do not, or it is not likely that they do not comply with the standard; or
4. an interim ban, or a permanent ban, on the consumer goods is in force.

The phrase 'takes action to recall consumer goods' is readily understandable and does not require any further definition. In any event, guidance on the interpretation of the phrase is available. The ACCC's Guidelines *Consumer product safety recall guidelines* explain that a voluntary recall 'occurs when the supplier of a consumer product initiates the recall and voluntarily takes action *to remove the goods from distribution, sale, and/or consumption*'.

Suppliers periodically make design modifications or production process changes for multiple reasons, including to improve the product's functionality, performance characteristics, visual appearance or safety features. Under the broad language of the proposed s 128(1A), such improvements may be taken to constitute or include a "*corrective action...to mitigate safety*", when such improvements are well removed from the circumstances warranting a product recall notification.

The proposed definition of 'recall' goes beyond its readily understood meaning and the ACCC guidelines and potentially encompasses internal preliminary actions undertaken as part of a suppliers' safety assessment. Suppliers also take precautionary corrective actions to assess whether safety risks are present, for instance in response to a customer complaint. In most cases, the consumer good is safe and no recall is necessary. These precautionary measures should not trigger a notification requirement, even though they may be considered corrective actions to mitigate safety risks. If a notification requirement were to be triggered in these circumstances, suppliers could be deterred from undertaking precautionary corrective actions, given the significant burden voluntary recalls entail.

In practice, identifying a consumer product safety hazard is often iterative. As acknowledged by the ACCC in its Guidelines, the identification process involves a risk assessment and the ACCC encourages suppliers to contact them at an early stage of this process. It is preferable for this process to remain flexible so that suppliers can take pro-active measures to ensure that no safety hazards are present, but without triggering a recall notification in every case.

The ACL review did not identify any instances where a voluntary recall should have been notified and was not on the basis that the supplier 'craft[ed] their remedial action to not trigger the notification requirements'. The recommendation appears to have been accepted simply on the basis that there is not currently a definition, and not as a response to any identified harm.

I trust these observations are of assistance.

Please contact Fiona Crosbie Chair of the CCC at [Fiona.crosbie@allens.com.au](mailto:Fiona.crosbie@allens.com.au) or (02) 9230 4383 in the first instance, if you require further information or clarification.

Yours sincerely



**Rebecca Maslen-Stannage**  
**Chair, Business Law Section**