

6 March 2019

Mr Liam Hedge  
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Australian Competition & Consumer Commission  
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Dear Mr Hedge,

**Submission to on the CAANZ guidance relating to 'unsafe' and 'reasonable durability' in the Australian Consumer Law**

Thank you for the opportunity for the Law Council of Australia (**the Law Council**) to provide a submission on the draft guidance developed by Consumer Affairs Australia and New Zealand (**CAANZ**) regarding the meaning of the concepts 'unsafe' and 'reasonable durability' as contained in the Australian Consumer Law's (**ACL**) consumer guarantees regime. Thank you also for allowing an extension of the original deadline for the completion of this submission.

The Law Council acknowledges the assistance of the Competition & Consumer Committee of the Law Council's Business Law Section, and the Australian Consumer Law Group of the Law Council's Legal Practice Section, which have provided the substance of this submission.

**1. General comments**

The Law Council supports the introduction of guidance on the concepts of 'unsafe' and 'durability' as a tool for ensuring consumers and businesses have a better undertaking of their rights and obligations under the ACL, and to assist them in applying these concepts in their day-to-day business.

It is noted that section 54 of the ACL does not itself use the terms 'unsafe' and 'durability', but rather deals with what is 'safe' and 'durable'. The ACL uses the term 'unsafe' elsewhere (for instance in section 260).

The Law Council considers that it may be beneficial to address within the guidance the concept of 'hidden defects' (per section 54(2)) with regard to its potential impact on both safety and durability.

## **2. Guidance on 'reasonable durability'**

### *2.1. Explanation of guidance*

The Law Council considers that the guidance on durability should include an explanation of what it intends to cover and how it should be used. The Law Council suggests that an explanation would be beneficial, to the effect that the guidance is only focused on one concept (i.e. durability) within what is otherwise a lengthy and complex test for determining acceptable quality under the broader consumer guarantees regime.

Further, even where a product is found not to be 'reasonably durable' (and therefore not of acceptable quality), the appropriate remedy under the ACL will depend on whether the failure to comply with the guarantee is a major or minor failure. It would therefore also be beneficial to make clear that just because a good is found not to be durable, this does not mean that the consumer is always entitled to reject the good and receive a full refund or replacement. Rather, it may be the case that the failure is minor, and the supplier may choose to repair the good instead.

### *2.2. Factory seconds and refurbished goods*

The guidance explains the concept of durability as it relates to factory second goods and refurbished goods. The Law Council considers that the guidance places an onus on businesses, which does not exist at law, to explain factory second faults to consumers including what fault is responsible for the reduced price of the good and how that fault may affect the good's durability so that consumers can make an assessment as to the reasonable durability of the good.

The guidance also states that it is possible to buy goods as factory seconds or outlet sales that have major faults, 'so long as the fault is drawn to [the consumer's] attention'. The ACL does not place an obligation on suppliers to actively notify consumers of faults. For example, section 54(7) of the ACL states that goods do not fail to be of acceptable quality if the consumer examines the goods before purchase and that examination ought reasonably to have revealed that the goods were not of acceptable quality. In that case, there is no obligation on the supplier to disclose the factory second defects for the exception in section 54(7) to apply; it may be enlivened by the fact that an examination of the goods ought to have revealed the defect. Further, section 54(4) provides that a good is taken to be of acceptable quality if the only reason or reasons why it is not of acceptable quality are drawn to the consumer's attention. This provides an exception to the guarantee of acceptable quality as opposed to imposing a positive obligation on businesses to draw all potential faults and the nature of a good's components to consumers' attention. The Law Council considers that this particular issue relates to disclosure (i.e. statements made to consumers and/or examination of the goods), which is separate to the concept of durability, and for that reason recommends that the comments around disclosure should be omitted from the guidance.

### *2.3. Use of specific timeframes in examples*

The Law Council considers that the examples set out in the guidance are helpful, however, it is concerned that the specific periods of time referred to in some of the examples may be excessive, particularly in the absence of any judicial guidance.

In particular, the example on page 3 of the guidance referring to Lara and Jessica, who purchase high-end and basic washing machines, states that 'a reasonable consumer is likely to expect [the high-end washing machine to] last for more than eight years' and the

basic washing machine 'to last eight years'. Also, the example on page 6 of the guidance referring to Hamish and Connor, who purchase mid-range clothes dryers, states that if the dryer is rarely used it would reasonably be expected 'to last longer than five years'.

The Law Council is concerned that the eight-year life expectancy of the washing machines, and the five-year life expectancy of the dryer, creates an arbitrary and generalised expectation of the durability of these products that may be overly lengthy. The Law Council considers that the timeframes in the examples could be reduced to say two-year life expectancies instead, which would more clearly be within the reasonable expectation of consumers and would still illustrate the concept of durability that they are trying to achieve.

Additionally, the Law Council also considers that the guidance should include a general statement or disclaimer that the examples (and the timeframes / product life expectancies referred to) are intended to be purely illustrative, and are not indicative of the actual durability that a product may have in real life. Durability must be determined on a case-by-case basis and will depend on the particular product and circumstances in question (and is ultimately a matter for assessment by the courts).

#### *2.4. Warranties*

The Law Council accepts the guidance that the length of a manufacturer's warranty may be of some relevance to how long a consumer can expect a good to last. However, the guidance further states that 'you can often expect a good to last longer than the supplier or manufacturer's warranty period.' It is open to manufacturers and suppliers to determine whether they will provide a warranty and for how long that warranty will last. In many cases, suppliers and manufacturers choose to offer lengthy warranties, often as part of a sales or marketing tactic to attract consumers or promote brand loyalty, which may offer broader rights and remedies than are available under the ACL. The Law Council considers that the wording in the guidance should be amended to say, for example, that 'a good may, in some circumstances, last longer than the supplier or manufacturer's warranty period.'

#### *2.5. Use affecting durability*

The Law Council considers that more guidance could be given in respect of how use (or lack of use) of a good may affect its durability. The guidance states that 'the more heavily and frequently you use a good, the less time you can expect the good to last. Conversely, the less you use a good, the longer you can expect it to last.' However, the Law Council considers that it would be worth noting that some goods or components of goods may have a limited life expectancy or shelf life, regardless of whether or not the consumer has used the good. For example, a component of a vehicle, such as the battery, may deteriorate and go flat even where the consumer has left the vehicle in the garage and has not driven it.

### **3. Guidance on 'unsafe'**

#### *3.1. Community expectations*

The guidance states that 'the concept of unsafe is not defined in the ACL and has its ordinary meaning in line with community expectations.' The Law Council agrees that the concept of unsafe has its ordinary meaning, however, it considers that the addition of 'in line with community expectations' does not accurately reflect the position at law. As the guidance states, it is ultimately the role of a court to determine whether or not a good is safe or unsafe, and the court will consider this with regard to the concept's ordinary meaning. Adding in the element of 'community expectations' may create further ambiguity that can be avoided.

### 3.2. *Safety over time*

Whether or not a good can be considered safe may vary over time and a key challenge is that of goods becoming unsafe after they have been used for a period of time. The guidance provides some insights but does not address this issue in concrete detail. While it is acknowledged that it is difficult, if not risky, to specify precisely what constitutes a reasonable 'period of time' for all situations, some further consideration of this issue may be beneficial.

### 3.3. *Product safety recalls*

The Law Council is supportive of the way in which the guidance focuses on the concept of safety as it relates to the consumer guarantee provisions of the ACL, and differentiates it from other laws relating to unsafe goods (such as the separate product safety regime in the ACL that provides for mandatory safety standards, product recalls, and bans). Companies may choose to conduct recalls for a variety of reasons. In particular, companies may decide to undertake a recall as a preventative action. As the guidance states, the fact that goods are recalled 'does not mean that they are unsafe for the purposes of the consumer guarantees'. This is an important distinction as the threat of liability under the consumer guarantees should not discourage companies from conducting recalls.

The guidance states that 'assessment [of whether a good is unsafe] often needs to be done on a case by case basis, and as outlined in the examples above, recalled goods will not always fail to meet the consumer guarantee of acceptable quality for reason of them being unsafe'. However, the Law Council considers that one of the examples it refers to above may actually cause confusion and undermine this statement. The example involving Aaliyah and her new model car jack seems to suggest that although her car jack was recalled, because it was later found out to not be one of the car jacks made from defective steel (and therefore no longer part of the recall), it was considered safe and of acceptable quality under the consumer guarantees. The example seems to imply that if Aaliyah's car jack was made from defective steel and included as part of the recall, then it would be considered unsafe and therefore not of acceptable quality (which, as stated elsewhere in the guidance, is not the intended conclusion that should be drawn in cases involving a product recall). The Law Council considers that the guidance on this concept of product recalls could be made clearer by omitting that particular example.

### 3.4. *Instructions and warnings*

The Law Council considers that the guidance could provide further clarification around the use of warnings and instructions on products. The guidance could clarify that a product will not be considered safe for use merely because there is a warning contained in the instructions if the warning cannot actually be adhered to by the consumer. For example, in the scenario involving Malachy's kitchen appliance, although the instruction manual tells users not to open the lid whilst the contents are still moving, the consumer cannot adhere to the warning as the appliance is opaque and does not allow the user to see inside. In such circumstances, even though there is a warning in the instruction manual, it will not be sufficient to render the product safe for use as the warning cannot be actioned by the user.

The guidance should clarify that, conversely, if a consumer is able to action a warning, then suppliers may (depending on the risk the subject of the warning) be able to rely on placing warnings in an instruction manual and are not required to have warnings placed on the actual product.

### 3.5. *Statements made about the goods*

The guidance makes it clear that 'when a good is marketed for a specific purpose, and the good is unsafe for that purpose, the good will likely fail the consumer guarantee for acceptable quality.' The Law Council considers that it may also be worth noting that when a good is marketed for a specific purpose and it is unsafe for that purpose, those representations made about the good may also constitute misleading or deceptive conduct and/or false or misleading representations under the ACL.

If you have any questions in relation to this submission, please do not hesitate to contact Ms Jessica Morrow, Administrator of the Business Law Section ([Jessica.Morrow@lawcouncil.asn.au](mailto:Jessica.Morrow@lawcouncil.asn.au)), or Mr Travis Kotzur, Administrator of the Legal Practice Section ([travis.kotzur@lawcouncil.asn.au](mailto:travis.kotzur@lawcouncil.asn.au)).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smithers', with a long horizontal stroke extending to the right.

**Jonathan Smithers**  
**Chief Executive Officer**