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By email: liam.hedge@accg.gov.au

Liam Hedge
Consumer Affairs Australia and New Zealand
c/- Australian Competition & Consumer Commission
GPO Box 520
Melbourne VIC 3001

Dear Liam

Consultation on 'unsafe' and 'reasonable durability' draft guidance

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the draft *Guidance on 'reasonable durability'* and *Guidance on 'unsafe'* documents circulated by the Australian Competition & Consumer Commission (the **ACCC**) for Consumer Affairs Australia and New Zealand (**CAANZ**).

We generally support clarification of the consumer guarantees as recommended by the *Australian Consumer Law (ACL) Review – Final Report*,¹ noting the initial government objective to 'improve consumer wellbeing through consumer empowerment and protection'.² Anecdotally, the consumer guarantees and their legal elements are difficult for Consumer Action clients to navigate.

However, we stress the importance of ensuring guidance aimed at a consumer audience is accessible for consumers, including the most vulnerable consumers. To enable 'well-informed, confident consumers',³ the guidance must be practical and clear. Our recommendations are submitted with this aim.

Summary of recommendations

1. Target guidance specifically to consumers with separate guidance offered for businesses rather than attempting to reach both audiences with the same documents.
2. Consider reformatting the consumer-targeted guidance to reduce length and to draw attention to crucial sections with subheadings commonly understood by consumers.

¹ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report* (March 2017), p 5.

² Council of Australian Governments, Intergovernmental Agreement for the Australian Consumer Law, (2 July 2009) paragraph C, <https://www.coag.gov.au/content/intergovernmental-agreement-australian-consumer-law>.

³ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report* (March 2017), p 1.



3. Utilise clear and consistent language across the examples.
4. Undertake consumer testing of the guidance.
5. Clarify the impact of time in the Guidance on 'unsafe'.
6. Consider adding approximate timeframes for 'reasonable durability'.
7. Include reference to remedies in the Guidance on 'reasonable durability'.
8. Add a brief further resources list at the end of the guidance.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Accessibility and clarity

Uncertainty about rights under the ACL limits people's ability to obtain fair outcomes and assists retailers and manufacturers in avoiding their obligations under the ACL (knowingly or unknowingly). Clear, accessible guidance will help to empower consumers to understand and exercise their rights when purchasing goods.

Audience

Consumers will most likely seek guidance on consumer guarantees when an issue arises rather than for general knowledge. We recommend creating separate guidance aimed specifically at consumers, rather than at both consumers and businesses, to target consumers more appropriately and reduce barriers to consumers accessing fair outcomes. Separate guidance would also fit the structure of existing ACCC information with a 'Consumer guarantees' webpage and guide directed at consumers and a 'Consumers' rights and obligations' page geared toward businesses.

Length and formatting

We welcome the use of short paragraphs and plain English to support consumer understanding. However, the documents (6 pages and 8 pages) are potentially prohibitively long for a consumer audience. Sections that are repetitive could be combined, for example, the specifics businesses should be clear about in the 'factory seconds' and 'refurbished goods' sections of the *Guidance on reasonable durability*.

Briefer fact sheet-style guidance with dot points rather than full sentences and paragraphs would be more approachable for consumers. Headings and subheadings should also be numbered to assist in pinpointing a relevant section. Increased and punchier subheadings may also improve accessibility by drawing a consumer's attention to crucial sections, such as a person being entitled to a refund, replacement or repair



of an unsafe good. We also recommend subheadings utilise terms commonly understood by consumers. For example, 'existing safety standards and bans' may be clearer as 'safety standards and recalls'.

Consistency of language in examples

We welcome the use of examples, which help to illuminate complex concepts. However, the language used is inconsistent. For example, the draft *Guidance on reasonable durability* includes 'probably not fail to meet the consumer guarantee of acceptable quality because they were not durable', 'is likely to meet the consumer guarantee of acceptable quality', 'is unlikely to be of acceptable quality' and 'would be able to claim the good was not of acceptable quality under the ACL'. For effective examples, we recommend adhering to one clear and consistent phrase to describe whether a good is of acceptable quality.

In choosing the language, clear, unqualified phrasing such as 'complies'/'does not comply' or 'meets the guarantee'/'does not meet the guarantee' would be more helpful for consumers than 'likely to comply'. To enable more concise language in each example, a disclaimer could be added to the start or end of the guidance to indicate that the guidance represents the views of regulators and a court or tribunal makes a decision with regard to the specific circumstances before it.

Examples could also include possible outcomes to help avoid the need for consumers to sift through separate guidance to understand the 'next steps' in each case.

Consumer testing

Consumer testing helps to gauge whether a document will be successful in assisting its consumer audience, which can be diverse. We strongly recommend consumer testing of any public-facing consumer-targeted guidance prior to finalisation and distribution. While Consumer Action can provide feedback based on our in-depth knowledge of consumer issues, we are not a replacement for the perspective of persons who may have no knowledge of Australia's consumer protections (until they experience an issue with a good or service). A consumer focus group would help to ensure the draft guidance will meet the needs of their consumer audience.

Relevant law

In Victoria, consumers will usually take a consumer guarantee dispute to our state civil tribunal in the first instance. 'Tribunal' should be included in addition to 'court' in determining whether a good is unsafe.

Guidance on 'unsafe'

The *ACL Review – Final Report* noted that guidance on 'unsafe' goods could unpack the impact of extended time prior to a good becoming unsafe.⁴ This complexity is not addressed in the draft guidance but remains an aspect requiring clarity, particularly when a latent defect overlaps with the purchase of used goods, such as used motor vehicles, or in relation to consumable components. It would seem a product's safety should be guaranteed, irrespective of time past, as with Takata airbags where the defect rendering the product unsafe generally only appears if the car is in a collision. We recommend clarifying the effect of time in the guidance.

⁴ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report* (March 2017), p 18.



The draft guidance refers to voluntary and mandatory recalls, and their interaction with the consumer guarantees. This section is lengthy and may be clearer with a diagram showing this overlap and the remedies available, particularly as a consumer may be entitled to a refund under the consumer guarantees even if a recall notice only offers a repair or replacement.

Guidance on 'reasonable durability'

Although difficult to determine, approximate guidance on reasonable timeframes would help to empower consumers in relation to goods that seem to lack durability. The *ACL Review – Final Report* suggested in relation to timeframes that 'consumers should understand that estimates provided are a guide only and that their rights will depend on the specific circumstances for each good and each transaction'.⁵ We recommend further investigation into whether it is possible to supply general timeframes as part of the guidance, as their inclusion would be useful in decreasing consumer uncertainty about their own matters and may help empower vulnerable consumers to push for fair outcomes in their disputes.

While the draft *Guidance on 'unsafe'* sets out that a consumer has the right to reject a good and choose between a refund, replacement or repair, the *Guidance on 'reasonable durability'* does not include any reference to remedies. Consumers will likely access the guidance when an issue emerges rather than for general knowledge; therefore, it would be useful to include a list of available remedies so they can understand what a lack of durability means in the context of their situations.

The information on extended warranties on page 5 of the draft *Guidance on 'reasonable durability'* is important, as it lets consumers know about their protections when a good breaks down despite not purchasing an extended warranty. Given the misunderstandings about the function of the ACL versus warranties by both consumers and businesses,⁶ we recommend incorporating this into the second point on page 1 (and removing it from the middle of the guidance). A suggestion for the second point on page 1 is:

The guarantee that a good will be reasonably durable as part of its acceptable quality *automatically* applies:

- for a reasonable time
- whether or not the goods came with a manufacturer's warranty
- whether or not you purchased an extended warranty.

The guarantee may continue to apply after any warranty expires.

Additional resources

We recommend including a brief list of resources for further information or advice at the end of the guidance, for example, the ACCC's Repair, Replace, Refund problem solver tool on www.accc.gov.au.

⁵ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report* (March 2017), p 23.

⁶ Consumer Action Law Centre, *Lemon-aid: Why it's time for Australia to introduce 'lemon laws'*, June 2018, available at https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/06/LemonLaws_ConsumerActionLawCentreJune2018.pdf citing the Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, 18 May 2016, pp 72 and 76, available at <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.pdf>.



Distribution

We suggest wide distribution of the guidance to consumers and businesses, such as through the popular ACCC iPhone application and social media. Importantly, the distribution should capture people who would not proactively access the ACCC's website. This may include direct distribution of any business-targeted guidance to small retailers who are not part of larger industry associations to improve their knowledge of their responsibilities and obligations pertaining to their customers' rights.

Please contact Brigette Rose, Senior Policy Officer, on 03 9670 5088 or brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

