Gas Appliance Manufacturers Association of Australia

GAS Connections

CONSULTATION RIS FOR PROPOSALS UNDER THE AUSTRALIAN CONSUMER LAW (ACL) CONSUMER GUARANTEE REGIME

For background refer to:
https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/

The GAMAA Executive reviewed the consultation RIS in detail and discussed key aspects with other industry bodies, including AiGroup and supported the extensive AiGroup submission to Treasury (whom are acting on behalf of Consumer Affairs Australia & New Zealand (CAANZ)). A brief summary of the key points in the AiGroup submission is below:

COMMENTS ON PROPOSAL 1 - Increasing the threshold in the definition of "consumer" from $40,000 to $100,000. We see two key problems:

Problem with the inclusion of businesses in consumer definition

As a matter of principle and public policy, businesses should not be covered under the ACL as consumers, and the focus instead should be on the most disadvantaged customer. We are cautious about further government intervention in legitimate commercial contractual relationships between businesses, irrespective of size. As a matter of public policy, governments should respect the freedom for businesses to agree on legitimate contractual terms, unless there is persuasive evidence that intervention would effectively remedy significant existing problems or further boost exchange. Such evidence has not yet been provided. CAANZ will need to examine the cost impact on small businesses as suppliers, as well as other businesses, if it decides to change the threshold value.

Problem with the use of an arbitrary monetary threshold in consumer definition

A monetary threshold value is a blunt and arbitrary instrument that does not provide clarity to the broad definition of "consumer" in the ACL. Consequently, it creates too much confusion and uncertainty for consumers and suppliers. The arbitrary threshold creates another significant problem for suppliers: the absence of a limited liability provision in the ACL to protect suppliers from unlimited consequential losses.

Proposed alternatives

We suggest two alternatives. First, Australia could adopt the United Kingdom definition of the "consumer" as a natural person, which excludes companies. This provides more certainty and clarity for both consumers and industry. Alternately, Australia could maintain the current threshold of $40,000, but exclude contracts with an ABN, or at least incorporated companies and government entities. For consistency, this amended definition for consumer should also extend to unsolicited agreements.

COMMENTS ON PROPOSAL 2 - Clarifying the consumer guarantees remedies. The Consultation RIS identifies two issues relating to major failures associated with consumer guarantees: (i) Whether a non-major failure within a short period of time equates to a major failure; and (ii) Whether multiple non-major failures cumulatively amount to a major failure. Overall, we do not support amending the ACL to expand the definition of major failure to include these types of scenarios. While it would be unfortunate for the consumer to experience these types of incidents of failure, it would not be appropriate to apply a simple equation to address a complex issue.

Fundamental problems with the proposal

The legal test for a major failure depends on the particular facts of each situation. This is because not all failures are the same and could arise from a multitude of reasons, which could either be attributable to the consumer, supplier or outside the control of parties. If the ACL was simplified by lowering the threshold for major failures, this would distort the policy intent in distinguishing these types of failures, while also creating additional uncertainty and potentially masking real issues. Relaxing the threshold for major failures creates a new power imbalance, favouring consumers to the detriment of suppliers. There is a serious risk that this will open the floodgates to unreasonable and vexatious claims. While it is important to ensure consumers' rights are protected, it is equally important that legitimate businesses are protected from spurious claims and not discouraged from doing business in Australia.

Opening up the definition of major failures, especially to incorporate multiple non-major failures, would substantially increase uncertainty. For instance, there are certain products that are purchased which may require installation or other after-service support by a third party for example gas appliances. Problems can arise outside the supplier's control, but which could be construed as falling within an expanded definition of major failures, including for example incorrect installation leading to increased customer complaints and safety concerns. In this example, the product itself may not be faulty at all. It would be unfair and poorly targeted to make manufacturers and suppliers effectively responsible for issues associated with product installation or other third party services not associated with the manufacturer. However, we are concerned that under a multiple failure regime, this would be the outcome. The example highlights the need for reasonable limits on the liability of manufacturers.

Alternative proposal

A better solution is to improve the current level of consumer and supplier awareness and appreciation of the ACL and its limits, including what constitutes major failures. Consumers can be empowered by better information, and governments and regulators can play an important leadership role in helping consumers better understand their rights. We appreciate that current issues relating to consumer guarantees may be unique to specific industries and even products; for instance, the definition for durability of goods may vary by the type of product. Therefore, we propose industry-specific guidelines. Development of such guidelines will need further consultation with consumers and industry. However, clarifying definitions and processes through industry-specific guidelines will only partly solve the above issues. The broader education and awareness programs for consumers and industry we propose would also complement these guidelines.

Industry awaits feedback from Treasury regarding the above concerns.

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GEMS

GAMAA was one of several peak industry bodies which recently recently met with Anna Collyer, who is heading up the independent 5 year review into the Commonwealth GEMS Act. Also present at the meeting were the Australian Industry Group, CESA, the Lighting Council, the Australian Water Heater Forum, Manufacturing Australia and AREMA. The industry bodies had requested the meeting to ensure that a number of key points, agreed across industry groups, were highlighted to the reviewer. Chief amongst these points were

the need for continued reliance on Australian Standards for future GEMS determinations

the need for a more consultative approach by the government towards industry in developing future determinations

the need for greater focus by the department on compliance activities rather than registration activities.

Ms Collyer expects to have a draft report of her review available by mid-year, and this will form the basis for further discussions with industry regarding potential changes to the Act.