23 April 2018

Manager
Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600
By email: australianconsumerlaw@treasury.gov.au

Dear Manager

Lighting Council Australia (LCA) welcomes the opportunity to provide comment on the Consultation Regulation Impact Statement (CRIS), Chapter Two, Paper released by your Department on 9 March 2018.

LCA's response to the Issues Paper is based on consultation with the lighting luminaire and lamp supply industry through our member network. LCA's membership is composed of 100 of Australia's leading lighting manufacturers and suppliers. A number of our members are leading retailers (e.g. Beacon Lighting) and others are suppliers to leading retailers (e.g. Mirabella and Clipsal (owned by Schneider Electric)). LCA Members supply around 80% of all lighting equipment in Australia in the residential, commercial, industrial and public lighting markets.

LCA has serious concerns that proposed solutions to *Problem 1 - Failure within a short period of time* could give rise to unexpected but very serious problems that will harm suppliers and retailers, and ultimately, consumers. We note that Options 2 and 3 may represent substantial changes to the balance between contracting parties' rights, beyond those conveyed on the face of the consultation documentation. These concerns are set out in the submission below.

LCA also raises a concern about consumer expectations regarding product life in light of requests from other Government agencies for products to carry markings about the 'design life' of a product. Industry is concerned about how a representation in relation to the design life of a product might be understood to convey an impression about either the statutory (implied) warranty regime or be understood to be an Extended Warranty. This discussion may overlap with the CRIS Chapter Three issues.

LCA would be very pleased to have a further discussion about the issues raised in this response either in person or by teleconference.

Yours sincerely

David Crossley
Technical Manager
Lighting Council Australia

Characteristics of the Australian consumer lighting market

LCA's response to the issues raised in Chapter 2 of the CRIS is based on the particular characteristics of the Australian consumer lighting market. These include:

- The rise in sales of LED lamps and luminaires, which represent a revolutionary change as compared to traditional lighting technologies.
- A commensurate deficiency in public awareness of the characteristics of LED lamps and luminaires, including particularly compatibility issues with other electrical components within the typical home.
- That lighting equipment in Australia is extensively regulated.[1]
- The nature of how lighting is equipment is purchased in Australia (especially in regards to electrical contractors), noting the ability of consumers to enforce ACL rights along the production chain. Some LCA members make few sales directly to the public but may be subject to additional costs should certain options in the CRIS be adopted.
- The fact that many lighting products are purchased on the basis of highly idiosyncratic or, at least subjective, factors including the 'feel' and 'warmth' of a product within a specific environment. It may be considered that at least some lighting products, particularly larger purchases of multiple products with the intention to create a certain lighting effect, could be considered as experience goods (Nelson 1974).[2]
- The difficulty for suppliers to anticipate or demonstrate the performance of the equipment in the consumer's chosen deployed environment with respect to those subjective characteristics.

General comments

Lighting Council Australia members are responsible for the supply of over 80 per cent of all lighting equipment sold in Australia. Considerable market knowledge is captured within our membership.

Lighting Council Australia members involved in the retail sale of lighting equipment to Australian consumers pride themselves on the provision of high quality lighting equipment. These members note that the provision of lighting equipment, particularly in relation to the replacement of older generation lighting technologies (halogen and fluorescent) with newer generation LED lamps, is characterised by low levels of consumer awareness.

Some retailers consciously choose a strategy of providing consumers with quality advice, which in turn leads to consumer goodwill, and a willingness on behalf of consumers to pay above the absolute lowest-price.

Overall our members report very low return rates (i.e. <1 per cent). Moreover, it would be highly unusual that a product returned by a consumer would be repaired noting the relatively low value of the products, high labour costs, the characteristics of the technology itself, and the manufacturing process. Accordingly, little emphasis has been given to discussion of repairs in this submission.

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[1] In addition to electrical safety regulations, most types of lighting equipment are regulated by the Electrical Equipment Safety System of the Electrical Regulatory Authorities Council, electromagnetic compatibility requirements (ACMA), building standards and regulations (National Construction Code), country of origin labelling (Home Affairs), requirements arising from state and territory energy efficiency incentive schemes, and the Lighting Council Australia Code of Conduct.

[2] Experience goods and services are those for which quality can be difficult to fully establish until after purchase. This gives rise to the prospect of detriment in circumstances where quality differs from that anticipated by the consumer. See *Review of Australia's Consumer Policy Framework*, April 2008, at p31 for further discussion.

The essence of Problem 1—whether a failure to meet a consumer guarantee is major and the focus of this response—was a foreseeable consequence of adopting the language in the statute calling for the application of objective standards in particular circumstances. The statute uses the language of the common law as a matter of convention and provides a legal test for the resolution of disputes. That some parties to a consumer sale may disagree on what a reasonable consumer in a particular circumstance might have understood to be a major failure does not mean that the legislation is unsuitable for resolving disputes. This imperfection may well provide a basis for a functioning consumer market that is better than the one that might prevail after additional government intervention. A dilution of the major failure test—for instance, through the creation of a de facto return right for a broader set of reasons—represents a significant departure from the original legislation. If the objective is merely to simplify the law with respect to consumer entitlements (as per para 34), the non-status quo options appear to go beyond this and may dramatically change the calculus between contracting parties.

It is telling that in the discussions of the benefits and costs of each of the Options in response to the Problems, there is very little acknowledgement that the imposition of additional compliance costs will raise costs for suppliers, and as a consequence, for consumers. Applying a 'try before you buy' approach for consumers purchasing goods with a subjective or highly contestable deployment (such as lighting) would have significant ramifications, with additional costs necessarily flowing on to all consumers.

LCA considers that there are no easy solutions to the issue raised by the major/non-major failure uncertainty; only a trade-off between the rights of respective parties. While further clarity might be welcome, a fundamental revision of the rights of contracting parties nominally in favour of consumers (but ultimately reducing overall economic wellbeing) is not.

Specific concerns with CRIS Problem 1 options

'Major Failures', 'Non-Major Failures' and 'Minor Issues' in lighting equipment

Where a lighting product supplier adopts sound practices meeting all industry practice benchmarks and sells equipment produced in accordance with good manufacturing practices, non-performance is typically associated with manufacturing errors (which are rare) or where a product fails to meet the requirements of a stated purpose (either through the marketing of the product, or representations by the customer about the purpose for which the product is being purchased).

Given the subjective nature of evaluating the performance of lighting equipment—that is, how the lighting equipment performs within a particular environment to the satisfaction of a particular consumer—a 'non-major failure' or 'minor failure' may be easily asserted. This is particularly where a consumer makes a general statement at purchase about the purpose of the lighting equipment. Major failures (such as malfunctioning or incompatibility with a particular electrical system) on the other hand, are much easier to determine with respect to lighting equipment. LCA acknowledges that there may well be other product types where this assessment may be more complicated or contestable between the contracting parties.

The 2016 Australian Consumer Survey suggested that most "consumer problems" arise in the first month after purchase. It is unclear whether every "problem" does or should give rise to a legal right of recourse – a point acknowledged by authors at para 74. LCA suggests that this survey does not give much assistance in understanding of the scope of the problem and caution should be used in relying upon it for policymaking guidance.

Gaming and abuse leading to additional costs for consumers

LCA members are very concerned about the likely—albeit, unintended—consequence of any additional consumer rights with respect to product returns, particularly within a stated period of time (such as 30 days). As stated above, many LCA members provide a high level of customer service in educating consumers. In other words, many LCA members do not compete purely on price.

Under a number of options canvassed in the CRIS, were a consumer to observe the identical product that they previously purchased for sale at a lower price elsewhere (for instance, from a vendor focussed on low cost items with a low level of customer service), they would be empowered to simply return the good to the earlier vendor, stating some subjective complaint about the lighting not meeting their requirement. While similar issues prevail where bricks-and-mortar retailers compete with online vendors (and, as such, would not be unique to lighting), government should not be exacerbating this problem by legitimating spurious complaints.

The existence of voluntary consumer returns policies—above those required by the law—does not mean that this is legitimate area for legislative expansion. Rather it demonstrates the precise opposite – that there is an existing, well-functioning market for the provision of these additional services. The companies choosing to adopt these more generous approaches are undertaking a conscious business strategy, which may be motivated by consumer goodwill, branding their products as 'premium' or 'low hassle'. An attempt to use these higher-than-statutory standards erodes legitimate variations within the retail market, reducing consumer choice to deal with low-cost/low-service market participants, as compared to those market participants who as a matter of business strategy choose to provide a more generous set of consumer entitlements.

For instance, one Member that is a major retailer provides a change of mind refund or product exchange policy within 30 days. Products must, however, be returned in their original packaging, in a resalable condition and have not been installed. As a result, the retailer retains the discretion to reject returned goods that are not in a condition to be resold. Moreover, the Member advises that about 60 per cent of returned goods have no fault. Faulty goods are generally sold for scrap value or disposed of, as the nature of the lighting equipment sold means that repairs are rarely undertaken.

Accordingly, LCA opposes any enhancement to the rights of consumers to reject a good, particularly in seeking a refund, for a minor failure. The current regime provides an opportunity for consumers to return deficient goods – that is, where the product is the subject of a major failure. This provides sufficient legal protection for consumers, noting that, historically, change of mind has not been a legitimate basis for repudiating a contracting agreement.

It must also be said that is not the role of government to create or enhance recourse rights for poor decision-making. The failure of a supplier to provide a good or a service that meets the stated or expected qualities gives rise, in essence or at least traditionally, to an action in enforcement of contract. The creation of an additional set of rights for consumers to change their minds about an acquisition does not enhance consumer contracting: rather it undermines consumer contracting, creating an additional cost for business that must be borne, ultimately, by consumers. The effect of certain additional rights would be the imposition on prudent consumers the costs of decisions by imprudent consumers.

Prevailing governmental regulatory failure

It should also be noted that the main driver of poor consumer experience in the lighting market is attributable to the failure of governments, particularly state and territory regulators, to enforce existing regulations. Non-compliant products can raise very serious electrical safety risks. Non-compliant products, where not electrically unsafe, are additionally far more likely to fail to meet performance expectations due to the increased likelihood that the manufacturer uses poor processes or uses low value components. LCA has advocated for a number of years for greater government action on preventing the sale of non-compliant equipment.

The best means of increasing consumer outcomes in the retail lighting market is not through changes to the ACL but through enhanced efforts to enforce existing regulations affecting the supply of lighting equipment. LCA considers that this may be the case in a number of other, high-regulated product categories.

Design life, consumer guarantees and extended warranties

LCA Members note that at least two Government offices involved in prescribing regulations for the lighting industry have suggested or requested that products sold carry product markings with information about the product "design life". Design life in this context refers to the expected life of a product, and in relation to a batch of lamps manufactured is the point at which 50 per cent of manufactured products will have failed either electrically or photometrically. LCA Members report that product failure rates follow a 'bathtub curve', an engineering concept that refers to three general phases over time of product failures in a production process. In this first phase, there is a higher but decreasing rate of observed product failures (known as early or infant failures). In the second, a lower rate of product failures prevails, with failures being attributed to random failures. In the third, the failure rate increases, which is attributed to products wearing out as they reach their intended lifespan.

While manufacturers intend that a warranty (whether required by statute or granted through contract) cover all early or infant failures, there would be considerable cost implications if a manufacturer was deemed by law to be liable for longer durations.

Design life is not raised in the consultation paper as an issue, but LCA raises to policymakers' attention the very serious implication of importing a concept used in the engineering process of manufacturing as a product marking that could be understood to create legal rights for consumers.

LCA further notes that some industry participants do include design life statements, while others have indicated that they would like to do so but for the anticipated risk that including the statement might carry. LCA considers that inclusion of a statement of design life would convey useful information to consumers and that clarification of the law in this respect would give industry confidence in increasing the amount of useful information to consumers.

Responses to Options proposed to deal with *Problem 1: Failure within a short period of time*

Option 1 – retention of the status quo – should be the preferred response. With respect to most types of lighting equipment, particularly lamps and luminaires typically used by consumers, a major failure within 30 days of purchase—that is, where s260 of the Act applies—is relatively easy to determine. Where a lamp or luminaire malfunctions or is unsafe, the supplier would be obliged to remedy the failure, and would likely have breached state or territory electrical safety regulations.

Option 2 should be avoided because it gives rise to serious commercial risks to the providers of a high-quality retail experiences to consumers. A putative 'non-major failure' with respect to lighting could be a simple statement by a consumer that a lighting product fails to give the desired effect. This risk is exacerbated by the difficulty of retailers to demonstrate the different effects of certain lighting products in retail environments, and the difficulty of retailers to contest an assertion that the lighting products fail to meet those effects in the deployed (usually home) environment.

The discussion under Impact Analysis for Option 2 presupposes that there is something objectively deficient with the good and does not sufficiently deal with the issues raised in this paper about the risk of the consumer changing their mind about the product, citing a subjective factor. The discussion raises the possibility of additional waste arising from the disposal of not-feasible-to-repair goods by suppliers. This discussion presumes that there is some segment of goods that are currently sold that would be subject to consumer recourse under the proposal. While this is a reasonable assumption—more goods would be returned under a regime that strengthens the position of consumers—the real waste issue is overlooked. Where the change to the regime would empower consumers to return goods for spurious reasons, we are concerned that a great number of products would be returned that are entirely fit-for-purpose. In our retail market, particularly in the sale of lamps (as opposed to lighting fixtures), our members report that it would not be viable to repackage many of these goods and they would simply be disposed.

LCA is concerned that Option 2 raises the prospect of an extension of a 'try before you buy' regime across the consumer economy.

Option 3A is opposed by LCA because it presupposes adoption of Option 2.

In relation to the discussion under Impact Analysis, LCA contends that the ACL was, at least in part, intended to address the relatively high costs of enforcing contractual or statutory rights by consumers against suppliers particularly with respect to lower-cost goods. Where a dispute exists in relation to a higher-value good, such as whitegoods or motor vehicles, consumers are already have strong incentives to enforce their rights (whether they would have existed under traditional contract law or have otherwise been strengthened under the ACL). As a result, LCA supports the general proposition that high-value and low-value goods ought to be considered differently (and some kind of monetary threshold might be appropriate to give effect to that separation). LCA opposes, however, any additional increase to consumer rights as per Option 2.

Option 3B is opposed by LCA because it presupposes adoption of Option 2.

Responses to Options proposed to deal with *Problem 2: Multiple failures*

LCA does not have any specific comments on the proposals raised with respect to a lack of clarity in understanding whether multiple non-major failures can collectively be considered a major failure. The types of products sold in the Australian lighting market will not typically be the subject of multiple minor failures due to the nature of the manufacturing process. As stated above, where a lighting product meets all applicable electrical safety and other regulation (see footnote 1 above), the non-performance is typically associated with manufacturing errors (which are rare) or where a product fails to meet the requirements of a stated purpose (either through the marketing of the product, or representations of the customer about the purpose for which the product is being purchased). As a result, the characterisation of multiple minor failures is not a significant concern for LCA.

Accordingly, LCA supports the current state of the law as a default position, insofar as any regulatory changes create additional compliance costs and uncertainty for lighting industry participants.