30 April 2010

Australian National
Retailers Association
ABN 78 118 494 643

8/16 Bougainville Street
Manuka ACT 2603

Tel +61 2 6260 7710
Fax +61 2 6260 7705

3 Spring Street
Sydney NSW 2000

Tel +61 2 8249 4520
Fax +61 2 8249 4914

admin@anra.com.au

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen.aph.gov.au

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

ANRA appreciates the opportunity to make a submission to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

The Australian National Retailers Association (ANRA) welcomes the introduction of a single, nationally consistent consumer law and the Government's intention to provide Australian retailers with simple consumer laws that aim to make compliance easier.

However ANRA has identified three areas of the proposed Bill as being of concern to retailers and which have the potential to undermine the broader objective of the Bill to simplify the compliance burden. The issues that ANRA is specifically concerned about are:

- the uncertainly created for retailers by the reporting requirements contained in sections 131 and 132 of the Bill which relate to goods associated with death, serious injury or illness;
- the potential liability for retailers under sections 106 and 118 of the Bill when they are in control of, or possess, non-compliant products even when a retailer has no intention to sell those non-compliant products to the public in that state; and
- the provision (and acceptance) a credit card or debit card statement by retailer as proof of transaction set out in section 100 of the Bill.

1. *Reporting of goods "associated with the death, serious injury or illness of any person" (section 131 and Section 132)*

ANRA notes that a key focus of the Bill is to assist regulators to proactively respond to the emerging consumer product safety standards. As such, section 131(1) requires a retailer to give written notice to the Commonwealth Minister within two days of the retailer becoming aware that a good of the kind it sells has been "*associated with the death, serious injury or illness of any person*". Relevantly, section 131(2) provides that a retailer does not have to provide such notice if "*it is very unlikely that the consumer goods supplied were associated with the death or serious injury*". ANRA understands that Section 132 imposes a similar requirement in respect of product related services.

Whilst ANRA understands the need for accurate and timely reporting by retailers of incidents involving potentially dangerous goods and services, ANRA is concerned that there is a lack of clarity around the meaning of key terms in section 131(1) and (2) and 132 (1) and (2) – specifically the terms "*associated with*", "*serious injury or illness*" and "*becomes aware*".

ANRA's particular concern is that, without further clarity regarding the practical application of these terms, retailers will be uncertain as to when they must undertake mandatory reporting. As a result, retailers will potentially be in a situation where they considerably and unnecessarily over-report product or service related injuries creating a significant and unintended reporting burden on their business as well as an administrative burden on regulators. Alternatively, retailers may inadvertently fail to report product related injury. From a policy perspective, neither situation is desirable and would undermine the policy intent behind the reporting requirement of protecting the general public.

Another key concern is the limited amount of time that is available to retailers to make a written report under sections 131 and 132. This is discussed in more detail in Point 5 below.

2. When is death or serious injury or illness "associated with" a product?

The term "*associated with*" used in sections 131 and 132 is not defined in the Bill. Further, in ANRA's view, the examples given in the Explanatory Memorandum which are intended to explain what is meant by the term are also unhelpful. For example, the Explanatory Memorandum says that a good is "*associated with*" an injury or serious illness where "*the good was in the vicinity or close proximity of the occurrence of an accident, irrespective of whether the good was in fact being used (or misused) at the time of the accident.*"

ANRA submits that this example gives the term "*associated with*" an extremely broad meaning. For example, many products may be in "*close proximity*" to an incident, or may be in use either before or during an incident, but may not play any direct role in the injury or illness which actually occurs. Whilst retailers understand the policy objective of reporting dangerous goods and services to the Government, in giving such a broad interpretation to the term, ANRA is concerned that retailers will be forced to potentially report incidents regarding products and services that have little or no connection to the serious injury or illness that has occurred.

Not only does this create considerable compliance obligations and cost for business, it is also likely to result in the Government receiving a large number of reports regarding products that are, in practical effect, not related to injury or harm. This likelihood is magnified by the two day reporting period which will not allow retailers to undertake any adequate investigation into the alleged incident or reported injury or illness that is said to have resulted from that product or service. This issue is also discussed in further detail in Point 5 below.

3. What is a "serious injury or illness"?

ANRA has similar concerns about uncertainty in respect of the term "*serious injury or illness*" used in sections 131 and 132. The Bill defines a serious injury or illness as:

> *...an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:*
>
> *(a) an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or*
>
> *(b) the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.*

This definition raises a number of questions. The definition refers to an injury or illness that "requires" medical treatment. It is not clear whether this means an injury or illness that would normally justify medical treatment, or whether this means that the injured individual did in fact seek such treatment. Similarly, the terms "*ailment, disorder, defect or morbid condition*" are also undefined. For example, ANRA notes that it is arguable (although uncertain) that an allergy could amount to an "*ailment, disorder, defect*", and an allergic reaction following exposure to an allergen could amount to an "aggravation" of such an "*ailment, disorder, defect*". Unfortunately the Explanatory Memorandum does not provide sufficient clarification.

4. When can it be said that a retailer "becomes aware"?

ANRA understands that a retailer will be under a reporting obligation the moment that the retailer "*becomes aware*" that the goods have been associated with the death, serious injury or illness. ANRA understands this obligation applies regardless of whether the supplier sold the actual product or service that caused the injury – a retailer need only sell a product of the kind that is allegedly associated with the serious injury, illness or death. Section 131(4) and section 132(4) currently state that the way in which a retailer becomes aware includes "*but is not limited to*" situations where the retailer receives information from a consumer, a re-supplier, a repairer or insurer and/or an industry association or consumer organisation. On the basis of this drafting, ANRA understands that a retailer could potentially be said to have become aware of death, serious injury or illness as a result of a media report regarding a product even if the retailer has received no direct communication from any affected or relevant party (such as a customer or a supplier). This is despite the fact that it is often not clear from public or media reports what the exact product or service of concern is (such as batch/version number) where the product or service was purchased and the extent to which it is or may be associated with a claimed serious injury or illness. This problem is particularly acute for national retailers with stores across the country.

ANRA notes that in the majority of instances where a product or service causes or is associated with an injury or illness, a retailer will ordinarily be contacted by an affected customer, a government agency, an industry group or a supplier. This usually occurs relatively quickly. Once a retailer receives this direct notification the retailer would then be able to undertake appropriate investigation and action including making a report under section 131 or section 132. A retailer is not, of course, able to undertake this investigation in instances where they have seen a media report and have no direct knowledge of the alleged problem with the product.

ANRA notes from the Second Reading Speech that it is not intended that a business need "*otherwise make itself aware of an incident that they do not become aware of in the ordinary course of business*". ANRA is concerned, however, that this intention is not accurately reflected in the text of the Bill. In ANRA's view, this intention can only be achieved through providing that a retailer must receive some direct communication from a relevant or affected party (such as those currently listed in Section 101(4)) before they can be said to have "become aware" that a product or service may be associated with illness, injury of death. Another benefit of this approach is that, from a compliance or enforcement point of view, it will be easier to ascertain the date at which a retailer was made aware and therefore whether that retailer has complied with mandatory reporting timelines.

5. Limited time for retailers to make written report

Under section 131 and section 132, a retailer must make a written report within two days of becoming aware of a product or service being associated with death, serious injury or injury. ANRA understands that that the purposes of having a two day reporting period is to ensure that the Government is made aware of potential product risks in a timely way.

Whilst ANRA supports this policy intention, ANRA is concerned that this two day reporting period is not practical for a majority of retailers. In many instances it will be extremely difficult in two days for a retailer to undertake a proper investigation and analysis as to whether a customer complaint is legitimate and of the kind that needs to be reported under either section 131 or section 132. This is particularly so for a large national retailer where it may take some time for a complaint made at a store level to reach the appropriate investigation and product assurance personnel.

This raises the prospect that retailers will have to report all customer complaints regarding product or service related injury or illness to avoid contravening either section 131 or section 132 including those injuries or illnesses that are suspected of being without foundation or fraudulent. ANRA is concerned that this over-reporting will create a compliance burden for retailers and an administrative burden for regulators. Forcing a retailer to make a report, even where there are concerns that the customer complaint is fraudulent or unsubstantiated, is also a concern for retailers where there is a risk of commercial or brand damage being caused if that report is made public.

6. Consumer goods that do not comply with safety standards (section 106 and section 108)

ANRA notes that section 106(3) of the Bill provides that a retailer must not "*manufacture, possess or have control of*" consumer goods that do not comply with a relevant safety standard which is in force. Section 118(3) similarly provides that a retailer must not "*manufacture, possess or have control of consumer goods that are subject of an interim or permanent ban.*"

In the ordinary course of business, retailers will often order products from domestic and international suppliers and store such products in their distribution centres or warehouses. In a number of instances, the stock that is purchased, transported and stored by a retailer may not be wholly compliant with relevant Australian standards or requirements. This is because that stock is often yet to go through a retailer's quality assurance and compliance process and/or because the retailer knows the stock is not compliant but the retailer plans to re-work that stock to make it compliant prior to sale. For example, a retailer may import stock that it knows needs to be re-labelled to comply with Australian product labelling requirements that differ from the country of manufacture. Alternatively, a retailer may import or order stock and not know that it is not compliant with relevant standards until the time at which it undertakes its quality assurance process. The retailer will often have to hold on to that stock until it can be sent back to the manufacturer. The same occurs following a compulsory product recall ordered by regulators. Importantly, in these instances, the retailer has no intention to supply that stock to the general public prior to it being appropriately checked, certified and re-worked to meet the Australian standard. In other words there is no risk to consumers from a product safety standpoint.

Despite this, ANRA is concerned that section 106(3), as currently drafted, will mean that a retailer in the situations outlined above (who holds non-compliant products with no intention to distribute products in that form) is potentially liable for a breach of the law. This is because the retailer is effectively "in control" of non-compliant stock once they begin transporting or storing such stock. ANRA is not aware of any policy reason for imposing liability on retailers in the situations outlined above where there is no product safety risk.

In light of this concern, ANRA seeks clarification that a retailer in the above or similar situations would not be in contravention of section 106(3). ANRA suggests that it may be appropriate to provide this clarification either in the Bill or in the explanatory material accompanying the Bill.

7. Requirement for retailers to provide proof of transaction – Section 100

Section 100 requires a retailer to provide proof of transaction on either a mandatory basis or as requested by a customer (depending on the value of the relevant transaction). Following on from this, the drafting note under Section 100(4) goes on to specify a list of examples as to what constitutes a proof of transaction document. Whilst ANRA welcomes the guidance given in this note, ANRA does not consider that it is appropriate to include "*a credit card or debit card statement*" as a proof of transaction in this list.

At a practical level, ANRA notes that section 100 relates to the proof of transaction that a retailer is to provide a customer at the point of a transaction. In this regard, ANRA notes that a retailer cannot provide a customer with a credit card or debit card statement and its inclusion in this list is therefore not warranted.

ANRA also has broader concerns regarding inclusion of "a credit card or debit card statement" on this suggested list of proof of transaction documents. This is because, for many retailers, such statements do not contain sufficient information to constitute an appropriate record of the products that have been purchased. ANRA accepts that such statements are proof that a transaction did take place. Such statements do not, however, list the specific products which were purchased in that transaction. This means that a retailer, when presented with such a statement, has little or no ability to actually ascertain the products that were purchased in the transaction by a customer. This problem is particularly acute for retailers such as supermarkets or discount department stores that will often sell a number of products in one transaction where these products can be purchased from a number of retailers. The problem is less acute for other retailers, such as speciality clothing or major electrical goods retailers, where people will generally purchase one or two items in a transaction.

Whilst retailers may choose to accept a debit or credit card statement as a proof of transaction in addition to other documents, ANRA considers that it should appropriately be left to the retailer to determine whether they will accept this form of document as proof of purchase. Retailers are best placed to make this decision based on the type of goods they sell. ANRA is concerned that by stating in legislation that debit and credit card statements are a proof of transaction, this will have the unintended effect of creating the impression that all retailers must accept these documents as proof of purchase despite the problems above. This is a further reason why the document list in section 101(4) should not include "a credit card or debit card statement".

8. Suggested amendments

In light of the issues outlined above, ANRA would welcome further clarity in the Bill and explanatory material to explain in a practical sense what constitutes a "*serious injury or illness*" and at what point a product or service is *"associated with"* the injury, illness or death. ANRA also suggests that the Government develop practical guidance material regarding these reporting requirements prior to the reporting requirements coming into force. To ensure that this guidance material is as practical and effective as possible, ANRA suggests that this guidance material be developed in consultation with retailers. ANRA is happy to work with the Government to facilitate this consultation.

In respect of the specific issues relating to when a retailer "*becomes aware*" for the purposes of section 131 and section 132, ANRA considers this issue could be resolved through replacing the phrase "*without limiting subsection (1)*" with "*for the purposes of subsection (1)*" in both section 131(4) and section 132(4). The effect of this change would be to ensure that retailers remains subject to mandatory notification requirements but only from the time the retailer is contacted by either a consumer, supplier, repairer, insurer or industry or consumer organisations. As noted above, in the ordinary course of business these are the people and bodies that would already ordinarily contact a retailer in the event of a potentially dangerous good or service.

Finally in relation to the two day reporting requirement, ANRA suggests that a more appropriate time period in which retailers must report is seven days. This would enable retailers to undertake the investigation and analysis discussed above to ensure they are reporting accurately and only where necessary.

Thank you for the opportunity to comment on this legislation and should you wish to discuss the matters raised please contact the ANRA office on ph: 02 8249 4520.

Yours sincerely

(...)

Margy Osmond
Chief Executive Officer