

**COMMUNICATIONS
ALLIANCE LTD**



**COMMUNICATIONS ALLIANCE
SUBMISSION TO CONSUMER AFFAIRS AUSTRALIA
AND NEW ZEALAND (CAANZ):
REVIEW OF THE AUSTRALIAN CONSUMER LAW**

June 2016

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About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1. Introduction

- 1.1 Communications Alliance (CA) welcomes the opportunity to make this submission to Consumer Affairs Australia and New Zealand in response to the Australian Consumer Law Review Issues Paper dated 31 March 2016.
- 1.2 One of CA's prime missions is to promote the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance.
- 1.3 CA and its members are also committed to ensuring that positive customer experiences remain at the heart of telecommunications sector development. That commitment informs the content of this submission.
- 1.4 The submission comprises of the following further sections:
 - (a) **Section 2** - Briefly outlines the scope of consumer regulation governing the Australian communications sector.
 - (b) **Section 3** - Sets out CA's general observations on the current operation of the ACL, and identifies specific areas within the ACL where CA's members believe refinements or additional guidance will help ensure the ACL remains 'fit for purpose' and can continue to be applied in a way that benefits consumers and industry.
 - (c) **Section 4** - Includes some brief comments relating to administration and enforcement of the ACL and suggestions for how this can be enhanced.
 - (d) **Section 5** - Outlines the general principles which CA members consider should guide consideration of any expansion to the ACL, and in this context briefly comments on some of the proposals raised in the Issues Paper relating to emerging or potential consumer protection issues.
- 1.5 Key recommendations made by CA in this submission are captured in boxed text within sections 3 to 5, and are consolidated for ease of reference in the Appendix.

2. Consumer regulation in the telecommunications sector

- 2.1 The telecommunications industry in Australia is governed by a significant number of sector-specific instruments incorporating consumer protection measures, which operate alongside more general regulation such as the ACL.
- 2.2 A prime example is the *Telecommunications Consumer Protections (TCP) Code*, which was first developed by CA in 2007 after consultation with consumer groups, regulators, and other stakeholders, and subsequently registered by the Australian Communications and Media Authority (ACMA). The TCP Code applies to all Carriage Service Providers in Australia who provide services to consumers and includes a host of safeguards for mobile, landline and internet customers, relating to areas such as staff conduct, point of sale activity, billing, payment methods, and complaint handling. It was most recently updated in February 2016.
- 2.3 Other instruments that are focused on the telecommunication sector and which incorporate a significant number of consumer protection-related provisions include:
 - a. A range of other telecommunications industry codes, created by CA and enforceable by government regulators such as the ACMA, which specify minimum requirements for suppliers and incorporate customer service obligations and safeguards in areas like fault rectification, billing accuracy, network performance, and access to premium services and emergency services;

- b. The *Telecommunications (Consumer Protection and Service Standards) Act 1999* – which includes consumer protection focussed components such as the Universal Service Regime, the Customer Service Guarantee and the Telecommunications Industry Ombudsman scheme;
 - c. The *Spam Act 2013* which governs the sending of commercial email and SMS;
 - d. Part 6 of the *Telecommunications Act 1997* - which sets out the framework for the development of industry codes of practice relating to consumer-related issues; and
 - e. Section 6 of the *Australian Communications Authority Act 1997 (ACA Act)* – which includes in the telecommunications functions of the Australian Communications Authority (ACA) the role of reporting to and advising the Minister 'in relation to matters affecting consumers, or proposed consumers, of carriage services, as well as other functions relating to the provision of information to consumers.
- 2.4 Collectively, these instruments provide customers with a wide range of protections and rights, which have complemented the telecommunication sector's commitment to consumer interests.
- 2.5 However, the multiple layers of regulation also give rise to high compliance costs, which in turn impacts customer pricing. Additionally, overlaps and inconsistencies in the regulatory instruments can complicate and slow the introduction of new business practices aimed at delivering better services and options for consumers.
- 2.6 Accordingly, CA has a strong interest in advocating for consumer protection regulation that is streamlined, clear, free of inconsistencies, and avoids creating unjustified 'red tape'. CA also believes a high bar should be set for adding new regulation in the field of consumer protection, given the breadth and scope of the instruments already in place, both generally and in the telecommunications sector.
- 2.7 In this context, the next two sections of this paper include a focus on:
- a. identifying where refinement of, or additional guidance on, the ACL will assist consumers and businesses to better understand their rights and obligations and facilitate better sales experiences; and
 - b. suggesting principles to guide consideration of any proposals for expansion of the scope of the ACL, which will help to ensure proportionality and avoiding inadvertent consequences.

3. Current operation and administration of the ACL, and areas where refinement or additional guidance will help it remain fit for purpose

- 3.1 CA believes the ACL has served the community well since it was enacted back in 2010, and in general terms is working in line with the national consumer policy objective, expressed in the Intergovernmental Agreement for the Australian Consumer Law as '*[improving] consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*'
- 3.2 Consumers and the business sector have benefited from the clarity and efficiency of having a single harmonised law for consumer protection and fair trading, reflecting a national approach to the rights consumers have when they purchase goods and services in Australia.

- 3.3 As a general matter CA considers the ACL remains 'fit for purpose' and able to be applied in a way that effectively supports consumer policy in Australia in the foreseeable future.
- 3.4 However, there are aspects of the ACL that CA believes can continue to be refined, and the subject of more guidance from regulators, in the interests of consumers and industry. These areas are:
- Unsolicited Consumer Agreements;
 - Consumer Guarantees;
 - Warranty Against Defects;
 - The definition of "Consumer"; and
 - Component Pricing.
- 3.5 Detailed comments relating to each of these areas are provided below.

Unsolicited Consumer Agreements

- 3.6 The Issues Paper asks whether the provisions in the ACL relating to sales away from business premises and in scenarios where the sale conversation occurs 'uninvited' are operating effectively.
- 3.7 CA believes there are areas where these provisions can be adjusted to facilitate better outcomes for customers.
- Allowing supply to customers within the cooling off period and provision of the agreement document*
- 3.8 Currently, where an 'unsolicited consumer agreement' arises, consumers have the right under section 82 of the ACL to cancel the agreement within 10 business days without penalty.
- 3.9 The cooling off provisions aids consumers who may find it difficult to properly assess the merits of purchasing opportunities when dealing with a salesperson in circumstances that were unplanned. The relevant provisions enable those persons to reconsider any purchase made in a period after the sales interaction.
- 3.10 However, those provisions also disadvantage many customers. In particular, customers who purchase goods or services in these circumstances and do so in an informed manner, are unable to receive any supply of those goods or services during the 10 day cooling off period. The consequences of such a supply occurring are that the customer is not liable to pay for the service and the supplier is liable for pecuniary penalty under the ACL.
- 3.11 This can be a major source of frustration for such customers. CA members have experienced many instances where customers have asked their business if they can find a way around this restriction, such as by the customer initiating a new sales conversation so that it is not 'unsolicited', as they want or need relevant services more immediately.
- 3.12 CA recognises that it may not be possible to define appropriate circumstances where the cooling off restriction could be waived by customers, without the risk of detrimental impact to a category of customers who are not be in the best position to make 'on the spot' decisions relating to the purchase of goods or service during the types of sales interaction where cooling off rights currently apply.
- 3.13 One solution, which would provide more flexibility while ensuring any 'risk' from it was borne by the business rather than consumers, would be to permit suppliers to offer customers the option of receiving goods or services up until the expiry of the cooling off period, with fees or charges payable in relation to that supply to be reimbursed (or

not payable) if the customer subsequently exercises their cooling off right. Only if the cooling off right was not exercised would the relevant fees or charges then remain payable by the customer.

- 3.14 So long as suppliers were given discretion on whether or not to offer this 'early supply', so that they could make decisions based on a balancing of their desire to provide better customer experiences with the financial risk of not being compensated for services provided, this would facilitate a more flexible supply model that better accommodates both customer service demands and customer protections. Consumers will have the additional benefit of effectively being able to 'trial' the products and services during the cooling off period to determine whether the products or services actually suit their needs.
- 3.15 CA also suggests that the right of customers to cancel the agreement during the cooling off period in such circumstances should be subject to a requirement that, if such termination occurs, they return any products supplied to them within a reasonable period of time - except if the products can't be returned, removed or transported without significant cost to the consumer, in which case the supplier should be under an obligation to collect them (which is consistent with the consumer guarantee regime).
- 3.16 Currently, under the ACL, consumers who negotiate an unsolicited sale over the phone must be given a written copy of the agreement, within 5 business days (or longer if the consumer agrees). Additionally, agreements can be provided in person, by post or electronically (if the consumer agrees).
- 3.17 Given that cooling off does not commence until receipt of the agreement, CA does not believe that a 5 business day timeframe for delivery is necessary. It is also difficult to ensure that this timeframe is met. Alternatively, CA suggests that the requirement should be to dispatch the agreement within 5 business days of the negotiations. This aligns with requirements under the TCP Code to dispatch a summary of an offer to a customer within 5 business days of a sale made as a result of an inbound call. Further, it is a timeframe that is much easier to comply with.
- 3.18 CA also believes that in circumstances where customers have provided a valid email address as an agreed method for receiving electronic communications relating to their purchase, suppliers should have the right to send the agreement document to this email address without the requirement for obtaining additional consent from the customer to send the agreement document electronically. It is easier to confirm electronic delivery of documents and gives suppliers greater capacity to comply with timeframes.

Recommendation 1: Suppliers should be permitted to offer customers the option of receiving goods or services within the 10 day cooling off period in the context of unsolicited consumer agreements, with no fees or charges payable in relation to that supply if the customer subsequently exercises their cooling off right. Only if the cooling off right was not exercised would the relevant fees or charges then be payable by the customer. Whether or not such an offer was made to a particular customer should be entirely within the discretion of the supplier, so they can make a decisions based on a balancing of their desire to facilitate better customer experiences with the financial risk of not being compensated for the goods or services provided.

The right of customers to cancel the agreement during the cooling off period in such circumstances should also be subject to a requirement that, if such termination occurs, they return any goods supplied to them within a reasonable period of time - except if the goods can't be returned, removed or transported without significant cost to the consumer, in which case the supplier should be

under an obligation to collect them (which is consistent with the consumer guarantee regime).

The requirement to provide a customer with an agreement document made over the phone within 5 business days of negotiations should be changed to a requirement to dispatch such an agreement document within that timeframe. This requirement is easier for suppliers to comply with and has no detrimental impact to customers.

Further, suppliers should be entitled to send the agreement document electronically where customers have provided a valid email address as an agreed method for receiving electronic communications relating to their purchase. It is easier to verify receipt of a document delivered electronically and easier to comply with delivery timeframes (whether or not such delivery timeframes are changed as suggested above).

Application to pop-up stores

- 3.19 The Issues Paper asks whether the ACL is operating effectively in the context of 'pop-up' stores, and in particular notes that application of the ACL provisions relating to unsolicited consumer agreements is not always clear-cut in relation to customer interactions conducted around such stores.
- 3.20 CA notes that the growth of pop-up stores is an example of businesses embracing new opportunities to provide consumers with faster, more convenient and innovative retail experiences. This type of retail activity allow businesses to:
- a. effectively trial the viability of new locations, methods, partnerships, products and services;
 - b. provide service to areas and communities that would not otherwise represent a financially viable offering all year round;
 - c. offer improved convenience to consumers; and
 - d. dynamically engage with their customer base.
- 3.21 In the telecommunications sector, pop-up stores are common. They can be an especially valuable vehicle to bring service providers closer to customers in areas where a permanent store may not be viable, but it is important to have a retail presence for particular periods to ensure customers are given every opportunity to take advantage of new offers or technology developments. A prime example is towns about to become 'NBN ready'.
- 3.22 CA agrees that the current provisions in the ACL relating to unsolicited consumer agreements give rise to uncertainties in the context of pop-up stores, which it would be beneficial to address, so that retail innovation and consumer convenience is not compromised.
- 3.23 In particular, consideration should be given to providing greater guidance on, or a definition of, the wording "other than the business or trade premises of the supplier" as it is used in section 69(1)(b)(i)) of the ACL. A broader extract from the section with this wording in bold is provided below for ease of consideration:

69 Meaning of unsolicited consumer agreement

- (1) An agreement is an *unsolicited consumer agreement* if:
- (a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

- (b) it is made as a result of negotiations between dealer and the consumer:
- (i) in each other's presence at a place **other than the business or trade premises of the supplier** of the goods or services; or
 - (ii) by telephone;
- whether or not they are the only negotiations that precede the making of the agreement; and

- 3.24 This wording currently creates confusion and wariness in retailers in the context of pop-up stores.
- 3.25 CA believes it is important that any refinement to this area of the ACL take into account the fact that when a customer visits a professionally operated pop-up stores with mobile but substantial settings, even where positioned in an area that is not traditionally commercial in nature, their experience will be analogous to what occurs in a more traditional retail context. In this context, there would seem to be no reason for these two transaction scenarios to be treated differently under the law.
- 3.26 Rules around unsolicited consumer agreements could still apply where staff members definitively leave the area in and around a pop-up store (or any similar infrastructure like a kiosk). However, CA also believes that it is important to draw a distinction between this scenario and situations where interactions occur between sellers and customers that are near, adjacent or obviously connected to a visible pop-up store.

Recommendation 2: Consideration should be given to providing greater guidance on, or a definition of, the wording "other than the business or trade premises of the supplier" as it is used in defining the term *unsolicited consumer agreement* in section 69(1)(b)(i) of the ACL. This wording currently creates confusion and wariness in retailers in the context of the pop-up stores.

CA believes any refinement to this area of the ACL take into account the fact that when a customer visits a professionally operated pop-up stores with mobile but substantial settings, even where positioned in an area that is not traditionally commercial in nature, their experience will be analogous to what occurs in a more traditional retail context. In this context, there would seem to be no reason for these two transaction scenarios to be treated differently under the law.

CA also believes that it is important to draw a distinction between scenarios where:

- staff of a pop-up store definitively leave the area in and around that store, and interact with customers; versus
- interactions occur between sellers and customers that are near, adjacent or obviously connected to a visible pop-up store,

with application of the rules around unsolicited consumer agreements only applying to the former. In CA's view, the latter should not be considered to be a situation where consumers should be assumed to be at risk of additional vulnerability or disadvantage in terms of their access to information or ability to refuse offers when compared to a traditional retail interaction.

Exemptions

- 3.27 CA also believes that consideration should be given to adjusting aspects of the current exemptions to the unsolicited selling regime in regulation 81 of the *Competition and Consumer Regulations 2010* (Regulations).
- 3.28 Currently, a "subsequent agreement of the same kind" is only an exemption if the total contract value is less than \$500. In many sectors where it is common for sales

practices to be of a nature that brings into play the ACL provisions on unsolicited consumer agreements, this value threshold significantly limits application of the exemption. The telecommunications sector is a prime example.

- 3.29 Consumers in this situation already have an established relationship with their supplier and should be permitted to contract freely for additional goods or services of the same kind, and not risk having the delivery of their service delayed or interrupted. For example, a customer who agrees to purchase a second mobile phone and plan for their teenage child would in practice have to wait 2-3 weeks for the service to be provisioned, despite the fact that the consumer is very aware of the terms of the contract from their existing relationship.
- 3.30 Similarly, "business contracts" are an exemption from the unsolicited selling regime, but only if the contract is for products or services "not of a kind ordinarily acquired for personal, domestic or household use or consumption." Many telecommunications products and services fall outside of this exemption even though the contracts are business to business contracts.

Recommendation 3: Business to business contracts should be exemptions to the unsolicited selling regime, regardless of whether or not the product or service is of a kind ordinarily acquired for personal, domestic or household use. The definition of business contract should be amended so that it is defined as a contract for the supply of goods and services to a business.

Subsequent agreements of the same kind should be treated in the same way as renewable agreements of the same kind and not be subject to a \$500 cap.

Consumer Guarantees

Greater clarity and certainty of provisions

- 3.31 The Issues Paper notes that the contextual nature of the consumer guarantees has raised issues about the clarity and certainty of the provisions for both consumers and businesses, including whether there is a need for greater clarity around issues such as:
- a. what constitutes a 'major' failure to comply with the consumer guarantees;
 - b. concepts such as 'acceptable quality' and 'reasonable' durability; and
 - c. the length of time a good should be expected to last.
- 3.32 The lack of guidance on these issues creates considerable complexity for businesses and consumers, who must make their own assessment on these matters in the context of the goods and services they offer or purchase.
- 3.33 CA agrees that further practical guidance would assist businesses and consumers understand and apply these aspects of the consumer guarantee provisions. At present, there is limited guidance.
- 3.34 For businesses such as CA members, the need to independently determine how the consumer guarantee as to acceptable quality applies introduces risks that their assessment will not align with consumers' or regulators' expectations of how that consumer guarantee will operate regarding particular goods and services. The reality is that it is very difficult for these businesses to provide front line retail staff with the level of guidance they need to deal with customers in a way that maximises consistency and reduces subjectivity of assessments. This can also result in delays in the assessment process because frontline staff feel the need to seek input and advice from others in the business.

- 3.35 CA recognises that one of the difficulties of providing guidance is that what:
- a. is a 'major failure'; or
 - b. constitutes 'acceptable quality', and 'reasonable' durability, and
 - c. is the appropriate length of time a good should be expected to last,
- may be expected to be different for different categories of goods. For example, consumers will have different expectations on these aspects for a \$25,000 car versus a \$1,000 mobile handset.
- 3.36 CA considers that a considerable amount of this uncertainty could be resolved if the ACCC were to codify or provide more specific guidance on the application of consumer guarantees to defective goods. In particular, greater guidance as to matters such as those raised in paragraph 3.35 (a) to (c) would deliver greater certainty for both businesses and consumers, and reduce the cost of compliance with the provisions for business. CA considers that such clarification and guidance would be beneficial even if it was made at a very high level, for instance by specifying how the consumer guarantee as to a 'major failure' or 'acceptable quality' applied to particular categories of goods such as mobile phone handsets.
- 3.37 CA also believes it may be helpful to develop a regime that allowed industry associations to develop guidance of this nature, which could then be assessed and where appropriate endorsed by a regulator such as the ACCC.
- 3.38 In 2013 the ACCC published an industry guide for the motor vehicle industry which explains how to assess whether a motor vehicle has experienced a 'major failure'. In order to provide parameters on what constituted a 'major failure' the industry guide differentiated between that and a 'minor failure'.
- 3.39 A similar guide for sectors such as the telecommunications industry would be beneficial.
- 3.40 Examples of the type of guidance that may be provided, specific to the issue of differentiating between major and minor failures, is set out below. CA notes that this is illustrative information only. If this proposal was embraced, it would be appropriate to conduct detailed inquiry and draw on a broad range of industry expertise and sector-specific customer input to further develop and seek broad consensus on this type of guidance.

-Illustrative guidance only-

Differentiating between major and minor failures

A **major failure** to comply with the consumer guarantees in relation to a mobile handset could be defined as where, for example:

- a reasonable consumer would not have bought the device/service if they had known about the full extent of the problem. *For example the mobile device cannot utilise the functionality of call, SMS/MMS and data connection;*
- a device is significantly different from the description, sample or demonstration model shown to the consumer. *For example the mobile device is a model of lesser capability and functionality in terms of memory, processing speed, and compatibility with Apps;*
- the device or service is substantially unfit for its normal purpose and cannot easily be made fit within a reasonable time. *For example, where the battery/charging mechanism in the device does not work properly and the handset is only able to be used for an hour without being connected to a charger;*
- the device or service is substantially unfit for a purpose that the consumer told the supplier about, and cannot easily be made fit within a reasonable time. *For example, where the customer specifically requested a device in order to run certain Apps, but the device was not compatible with those Apps; or*
- the device/service is not compliant with relevant safety regulations.

Minor failures to comply with a consumer guarantee for devices/services include where that device or service has a fault that significantly affects its operation, but can be fixed within a reasonable time. For example:

- the customer travels overseas, but international roaming has been barred on their mobile service; or
- the mobile service provider has not activated the SIM card.

Nb. It is not suggested by CA that these potential examples above for major failure and minor failure would constitute an exhaustive list; they are illustrative only.

3.41 Other areas the guidance could look to address include the following:

- a. Length of time a good should be expected to last** - Introducing a cap on the length of a time a good should be expected to last would be useful and would remove ambiguity for front line staff and customers. For example, applying a 24 month period to mobile devices (unless they were advertised as having particular long-life features or durability, or were particularly high value) would help introduce a bright line standard. In relevant cases, this period could also be neatly tied to an associated mobile service contract period. Working through all of these more common scenarios to document a clear position and maximise certainty would be highly beneficial for both consumers and suppliers.
- b. Acceptable quality** - There are a number of factors which are relevant to whether or not goods are of "acceptable quality" (e.g. the nature and price of the goods), and the test is very different to that of the previous "merchantable quality" test. There is currently not a lot of jurisprudence to provide firm guidance on the extent to which the test is to be applied. However, if industry guidance on

what constitutes a “major fault” and “minor fault” were to be developed, that may assist in the interpretation of acceptable quality.

- c. Reasonable Time** - Where a failure is not major, the supplier is required to remedy the failure within a “reasonable time”, which is not defined. Industry guidance on this point would be useful because what is reasonable will vary depending on the circumstances. For example, reasonable time to remedy a problem with a fixed line service or mobile phone would presumably be much shorter than for a minor fault with a mobile phone accessory (e.g. headphones).

Recommendation 4: Consideration should be given to providing more practical guidance to assist businesses and consumers understand and apply key aspects of the consumer guarantee provisions, such as:

- (a) what constitutes a ‘major’ or ‘minor’ failure to comply with the consumer guarantees;
- (b) the practical meaning of concepts such as ‘acceptable quality’; and
- (c) the length of time a good should be expected to last.

In particular, It may be helpful to develop a regime that allows industry associations to develop guidance relevant to the key goods or services traded by their members (such as mobile phones in the telecommunication sector), which could then be assessed and where appropriate endorsed by a regulator such as the ACCC.

Introduction of “Lemon Laws”

- 3.42 The Issues Paper notes possible challenges of applying the consumer guarantees to motor vehicles and suggests that “lemon” laws provision may be warranted, either for motor vehicles or more generally.
- 3.43 As noted in previous sections of this submission, CA believes the ACL in its current form remains ‘fit for purpose’ and should continue to be able to be applied in a way that effectively supports consumer policy. Additionally, given the volume of consumer protection regulation generally and in the telecommunications sector in particular, and the risks that addition of new provisions could lead to more regulatory overlap and disproportionate or unnecessary costs on business, CA believes a high bar should be set for adding new regulation.
- 3.44 In relation to defective products in particular, CA considers the ACL is already providing strong and effective consumer rights in most if not all sectors. Moreover, CA considers that the risk of unintended consequences arising from new regulation is high in this area, as attempting to define what constitutes a “lemon”, and what threshold should apply to the “lemon”, is likely to be a fraught endeavour.
- 3.45 To the extent there are issues arising from ‘lemon’ products in some sectors, CA believes that any gap in consumer rights may be able to be remedied by providing more clarity regarding what constitutes a “major failure” under the current consumer guarantees regime.
- 3.46 If this was not seen as being able to address a perceived problem, and additional provisions were proposed to be introduced to address a perceived issue in relation to ‘lemon’ products, CA considers the application of those provisions should be limited to sectors where it is clearly evidenced that the consumer guarantees and other ACL provisions were not already providing effective consumer protection.

Recommendation 5: To the extent there is evidence of a regulatory consumer protection 'gap' in relation to products that will not function despite repeated repairs, CA considers the initial focus should be on identifying whether further refinement to or guidance on existing consumer guarantees provisions (such as the concept of a 'major failure') will remedy this issue. If this was not seen as being able to address the problem, and additional provisions were proposed to be introduced to address a perceived issue in relation to 'lemon' products, CA considers the application of those provisions should be limited to sectors where it was clearly evidenced that the consumer guarantees and other ACL provisions were not already providing effective consumer protection.

Warranty against defects

3.47 The ACL defines a 'warranty against defects' (WAD) to include a "representation communicated to a consumer in connection with the supply of goods or services...to the effect that a person will (unconditionally or on specified conditions): (a) repair or replace the goods or part of them; or (b) provide again or rectify the services or part of them; or (c) wholly or partly recompense the consumer; if the goods or services or part of them are defective...".

3.48 Since 1 January 2012, regulation 90 of the *Competition and Consumer Regulations 2010 (Regulations)* has required that any document that evidences a WAD (referred to as a 'WAD notice' in this paper) must be transparent, and include a number of types of information plus this prescribed text:

'Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.'

3.49 There are a number of problems with this prescribed text, which we summarise below:
The wording of the prescribed text is technically incorrect

3.50 The prescribed text:

- a. refers only to 'goods', when the subject matter of a WAD may be services;
- b. refers expressly to remedies against a supplier that are only available for a failure to comply with the consumer guarantees on goods (such as replacement) – so while the mandatory text must be included in documents evidencing a WAD for services, not only will the mandatory text omit references to services but it will potentially incorrectly reference that remedies such as replacement are available;
- c. refers to the 'acceptable quality' guarantee, which itself applies only to goods under section 54 of the ACL; and
- d. does not reflect that, for goods/services not of a kind acquired for personal, domestic or household use, the supplier can in fact limit the liability.

3.51 Additionally, the prescribed text references *only* the remedies available against a *supplier* (ie. retailer) of goods (such as repair or replacement), which fails to reflect that a WAD caught by the relevant regulations may be a 'factory' or 'manufacturer's'

warranty – and the remedies available to a consumer *from* a manufacturer are confined to certain damages / compensation under section 271/272 of the ACL. The result is that manufacturers who offer a warranty against defects are obliged to state text that relates only to rights against suppliers (ie. retailers) of goods.

- 3.52 Accordingly, compliance with the prescribed text may in fact lead to misrepresentations, and indeed be inconsistent with the prohibition against misrepresentations regarding the existence, exclusion or effect of consumer guarantee rights under section 29(1)(m) of the ACL.
- 3.53 An ACCC website guide to the ACL's WAD provisions is mostly silent on these issues, but does suggest that it is open to warrantors to add additional text around the prescribed text, so long as such text *'does not limit or negate the mandatory text'*. Compliance with the ACCC's enforcement policy on the prescribed text would therefore seem to contemplate that suppliers of services or manufacturers of goods should include additional explanatory text that clarifies the application of the consumer guarantees provisions in their particular circumstances. However, the ACCC's guide does not override the regulations and it may be difficult to achieve the required wording with certainty that both the regulations and the ACCC guide suggestions are being met.

What is sufficient placement of the WAD notice?

- 3.54 Telecommunications service providers are required to make their standard customer terms available to customers in various forms, including on their website.
- 3.55 In this context, what is not clear in the context of the Regulations is whether the 'document' that references the WAD would be taken to be each web page that includes a WAD, or the standard form of agreement as a whole (which may be divided into many different pages on the provider's website). Additional guidance on this issue would be beneficial. Ideally, each such page should not be taken to be a separate 'document' that references the WAD, and thus individually subject to each of the mandatory text and other requirements in the Regulation.

Where is it necessary to include the mandatory wording in device packaging, and whose responsibility is this – the supplier or device manufacturer?

- 3.56 The regime makes it an offence for a supplier to "give" a consumer a WAD notice that does not comply with the requirements prescribed by the Regulations. Given the broad drafting of this provision, there is a concern retailers could inadvertently be liable for WAD defect notices provided by manufacturers to consumers in a retail context.
- 3.57 Usually, WAD notices are physically bundled with a product by the manufacturer during the production process. In the majority of cases these products are distributed to retailers and resellers sealed so that they cannot easily be physically opened without raising questions of tampering from consumers. To ensure retailers are not inadvertently held liable for WAD notices prepared by manufacturers, the Regulations should be amended to include an exemption for a person who:
- a. did not authorise the preparation of the WAD notice; and
 - b. would only be considered to have "given" the warranty against defect notice to a consumer on the basis of physically providing a product to that consumer.

Recommendation 6: Regulation 90 of the *Competition and Consumer Regulations 2010* should:

- as a first preference, be amended to remove the prescribed text that must currently be included in any document that evidences a 'warranty against defects'; or
- as a second preference, be amended to ensure that prescribed text it is not confusing or lacking in alignment with the other provisions in the ACL that relate to warranties against defects.

Additionally:

- more guidance should be provided relating to how the warranty against defect (WAD) provisions apply in the context of standard customer terms that are divided into a number of different pages on a supplier's website. Ideally, each such page should not be taken to be a separate 'document' that references the WAD, and thus individually subject to each of the prescribed text and other requirements in the Regulations; and
- where the regulation makes it an offence for a supplier to "give" a consumer a WAD notice that does not comply with the prescribed requirements, an exemption should be included for a person who: (a) did not authorise the preparation of the WAD notice; and (b) would only be considered to have "given" the warranty against defect notice to a consumer on the basis of physically providing a product to that consumer.

Definition of "Consumer"

- 3.58 The term "consumer" is defined in the ACL as a person who has acquired particular goods or services that are "ordinarily acquired for personal, domestic or household use or consumption", or where the amount paid did not exceed \$40,000.
- 3.59 This definition is problematic, as it means that protections in the ACL will regularly apply to parties beyond potentially 'vulnerable'. Indeed, the definition accommodates application of the protections to businesses, including large commercial entities, such as incorporated companies and government entities.
- 3.60 An example specific to the telecommunications sector is the acquisition by a large business of a service such as an ISDN. This type of service is fundamentally a phone service, and an argument can be made that a phone service is a service that is of a type or kind that is usually acquired for personal, domestic or household use.
- 3.61 The large business in the example may thus be able to argue that it falls within the definition of a "consumer" in the ACL the context of the acquisition of its ISDN service, and will thus be able to take advantage of provisions in the ACL relating to matters such as consumer guarantees and the unsolicited consumer agreements where relevant. Another example would be a business acquiring business mobile plans for employees. Again, because the plans are mobile phone plans with similar features to those acquired by consumers, the business could make the argument that they are a consumer under the ACL.
- 3.62 CA also notes that the few times a court has considered goods or services to be of a kind not ordinarily acquired for personal, domestic or household use or consumption has been in what may be termed 'clear cut' scenarios, e.g. where the goods were an air seeder, an incubating machine for ostriches, prime mover or industrial photocopier. For many other categories of products, the position is less clear.

- 3.63 A better approach would be to limit the definition of Consumer to natural persons (as in the UK and Europe more broadly). Consideration can be given to whether these natural persons would also need to be "acting for purposes that are *wholly or mainly* outside that individual's trade, business, craft or profession" (UK position) or just "acting for purposes which are outside his trade, business or profession".
- 3.64 Another option is to exclude contracts for goods or services where the customer provides an ABN. By providing an ABN, a customer is informing the supplier that the purchase is for business purposes (as they can claim a GST credit and potentially other tax benefits). At a minimum the definition of "consumer" should expressly exclude incorporated companies and government entities. This bears in mind that there is some level of sophistication required to establish a company or carry out the functions of Government and ensures consistency with other consumer protection laws.
- 3.65 Services can also be acquired by a business for re-supply. These purchases are clearly for business purposes and do not need the same protection as individuals. Currently, the exclusion for re-supply only applies to sale of goods. For example, a business may acquire a broadband internet connection for resupply through Wi-Fi to consumers. The business would currently be captured by the definition of the term "consumer".
- 3.66 The Issues Paper raises the question as to whether \$40,000.00 is still an appropriate threshold for consumer purchases. CA believes that the current threshold in the ACL is adequate and very appropriate for consumers. Generally, goods or services purchased for personal, domestic or household consumption are less than \$40,000.00 and where a consumer purchases goods or services over this threshold those consumers are commonly in a position where they can freely negotiate the terms of their purchase and understand the implications of their contractual arrangements. If the threshold were to change CA suggests further industry consultation is needed to understand how the increase would impact suppliers of certain goods or services prior to a definitive determination being made on this issue.

Recommendation 7: The provisions in the ACL defining a 'consumer' should be amended to:

- Exclude businesses from the definition of consumer by the following options:
 - Option 1: Limit a Consumer to natural persons acting wholly or mainly outside that individual's trade, business, craft or profession;
 - Option 2: Exclude contracts where customers supply an ABN (or at a minimum exclude incorporated companies and government entities).
- Exclude a person acquiring services for re-supply from the definition of consumer.

The \$40,000.00 threshold for consumer purchases, however, should be retained.

Component Pricing

- 3.67 Section 48 of the ACL requires the total minimum cost of products and services to be advertised. For example, where a company makes the sale of Product A conditional on customers also purchasing Service B, then the company cannot advertise the price of Product A only – the total price of A and B must be advertised. And if there are several types of Service B, Product A must be advertised with the cheapest type of Service B.
- 3.68 CA is concerned that s.48 is not particularly well drafted and the authorities do not provide much useful guidance on how it is to be interpreted and applied. When applying s.48 in practice, circumstances can arise which make complying with the obligation unclear, or unintentionally create a more confusing outcome for the customer.
- 3.69 For example, telecommunications service providers will sometimes feature an advertisement for an 'optional extra' or 'bolt-on' product to a larger product. For example, a Data Share SIM for \$5/month that allows customers to share the data entitlement from a normal mobile plan. The Data Share SIM advertisement is not linked to the promotion of any particular plan, and is capable of being added to a wide variety of eligible plans.
- 3.70 In this context, a question arises as to whether the provider's obligation is to advertise not just the Data Share SIM price, but also the price of an eligible service that goes with it (e.g. Min cost \$40 = \$35/mth plan + \$5/mth data share SIM). If this is the case, the next question that arises is whether this is actually leading to advertising that is more confusing for the customer.
- 3.71 CA is also concerned that strict application of s.48 (as it is understood to be interpreted by relevant regulators) can create confusion for customers where companies are advertising an optional, 'bolt-on' product or a product available on a standalone basis where there is no compulsion to purchase that additional good or service, and are required to advertise the *minimum* total cost.
- 3.72 For example, a customer could choose to purchase an application service from a provider on their pre-paid mobile for \$40/mth. The absolute minimum cost to acquire the application service from the provider with a pre-paid service would be \$40 plus the cheapest pre-paid service available - i.e. a \$2 SIM starter kit. This would total \$42 per month. However, the \$2 doesn't include any credit on the pre-paid service, which would mean that the application service isn't genuinely available to most customers, unless it can be accessed by Wi-Fi. Therefore, it would be confusing to advertise the \$2 price to most customers, since the vast majority of customers

consuming that product are purchasing a significantly higher value recharge product (e.g. a \$30 recharge), not a \$2 starter kit.

Recommendation 8: When the focus of a provider's advert is an optional product or service (i.e. an "add-on" or "bolt-on" product or service) that must be attached to one of two or more other types of product or service, it should be permissible to advertise:

- the price point for that optional product or service; along with
- an explanation that the optional product is only available with the purchase of other eligible product or service.

4. Administration and enforcement of the ACL

- 4.1 CA notes that the administration and enforcement of the ACL is generally effective. CA also considers that as a general comment the scope of penalties and other remedies that can be imposed by regulators under the ACL make for an effective enforcement toolkit, accommodating sufficient responses to breaches of the ACL to ensure the law can achieve its consumer protection and deterrence aims.
- 4.2 There is one area where CA considers adjustments to aspects of the current model are warranted, as outlined below.

Infringement notices

- 4.3 Presently, the ACCC may issue Infringement Notices to companies under s.134A *Competition and Consumer Act 2010* where it has reasonable grounds to believe that a person has contravened certain provisions in the ACL including:
- a. the unconscionable conduct provisions;
 - b. the unfair practices provisions (save for certain sections e.g. section 18 of the ACL);
 - c. certain unsolicited consumer agreement and lay-by agreement provisions; and
 - d. certain product safety and product information provisions.
- 4.4 According to the Explanatory Memorandum for the legislation¹, the rationale for providing the ACCC with this power was to:
- "...remedy a significant gap in the current enforcement framework by facilitating the payment of relatively small financial penalties in relation to relatively minor contraventions that may not otherwise be pursued through the Courts... The power is intended to provide the ACCC ... with greater flexibility to respond to less serious contraventions..."*
- 4.5 Despite this, the penalty risk for companies in respect of conduct contravening the ACL is significant.
- 4.6 The penalty amount in each infringement notice will vary, depending on the alleged contravention, but in most cases is fixed at \$10,200 for a corporation (or \$102 000 for a listed corporation) and \$2,040 for an individual for each alleged contravention. In practice, however, the ACCC has in some instances issued multiple infringement notices to companies in respect of what may be considered a single business activity. An example is where contraventions of the provisions relating to misleading conduct

¹ Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009.

have arisen from a single marketing campaign applied across different types of media, providing the ACCC with scope to issue an infringement notice in respect of each such type of media.

- 4.7 As the Issues Paper notes, in addition to the financial penalty aspect, being issued with an infringement notice can also have a significant detrimental impact on a company's reputation and brand – an impact which may not be fully addressed even if the company elects to pay the infringement notice penalty or successfully defends court proceedings on the matter.
- 4.8 For these reasons, CA believes it is particularly important that consideration be given to measures that will help ensure there is more rigour and transparency around the issuance of infringement notices in the future. That will help ensure this regulatory tool is applied in a proportionate manner.
- 4.9 For example, it would be helpful to have a process that provides parties with a clear period of notice to respond to an enquiry from the ACCC prior to the issuance of an infringement notice on an issue of concern to the ACCC. This would assist parties to cooperatively address the issue in circumstances where it is not yet clear that there has been a breach of the ACL.

Recommendation 9: Clear and specific timeframes for responding to queries by the ACCC before an infringement notice is issued would assist parties to cooperatively address issues that are of concern to the ACCC in circumstances where it is not yet clear that there has been a breach of the ACL.

5. General principles to guide the future development of the ACL, and comments on proposals raised in the Issues Paper relating to emerging or potential consumer protection issues.

- 5.1 The Issues Paper seeks views on whether the introduction of new protections into the ACL is warranted to ensure it 'keeps pace' with developments in the business and consumer landscape, with particular regard to the digital economy and emerging business practices.
- 5.2 CA supports this endeavour to ensure the ACL remains an effective tool for consumer protection. Periodically reviewing the extent to which the ACL is sufficiently flexible to respond to new and emerging issues will help ensure it remains relevant into the future.
- 5.3 As per earlier comments in this submission, CA also believes it is important that there be clear principles in place to assess the suitability of any changes to the ACL that may be proposed to ensure it is able to respond to new and emerging issues. This will help ensure regulation remains proportionate, and does not have inadvertent consequences that stifle innovation or business efforts to simplify the way they do business with customers and improve the customer experience.
- 5.4 These principles may include ensuring that before any new regulation is introduced:
 - a. There is sufficient evidence of an existing or foreseeable regulatory gap that should be addressed.
 - b. Existing consumer protection provisions in the ACL or other instruments cannot deal with a relevant issue sufficiently, and overlapping regulation is avoided (including with consideration of where introduction of new regulation will overlap with industry-specific regimes).

- c. Consideration is given to whether new regulation would give rise to disproportionate or unnecessary costs on business.
- d. The new regulation should be able to be readily understood by both consumers and businesses, and compliance facilitated by bright-line standards.

5.5 Additionally, CA believes that recognition needs to be given to the fact that:

- a. aspects of the ACL can continue to develop through judicial interpretation and case law. For example, what constitutes the “norms of society” in relation to unconscionable conduct;
- b. there is a risk that trying to supplement more general prohibitions and obligations with new provisions intended to more clearly deal with specific types of conduct risks giving rise to unintended consequences. See, for example, our comments in section 3 above on some of the issues that have arisen from the introduction of the requirement in section 48 of the ACL relating to advertising the total minimum cost of products and services; and
- c. CA notes that there is already duplication of regulation in the telecommunications industry between the ACL and other consumer protection provisions, such as the TCP Code.

5.6 As an example of the application of the principles outlined in 5.4 and 5.5, CA notes that the Issues Paper seeks views on whether there is a need for some reform of the misleading and deceptive conduct and false and misleading representations provisions. While CA believes that simplification of the various current overlapping provisions is desirable to the extent that compliance requirements are streamlined, more broadly, the Issues Paper does not identify:

- any existing or foreseeable regulatory gaps in the current legislation (and associated regulations and industry codes) that need to be addressed; or
- any clear examples of conduct that cannot already be dealt with effectively by existing provisions.

On that basis CA does not consider that a case has been made out for further regulation in this area (outside of simplification and streamlining).

Recommendation 10: It is important that there be clear principles in place to assess the suitability of any changes to the ACL that may be proposed to ensure it is able to respond to new and emerging issues. This will help ensure regulation remains proportionate, and does not have inadvertent consequences that stifle innovation or business efforts to simplify the way they do business with customers and improve the customer experience.

5.7 CA notes that the Issues Paper seeks comment on whether there may be a case to introduce new regulation in the ACL such as:

- a. a general prohibition against unfair commercial practices;
- b. a general prohibition against the supply of unsafe goods (as well as against non-compliance with a safety standard or ban);
- c. in the context of ‘online shopping’, additional obligations or prohibitions to enhance transparency on issues such as pricing, product safety and the genuineness of online reviews; and
- d. reform of the consumer guarantees regime to specifically address digital content.

5.8 Applying the principles outlined in sections 5.4 and 5.5 above, CA does not believe that it is clear new regulation in these areas would be justified, as explained further below.

Regarding a general prohibition against unfair commercial practices

- 5.9 The Issues Paper asks whether there are aggressive commercial practices or business models resulting in significant risks of consumer harm that are not adequately addressed in the ACL and which may therefore warrant a new general prohibition against unfair commercial practices.
- 5.10 CA considers that the Issues Paper does not provide any clear examples of conduct or business models that may be 'at issue' and that are not already able to be dealt with via existing provisions in the ACL such as the provisions on unconscionable conduct, false or misleading representations, or unfair contract terms.
- 5.11 CA believes it is particularly important to ensure any 'regulatory gap' is properly articulated before consideration is given to introducing new regulation – particularly where the nature of that regulation is such that it may be broadly framed and therefore a source of potential uncertainty for both businesses and consumers, with attendant compliance costs.
- 5.12 The introduction of the ACL helped to establish a national standard in consumer protection. The legislation already contains broad and flexible prohibitions on undesirable selling practices that can be adapted to an evolving market and that effectively address a range of clearly articulated commercial dealings.
- 5.13 As noted in section 2 of this submission, in addition to more general legislation such as the ACL, a large number of consumer protection instruments apply specifically to the telecommunications sector and already provide customers with a wide range of protections and rights, which have complemented the telecommunication sector's commitment to consumer interests.
- 5.14 Adding to what are already multiple layers of regulation gives rise to high compliance costs for businesses and these costs may ultimately be pushed onto consumers. Additionally, overlaps and inconsistencies in the regulatory instruments can complicate and slow the introduction of new business practices aimed at delivering better services and options for consumers.
- 5.15 Accordingly, CA believes a high bar should be set for adding new regulation in the field of consumer protection, and a clear demonstration of consumer detriment that is not already addressed by the existing regime would need to be identified. Based on the information in the Issues Paper the case for introduction of a general prohibition against unfair commercial practices is yet to be in any way persuasively articulated.

Recommendation 11: Based on the information in the Issues Paper, CA considers the case for introduction of a general prohibition against unfair commercial practices is yet to be in any way persuasively articulated.

CA does not consider that there is clear consumer harm that can be identified as not being addressed under the existing ACL provisions. As such a general prohibition on unfair commercial practices is not warranted.

Regarding a general prohibition against the supply of unsafe goods

- 5.16 The Issues Paper asks whether there are any changes that could be made to improve the effectiveness of the product safety provisions. One particular example

given is whether there should be a general prohibition against the supply of unsafe goods. The ACL currently prohibits non-compliance with safety standards, but does not contain a blanket prohibition of this kind.

5.17 The Issues Paper also notes that the intention of the product safety regime in Australia is to:

- a. deliver appropriate levels of consumer safety;
- b. maximise benefits and choice for consumers;
- c. minimise regulatory burden for suppliers and providing certainty about their obligations;
- d. foster competition in the supply of regulated products; and
- e. ensure that regulation is efficient, appropriate and responsive.

5.18 CA believes that a blanket prohibition on the supply of unsafe goods is undesirable. The existing prohibition against non-compliance with safety standards delivers appropriate levels of consumer safety and sanctions for non-compliance. The defective goods and consumer guarantee actions available under the ACL provide rights to persons who may have suffered injury, loss or damage. The prohibitions against false and misleading conduct may also be available in relation to withdrawal or recall of consumer goods which had been the subject of reports of product safety issues. The ACCC may also commence representative actions.

5.19 CA also believes that the introduction of new regulation should avoid overlap with any industry-specific regime. The telecommunications industry is already highly regulated and a range of technical standards already exist. For example, under section 376 of the *Telecommunications Act 1997*, the ACMA may, by legislative instrument, make a technical standard relating to specified customer equipment or specified customer cabling, including standards that consist of requirements necessary for the protection of health and safety. Several ACMA technical standards are currently specified in Schedule 1 of the *Telecommunications (Labelling Notice for Customer Equipment and Customer Cabling) Instrument 2015*.

5.20 In addition, CA, ACMA and the Federal Government are active in assessing possible consumer safety concerns in emerging telecommunications markets and setting safeguards to address customer education about specific concerns. Examples include C637:2011 Mobile Premium Services (MPS) Code, Telecommunications (Backup Power and Informed Decisions) Service Provider Determination 2014, and CA's Industry Guidance Note (IGN 004) Migration of Legacy Services.

5.21 Given ACMA's power to address industry specific product safety issues, CA believes it is unnecessary for the ACL to introduce further regulation.

5.22 CA believes that a blanket ban on the supply of unsafe goods would also contradict a number of the guiding principles of the product safety regime. For example:

- a. it would create uncertainty and compliance difficulties for suppliers to the extent that general safety and quality testing would be required for all equipment even in the absence of any accepted industry standard against which to test or in respect of which assurances could be obtained from upstream suppliers; and
- b. uncertainty and greater compliance costs could provide a strong disincentive to develop and supply new and innovative goods and services. The high risks associated with non-compliance could ultimately stifle innovation and limit consumer choice. This would have a particularly negative impact on certain industries (such as telecommunications) where technology is rapidly advancing and offering consumers an increasing range of options.

5.23 Consistent with the general principles for reform outlined above, it is important that new regulation in this area can be easily understood by both consumers and businesses, involves bright-line standards, and does not create significant or disproportionate compliance costs and difficulties.

Recommendation 12: CA considers that the current product safety regime is appropriately comprehensive and that a general prohibition against the supply of unsafe goods is unnecessary and undesirable as it would likely create uncertainty and compliance difficulties for suppliers, and the risk of non-compliance could stifle innovation and limit consumer choice.

Regarding 'online shopping' and whether additional obligations or prohibitions should be introduced to enhance transparency on issues such as pricing, product safety & the genuineness of online reviews

5.24 In relation to this section of the Issues Paper, CA notes the following:

- a. As mentioned above, the telecommunications industry is already required to comply with a range of other instruments that incorporate a significant number of consumer protection-related information provisions. These provisions apply regardless of the type of media a supplier chooses to engage a customer through. Additional online-specific obligations or prohibitions therefore will not add value to customers seeking telecommunications products and service but are likely to duplicate and/or complicate existing information available.
- b. The TCP Code already governs the sale of telecommunications products and services to consumers, and in particular, obligations around pricing. Those obligations are applicable where customers can purchase those goods and services online and include that "A Supplier must include any important conditions, limitations, qualifications or restrictions about an Offer in its advertising of the Offer, to allow Consumers to make informed choices and to avoid Consumers being misled." This includes inserting a full minimum quantifiable price. These obligations (amongst others set out in the TCP Code) ensures price transparency in the telecommunications space and prevents behaviour which could be described as 'drip pricing.' They also prevent providers from staying silent on ancillary fees such as hardware costs, installation fees or delivery fees.
- c. Additional regulation may have the unintended consequence of curtailing business models which enable customers to freely purchase ancillary 'bolt ons' or 'add ons' to their service.
- d. The ACL prohibits false or misleading representation that purports to be a testimonial by any person or a false and misleading representation by any person or a representation that purports to be such a testimonial. Further guidance for suppliers can also be found in the ACCC Supplier Guide "What you need to know about: Online reviews – a guide for business and review platforms" published in December 2013.

Recommendation 13: CA considers that further regulation of online shopping and emerging economies is not required, as the ACL already contains general regulations (such as regarding false and misleading representations) that can address the types of 'digital economy'-related issues raised in the Issue Paper.

Additionally, in the telecommunications industry, the TCP Code adequately addresses issues relating to the sale of telecommunications products, including pricing, and addition of further provisions into the ACL on such issues is likely to result in a regime that is unwieldy and creates outcomes that will lead to greater rather than less customer confusion.

Tailored remedies for non-tangible goods and services

- 5.25 The Issues Paper also raises more general issues about how the consumer guarantee provisions apply including whether remedies are appropriate, or should be tailored, for digital content.
- 5.26 However the Paper does not identify that, despite commentary about the change between traditional forms of a product to a new digital format and how they are used, there is currently an issue with the application of consumer guarantees specifically in relation to digital products.
- 5.27 The issues with the present laws as outlined elsewhere in this submission and in particular, how those laws deal with the provision of goods and services do not differ depending on the format of a product. For these reasons, CA believes that changes to the ACL should not be made unless and until specific problems are identified. While additional guidance may be necessary to assist consumers and businesses to better understand their rights and obligations, and remove uncertainty for businesses and facilitate better sales experiences, CA does not believe that further regulation is the appropriate response to the issue at this point.
- 5.28 In CA's view, it is essential to identify the issues, and engage in a process of consultation with industry groups to ensure that regulatory changes adequately address the issues at hand. Reforms in this area must be appropriate, and must not create uncertainty or disproportionate compliance costs that could deter innovation and negatively impact the evolution of the digital economy and supply of new goods and services for consumer benefit.
- 5.29 It may also be helpful to develop a regime that allows industry associations to develop specific codes for particular goods or services which may be endorsed by the ACCC, in consultation with ACMA where appropriate, where there is a need for greater regulation or further guidance.

Recommendation 14: Reform to the consumer guarantee provisions to address issues relevant to digital or non-tangible content should not be considered until specific problems are identified. It should then be the subject of industry consultation to ensure that regulatory changes are appropriate, and do not create restrictions that negatively impact the evolution of the digital economy and supply of new types of goods and services for consumer benefit.

APPENDIX

Recommendations made by CA in this submission (as extracted from the boxed text within sections 3 to 5 of this submission):

Unsolicited Consumer Agreements

Recommendation 1: Suppliers should be permitted to offer customers the option of receiving goods or services within the 10 day cooling off period in the context of unsolicited consumer agreements, with no fees or charges payable in relation to that supply if the customer subsequently exercises their cooling off right. Only if the cooling off right was not exercised would the relevant fees or charges then be payable by the customer. Whether or not such an offer was made to a particular customer should be entirely within the discretion of the supplier, so they can make a decisions based on a balancing of their desire to facilitate better customer experiences with the financial risk of not being compensated for the goods or services provided.

The right of customers to cancel the agreement during the cooling off period in such circumstances should also be subject to a requirement that, if such termination occurs, they return any goods supplied to them within a reasonable period of time - except if the goods can't be returned, removed or transported without significant cost to the consumer, in which case the supplier should be under an obligation to collect them (which is consistent with the consumer guarantee regime).

The requirement to provide a customer with an agreement document made over the phone within 5 business days of negotiations should be changed to a requirement to dispatch such an agreement document within that timeframe. This requirement is easier for suppliers to comply with and has no detrimental impact to customers.

Further, suppliers should be entitled to send the agreement document electronically where customers have provided a valid email address as an agreed method for receiving electronic communications relating to their purchase. It is easier to verify receipt of a document delivered electronically and easier to comply with delivery timeframes (whether or not such delivery timeframes are changed as suggested above).

Recommendation 2: Consideration should be given to providing greater guidance on, or a definition of, the wording "other than the business or trade premises of the supplier" as it is used in defining the term *unsolicited consumer agreement* in section 69(1)(b)(i) of the ACL. This wording currently creates confusion and wariness in retailers in the context of the pop-up stores.

CA believes any refinement to this area of the ACL take into account the fact that when a customer visits a professionally operated pop-up stores with mobile but substantial settings, even where positioned in an area that is not traditionally commercial in nature, their experience will be analogous to what occurs in a more traditional retail context. In this context, there would seem to be no reason for these two transaction scenarios to be treated differently under the law.

CA also believes that it is important to draw a distinction between scenarios where:

- staff of a pop-up store definitively leave the area in and around that store, and interact with customers; versus

- interactions occur between sellers and customers that are near, adjacent or obviously connected to a visible pop-up store,

with application of the rules around unsolicited consumer agreements only applying to the former. In CA's view, the latter should not be considered to be a situation where consumers should be assumed to be at risk of additional vulnerability or disadvantage in terms of their access to information or ability to refuse offers when compared to a traditional retail interaction.

Recommendation 3: Business to business contracts should be exemptions to the unsolicited selling regime, regardless of whether or not the product or service is of a kind ordinarily acquired for personal, domestic or household use. The definition of business contract should be amended so that it is defined as a contract for the supply of goods and services to a business.

Subsequent agreements of the same kind should be treated in the same way as renewable agreements of the same kind and not be subject to a \$500 cap.

Consumer Guarantees

Recommendation 4: Consideration should be given to providing more practical guidance to assist businesses and consumers understand and apply key aspects of the consumer guarantee provisions, such as:

- (a) what constitutes a 'major' or 'minor' failure to comply with the consumer guarantees;
- (b) the practical meaning of concepts such as 'acceptable quality'; and
- (c) the length of time a good should be expected to last.

In particular, It may be helpful to develop a regime that allows industry associations to develop guidance relevant to the key goods or services traded by their members (such as mobile phones in the telecommunication sector), which could then be assessed and where appropriate endorsed by a regulator such as the ACCC.

'Lemon' laws

Recommendation 5: To the extent there is evidence of a regulatory consumer protection 'gap' in relation to products that will not function despite repeated repairs, CA considers the initial focus should be on identifying whether further refinement to or guidance on existing consumer guarantees provisions (such as the concept of a 'major failure') will remedy this issue. If this was not seen as being able to address the problem, and additional provisions were proposed to be introduced to address a perceived issue in relation to 'lemon' products, CA considers the application of those provisions should be limited to sectors where it was clearly evidenced that the consumer guarantees and other ACL provisions were not already providing effective consumer protection.

Warranty against defects

Recommendation 6: Regulation 90 of the *Competition and Consumer Regulations 2010* should:

- as a first preference, be amended to remove the prescribed text that must currently be included in any document that evidences a 'warranty against defects'; or
- as a second preference, be amended to ensure that prescribed text it is not confusing or lacking in alignment with the other provisions in the ACL that relate to warranties against defects.

Additionally:

- more guidance should be provided relating to how the warranty against defect (WAD) provisions apply in the context of standard customer terms that are divided into a number of different pages on a supplier's website. Ideally, each such page should not be taken to be a separate 'document' that references the WAD, and thus individually subject to each of the prescribed text and other requirements in the Regulations; and
- where the regulation makes it an offence for a supplier to "give" a consumer a WAD notice that does not comply with the prescribed requirements, an exemption should be included for a person who: (a) did not authorise the preparation of the WAD notice; and (b) would only be considered to have "given" the warranty against defect notice to a consumer on the basis of physically providing a product to that consumer.

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Recommendation 7: The provisions in the ACL defining a 'consumer' should be amended to:

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Infringement notices

Recommendation 9: Clear and specific timeframes for responding to queries by the ACCC before an infringement notice is issued would assist parties to cooperatively address issues that are of concern to the ACCC in circumstances where it is not yet clear that there has been a breach of the ACL.

General principles to guide the future development of the ACL

Recommendation 10: It is important that there be clear principles in place to assess the suitability of any changes to the ACL that may be proposed to ensure it is able to respond to new and emerging issues. This will help ensure regulation remains proportionate, and does not have inadvertent consequences that stifle innovation or business efforts to simplify the way they do business with customers and improve the customer experience.

Prohibition of unfair commercial practices

Recommendation 11: Based on the information in the Issues Paper, CA considers the case for introduction of a general prohibition against unfair commercial practices is yet to be in any way persuasively articulated.

CA does not consider that there is clear consumer harm that can be identified as not being addressed under the existing ACL provisions. As such a general prohibition on unfair commercial practices is not warranted.

Product safety regime

Recommendation 12: CA considers that the current product safety regime is appropriately comprehensive and that a general prohibition against the supply of unsafe goods is unnecessary and undesirable as it would likely create uncertainty and compliance difficulties for suppliers, and the risk of non-compliance could stifle innovation and limit consumer choice.

Further regulation of online shopping and emerging economies

Recommendation 13: CA considers that further regulation of online shopping and emerging economies is not required, as the ACL already contains general regulations (such as regarding false and misleading representations) that can address the types of 'digital economy'-related issues raised in the Issue Paper.

Additionally, in the telecommunications industry, the TCP Code adequately addresses issues relating to the sale of telecommunications products, including pricing, and addition of further provisions into the ACL on such issues is likely to result in a regime that is unwieldy and creates outcomes that will lead to greater rather than less customer confusion.

Consumer guarantees and digital or non-tangible content

Recommendation 14: Reform to the consumer guarantee provisions to address issues relevant to digital or non-tangible content should not be considered until specific problems are identified. It should then be the subject of industry consultation to ensure that regulatory changes are appropriate, and do not create restrictions that negatively impact the evolution of the digital economy and supply of new types of goods and services for consumer benefit.



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