

Australian Consumer Law Review

Response to Interim Report

*Submission by the Australian Communications Consumer Action Network
(ACCAN)*

9 December 2016

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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ACCAN welcomes the opportunity to respond to the Interim Report by Consumer Affairs Australia and New Zealand. ACCAN has provided feedback on a number of the proposals outlined in the Report.

1. Provide telecommunications-specific guidance on the application of consumer guarantees

14. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 below, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

Australians rely upon their various telecommunications devices for work, to conduct essential transactions and to engage with the digital economy more broadly. As at June 2016, 93% of Australians use a mobile phone, with 76% of Australians using a smartphone.¹ 5.78 million people only use a mobile phone and have no fixed-line telephone at home.² There are also 21.97 million mobile phone internet subscriptions.³ Given that these devices provide access to essential telecommunications services it is critical that consumers are able to get an effective remedy when there is a problem with their device.

ACCAN supports the view of Telecommunications Industry Ombudsman (TIO) that there should be increased guidance on how consumer guarantees for goods and services apply in the telecommunications context.⁴ Increased guidance will provide greater certainty to manufacturers, mobile phone providers and consumers. ACCAN believes the ACCC, working with the TIO, would be best placed to provide this guidance. Below are several important priorities for improved guidance:

a) Need for guidance – example 1 – ‘would not have purchased’ (question 11)

Section 260(a) provides that a failure is major if a reasonable consumer would not have purchased the good with knowledge of the failure. For example, a consumer would not buy a new phone knowing that it randomly restarts itself. However, as the TIO notes, most consumers are not aware of this right and some experience difficulty when relying on this section when engaged in disputes with mobile providers.⁵

b) Need for guidance – example 2 - how long should a device last for it to be of ‘acceptable quality’? (questions 10 and 13)

In determining what is acceptable quality, goods need to be as ‘durable’ and generally ‘fit for the purposes’ as a reasonable consumer would expect, having regard to the nature and price of the goods.⁶

¹ [ACMA Communications Report 2015-16](#) November 2016, p. 19.

² [ACMA Communications Report 2015-16](#) November 2016, p. 53.

³ [ACMA, Communications Report 2015-16](#), November 2016, p. 28.

⁴ [Telecommunications Industry Ombudsman submission to Issues Paper](#), June 2016, p. 7.

⁵ [Telecommunications Industry Ombudsman submission to Issues Paper](#), June 2016, p. 9.

⁶ *Australian Consumer Law*, clause 54(2).

As noted by the TIO, consumers generally expect their telecommunications equipment to work well for at least as long as their service contract (that is, 2 years).⁷ However, the TIO notes that some providers 'do not consistently use a two year timeframe' particularly if a significant problem arises closer to the end of a 2 year contract.⁸

ACCAN believes that a reasonable consumer who buys a smartphone would expect it to be durable enough to last at least 2 years, taking into account the price and nature of the goods, noting that the smallest capacity model of the latest costs \$1079.

c) Need for guidance – example 3 - what is a 'reasonable period' in terms of time taken to remedy a failure (question 11)

There is no guidance about what is a 'reasonable period' for allowing the supplier to remedy a defect. As the TIO notes, consumers who have problems with their device often have to hand their phone over to be assessed. This can take up to several days.⁹

ACCAN supports the TIO's view that there should be greater clarity about the expected timeframes, as well as guidance on what circumstances the consumer should be offered an interim replacement so that they can continue to enjoy their communications service.

d) Need for guidance – example 4 – how do consumer guarantees apply to communications services as opposed to goods (question 11)

As noted in our earlier submission,¹⁰ the trouble with relying on the consumer guarantees is there is little guidance on what they mean in the context of delivery of telecommunications services. There has been very little case law around how these protections would practically be implemented in telecommunications. For example, would a mobile phone service that consistently loses coverage be one that suffered from a 'major failure'?

This makes it difficult for consumers to understand their rights and remedies under the ACL. ACCAN supports proposals that would see guidance notes produced and tribunal decisions published to help consumers better understand their rights in relation to specific services.

⁷ [Telecommunications Industry Ombudsman submission to Issues Paper](#) June 2016, p. 9.

⁸ [Telecommunications Industry Ombudsman submission to Issues Paper](#) June 2016, p. 9.

⁹ [Telecommunications Industry Ombudsman submission to Issues Paper](#), June 2016, p. 9.

¹⁰ [ACCAN, Submission to the Issues Paper, August 2016](#), p. 14.

2. Update the definition of ‘major failure’

16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a ‘major’ failure?

- What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of ‘non-major failures’ or type of safety defect that would trigger a ‘major failure’?
- Are there any relevant exceptions or qualifications?

ACCAN supports a specific change to the law to say that multiple ‘non-major failures’ could constitute a ‘major failure’.¹¹ As noted by the TIO, there have been cases where consumers have handed over their devices to be repaired several times before being offered a replacement or cancellation of contract.¹² In these cases, devices are often faulty again or are returned with the fault still present.¹³ ACCAN believes that in these cases, there would be a ‘major failure’ and the consumer should be able to choose to receive a full refund, not just submit the device to another round of repairs, or accept a refurbished handset of the same model which may have similar problems.

3. Extended warranties

21. Is there a need for greater regulation of extended warranties? If so:

- is enhanced disclosure adequate or is more required?
- what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?
- what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?

22. What guidance and transition arrangements would businesses need?

a) Clarification of ACCAN’s position

In the Interim Report, appears that ACCAN’s position on extended warranties was inadvertently misquoted. In our submission, we recommended that:¹⁴

- 1) businesses selling add-on warranties be required to provide a ‘cooling off’ period; and
- 2) businesses offering extended warranties be required to provide clear, accessible information on how these warranties differ from statutory guarantees to aid consumer decision making (“the transparency measure”).

¹¹ CAANZ, *ACL Review Interim Report*, p. 62.

¹² [Telecommunications Industry Ombudsman submission to Issues Paper](#), June 2016, p. 13 and Case Study 1 (at p. 14).

¹³ [Telecommunications Industry Ombudsman submission to Issues Paper](#), June 2016, p. 13 and Case Study 1 (at p. 14).

¹⁴ [Recommendation 7 in ACCAN Submission to the Issues Paper August 2016](#), p. 12.

We continue to recommend both of these proposals be implemented together as changes to the ACL.

However, the Interim Report suggested that ACCAN potentially supports an “opt-in process” for extended warranties instead of a cooling-off right. This is not the case. ACCAN is not familiar with the idea of ‘opt-in process’ for extended warranties. ACCAN continues to support both of the recommendations outlined above as they complement one another and are not alternatives.

b) Benefits of providing ‘clear, accessible information’ on extended warranties

ACCAN believes that providing this information will positively affect consumer outcomes because it will allow businesses to compete on actual benefits of their services rather than rely on consumer confusion. ACCAN does not believe that requiring transparency will create a significant regulatory burden for businesses. In New Zealand, where there is enhanced disclosure, the regulator provides sample text that businesses could use to differentiate their warranty:¹⁵

The Extended Warranty Agreement will apply for XYZ years.

The Consumer Guarantees Act means people can expect goods to be durable for as long as most would expect that kind of good to last. We estimate this Extended Warranty Agreement provides you with protection for **XXX** years longer than the protection you have under the Consumer Guarantees Act.

It is difficult to argue that this clear and simple guidance would be prohibitive to large electronics retailers and mobile providers.

4. Application of the consumer guarantees in the online environment – digital content

ACCAN firmly disagrees with statements made by some stakeholders that the existing consumer guarantees are clear enough to protect consumers of digital content and hybrid goods/services. As we stated in our submission to the Issues Paper,¹⁶ there is a significant lack of clarity about how consumer guarantees apply to these products. We strongly support CAANZ’s comment in the Interim Report that it will continue to monitor this area closely, particularly given recent market developments.¹⁷

The customer base for digital products and hybrid goods/services is continually growing. For example, in mid-November 2016, [redacted] released its first two Internet-of-Things products, which provide equipment together with an ongoing software and monitoring service.¹⁸ In early December 2016, the ACMA released its latest report finding that there are over 2.7 million Subscription Video on Demand accounts in Australia from providers such as [redacted] and that in the last

¹⁵ CHOICE, *Submission to the Issues Paper*, p. 53.

¹⁶ ACCAN *submission to Issues Paper pp 12-13*.

¹⁷ Interim Report, p. 200.

¹⁸ See <https://www.telstra.com.au/smart-home> and Corinne Reichert, ‘Telstra launches Smart Home devices and pricing’, November 15 2016.

week of the financial year 2016, 19 per cent of adult Australians had used a streaming music service such as ¹⁹

Due to the size of the existing market and its rapid growth, ACCAN believes it would not be prudent to adopt a wait-and-see approach, as this approach could allow for significant detriment to consumers and confusion about supplier responsibilities in the digital marketplace.

5. Enhancing accessibility

57. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

ACCAN recommends that Australian Consumer Law (ACL) regulators continue to ensure the accessibility and usability of information about consumer rights for consumers with special needs, including people with a disability, people with low-literacy, ESL consumers and CALD consumers.

At present, the ACCC and some State and Territory fair trading regulators have a variety of resources in languages other than English, as well as Easy English.²⁰ The ACCC also has dedicated resources for consumers with a disability.²¹ ACCAN urges all ACL regulators in every state and territory to create similar resources or provide links to existing resources developed by other agencies.

Consumers with disabilities disproportionately depend on their telecommunications services and devices to ensure they can communicate and engage in everyday activities. When these products and services do not function, these consumers need to be able to promptly discover their consumer rights and solve their problems. These consumers should continue to be able to access the ACL and related guidance material across multiple formats, including online and hard copy.

Consumer rights information should also continue to be accessible for ESL consumers through the Easy English format and materials in common foreign languages.

6. Unfair terms - non-disclosure clauses

47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:

- What examples should be added?
- Would this help address systemic issues or provide greater clarity for businesses and consumers?
- Are there any unintended consequences, risks or challenges that should be considered?

ACCAN agrees with the submissions made by Queensland Consumers Association and CHOICE that terms which require confidentiality or non-disclosure as a condition of resolving a dispute with a business should be restricted. ACCAN is specifically aware of one company in the telecommunications sector which requires customers to sign non-disclosure agreements of this kind. ACCAN rejects this practice because it stifles consumer discussion and conceals potentially harmful

¹⁹ [ACMA Communications Report 2015-16 p. 5](#) and 76.

²⁰ See for example [Victorian ACL regulator](#) and the [ACCC](#).

²¹ See for example the [ACCC's resources](#).

conduct. It is also potentially inconsistent with a right to statutory remedies under the ACL consumer guarantees. Queensland Consumers Association suggested that these clauses could be considered ‘unfair terms’, while CHOICE advocated for a separate prohibition of these agreements in cases where the consumer had an existing right to the same or greater remedies under the consumer guarantees regime.²²

ACCAN believes there is significant merit in adopting these proposals. Technology has provided consumers with the ability to dramatically improve competitive outcomes and consumer welfare by sharing their experiences of products and services. Put simply, businesses which treat their customers well will be rewarded by customers, especially if the business provides a transparent and fair way to resolve disputes.

7. Extending unfair contract terms to insurance products

43. Should the ASIC Act’s unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act? If so:

How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate? Would any changes to the definition of ‘main subject matter’ be required? Would the same types of terms be considered ‘unfair’? What this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders?

ACCAN supports the extension of unfair terms protection to insurance products regulated under the *Insurance Contracts Act 1984*. As noted in our earlier submission, consumers of telecommunications goods are bombarded with a variety of insurance options offered by the supplier and carrier. Some of these policies contain terms so restrictive that the ordinary consumer would rarely be able to claim under them.²³ Removing the current exemption would provide consumers with greater protection and encourage better industry practice.

8. Increased penalties

63. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised? If so, what approach should be adopted?

64. Are there alternative approaches to addressing the issues raised?

As noted in our earlier submission, ACCAN does not believe the current maximum financial penalties are adequate to deter future breaches of the ACL. This is particularly the case in the telecommunications sector, where profits are likely to increase considerably over the next few years with a surge in connected technologies across consumers’ lives.

²² [CHOICE Submission to the Issues Paper](#), p. 24.

²³ [ACCAN submission to Issues Paper, p 9.](#)

ACCAN supports Option 1 in section 3.2.3 of the Report to increase the maximum financial penalties available for breaches of the *ACL*. While ACCAN does not have a view on a specific maximum penalty amount (such as \$10,000,000 as proposed in the Interim Report as for competition law breaches), we do support the ability for courts to decide on a penalty taking into account the revenue earned by the company, as well as adjustments for inflation.