COMMUNICATIONS
ALLIANCE LTD

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

December 2016

TABLE OF CONTENTS

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 (CAANZ) in response to the Australian Consumer Law Review Interim Report dated October 2016 (Interim Report).

1.2. As outlined in our June 2016 submission, 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. CA's submission comprises of the following sections:

a. Section 2 - Provides some general comments on the Interim Report and principles CA believes should guide future development of the ACL.

b. Section 3 - Sets out CA's comment on specific options and questions raised in the Interim Report.

c. Section 4 – Recaps key recommendations CA made in its June 2016 submission which relate to areas that are not a significant focus of the Interim Report.

2. General comments on the Interim Report and principles CA believes should guide future development of the ACL

2.1. The Interim Report notes that stakeholders who have provided input into the review of the ACL (Review) generally agree the ACL's overarching objectives are appropriate, and the majority of submissions in response to CAANZ's 31 March 2016 Issues Paper convey a view that the ACL remains largely 'fit for purpose' as a tool for effective support of consumer policy in Australia. CA agrees with these views, while recognising the importance of periodically reviewing the ACL to ensure it remains an effective tool for consumer protection and is sufficiently flexible to respond to new and emerging issues.

2.2. As set out in CA's June 2016 submission, CA believes it is important that such reviews be informed by clear principles for assessing the need for, and suitability of, any changes proposed to the ACL. 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 and improve the customer experience.

2.3. The principles CA put forward for this purpose in the June 2016 submission included 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.

c. Overlapping regulation is avoided (including with consideration of where introduction of new regulation will overlap with industry-specific regimes[1]).

[1] CA's June 2016 submission noted the telecommunications industry in Australia is governed by a significant number of sector-specific instruments incorporating consumer protection measures,

d. Consideration is given to whether new regulation would give rise to disproportionate or unnecessary costs on business, or inadvertently result in adverse consumer experiences.

e. The new regulation should be able to be readily understood by both consumers and businesses, and compliance facilitated by bright-line standards.

2.4. Additionally, the June 2016 submission suggested that recognition needs to be given to factors such as that:

a. Aspects of the ACL can continue to develop appropriately through judicial interpretation and case law.

b. Trying to supplement more general prohibitions and obligations with new provisions intended to more expressly deal with specific types of conduct risks giving rise to unintended consequences.

2.5. These considerations informed a range of recommendations in CA's June 2016 submission, some of which are addressed or responded to in the Interim Report, while others are not.

2.6. In this submission, CA focusses on responding to specific options or questions raised in the Interim Report relating to areas of key relevance to the telecommunications sector or which CA considers are particularly important from a public policy perspective. Additionally, in section 4 of this submission, some of the key recommendations that CA made in its June 2016 submission relating to areas that are not a significant focus of the Interim Report are repeated, reflecting CA's hope that these issues will also be dealt with in CAANZ's final report.

3. Comments on specific options and questions raised in the Interim Report

3.1 Set out below are CA's comments on seven main areas dealt with in the Interim Report:

- The definition of 'consumer';
- Consumer guarantees (incl. Warranty Against Defects);
- Product safety;
- Unfair contract terms;
- Unsolicited consumer agreements;
- Penalties and remedies; and
- Purchasing online.

Definition of "Consumer"

In the Interim Report, CAANZ seeks views regarding the current scope of the ACL, and asks a range of questions including in relation to the definition of 'consumer' such as:

- Should the $40,000 threshold for the definition of 'consumer' be amended, and if so, how?

which operate alongside more general regulation such as the ACL. Refer pages 3 - 4 of the submission for more detail.

- What impacts would an increase in the threshold have considering the types of goods or services that would be captured but that are not already?

CA responds on these issues below.

Should the $40,000 threshold for the definition of 'consumer' be amended, and if so, how?

3.2 The term 'consumer' is currently 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.

3.3 CA believes the current $40,000 threshold should be retained.

3.4 This is consistent with the position put forward in CA's June 2016 submission. The primary changes CA called for in relation to the definition of 'consumer' in that submission were:

a. exclude businesses from the definition by one of the following options:

(i) limit the definition to natural persons acting wholly or mainly outside that individual's trade, business, craft or profession; or

(ii) exclude contracts where customers supply an ABN (or at a minimum exclude incorporated companies and government entities), and

b. exclude a person acquiring services for re-supply.

3.5 CA expressed the view in its June 2016 submission that the breadth of the current definition of 'consumer' is problematic, as it means that protections in the ACL regularly apply to parties beyond potentially 'vulnerable' and accommodates application of the protections to businesses, including large commercial entities, such as incorporated companies and government entities.[2]

3.6 In the Interim Report, regarding the question as to whether $40,000 is still an appropriate threshold for consumer purchases, CAANZ poses the following options for consideration:

a. to increase the threshold to $100,000 and link it to the Consumer Price Index (noting that the threshold has not changed since 1986); or

b. to increase the threshold to $300,000 to align with the small business unfair contract term protections.

3.7 Although the current threshold has not changed since 1986, CA believes that it remains appropriate for the purposes of identifying parties who should receive the benefit of relevant consumer protections in the ACL. Generally, goods or services purchased for personal, domestic or household consumption are less than $40,000 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.

3.8 CA does not consider it is evident from the Interim Report that a case has been made warranting an increase to the threshold to either $100,000 (reflecting CPI increase since 1986) or to $300,000 (for the purposes of aligning it with provisions relating to application of the prohibition of unfair contract terms in contracts to which small businesses may be a party).

3.9 CA notes that:

[2] See paragraphs 3.58-3.65 of CA June 2016 submission for detailed examples.

a. consumers and businesses acquiring goods and services above the threshold are already protected so long as the goods or services are of a kind ordinarily acquired for personal, domestic or household use; and

b. businesses acquiring goods and services above the current threshold are often protected by contractual terms, including service level agreements, that are more appropriate for the transaction and go beyond what a consumer guarantee would offer. It should not be presumed that these protections are less than the statutory consumer guarantees.

What impacts would a change to the threshold have considering the types of goods or services that would be captured but that are not already?

3.10 CA submits that an increase of the threshold to $100,000, or $300,000 would capture the supply of goods and services to many businesses which it may be considered do not need the same general protections as 'individual' consumers. To the extent that businesses need special protections in their commercial dealings, the question arises as to whether this is already adequately achieved with the unconscionable conduct and unfair contract terms provisions. CA believes that there has been insufficient evidence to the contrary presented in the Review to date.

3.11 An increase to the threshold also risks being counterproductive in terms of how it may affect some commercial dealings. In particular, it is arguable that the more prescriptive and broader the application of the consumer protection regime, the less likely parties will be to negotiate bespoke terms specific to their situation - which may go beyond the minimum legislative protections provided in the ACL.

3.12 Regarding the option of tying the threshold to CPI would have the consequence of creating uncertainty for both consumers and businesses from one year to the next and introducing an additional administrative burden for businesses to assess and potentially adjust business practices year upon year to accommodate the increase. The threshold should remain as a fixed monetary figure, subject to periodic review in the ordinary course of review of legislative instruments.

3.13 If the threshold were to be changed, CA suggests first that further industry consultation is needed to understand:

a. what types of agreements should be covered by the definition that are not already covered, and whether there is a more appropriate mechanism to afford these agreements special protection, so as not to overreach into transactions that wouldn't benefit from this regulation;

b. if there is to be an increase to the threshold, what that increase should be and what unintended consequences may arise from the increase;

c. the impact to both consumers and businesses, of tying the threshold to CPI, and

d. how the increase would impact suppliers of certain goods or services,

prior to a definitive determination being made on this issue.

3.14 CA believes that in-depth industry consultation on the aforementioned issues is both pertinent and necessary before reaching a conclusion on this issue. CA would be hesitant to support the view of simply raising the threshold arbitrarily to $100,000 (or some other value) on the basis that it hasn't been increased since 1986, or to $300,000, to align with the threshold in the small business unfair contract term regime.

<u>Consumer Guarantees</u>

In the Interim Report, CAANZ seeks views regarding the current Consumer Guarantees regime, asking questions including:

- Could issues of clarity be improved through further guidance and information, and if so, how?
- How could concepts such as 'durability' and 'major failure' be more clearly defined?
- When should a refund be provided to customers?
- How can the process involving the mandatory notice for warranties against defects be improved?

CA responds on these issues below.

Could issues of clarity be improved through further guidance and information, and if so how?

3.15 CA members consider that the consumer guarantees provisions play an important and commendable role in the consumer protection regime, but there is no doubt application of the provisions continues to present challenges for businesses and consumers. For these reasons, it considers that a non-legislative approach focussed on enhancing general understanding of some of the terms used in the provisions is the most appropriate way to improve the current regime.

3.16 The absence of detailed definitions of, or guidance on, many of the relevant concepts means a level of complexity and subjectivity continues to pervade application of the regime. Outside of circumstances involving regulator or judicial intervention, businesses and consumers are forced to make their own 'best efforts' assessment on the relevant matters in the context of the goods and services they offer or purchase.

3.17 In CA's June 2016 submission, it identified that more practical guidance was needed to assist businesses and consumers to 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.

3.18 For businesses such as CA members, the need to independently determine how certain consumer guarantees apply 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 frontline 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 retail staff feel the need to seek input and advice from others in their business.

3.19 The Interim Report suggests that a general guide, discussing the issues that require further clarity in a wide context, may be beneficial to interpretation issues.

3.20 However, CA considers that it would be more useful for guidance to be industry specific, given the broad range of products and services the ACL governs. Guidelines which provide simple examples which are obvious applications of the consumer guarantees provisions do not assist for more complex products and services, including digital and non-tangible content. The benefit of industry specific guidelines would be that time periods for various categories of goods could be discussed in depth, taking into account pricing and representations made to consumers.

3.21 In its June 2016 submission, CA noted that the ACCC published an industry guide for the motor vehicle industry in 2013. CA considers something similar for the telecommunications industry would be beneficial to address consumer guarantees issues.

3.22 CA considers that any industry specific guides should be developed in consultation with the relevant industry, because industry participants have had to address issues specific to their industry and could provide valuable insight into the sorts of issues on which guidance and greater clarity should be provided.

How could concepts such as 'durability' and 'major' failure be more clearly defined?

3.23 CA agrees that further guidance on what is 'durable' would be useful. The definition of 'acceptable quality' refers specifically to the concept of durability without clear guidance, making the definition difficult to interpret.

3.24 If there were guidelines stipulating that (for example) a 24 month durability period for mobile handsets was a reasonable benchmark for durability this would assist frontline staff when providing guidance to customers regarding how long a product is expected to last. Customers and retailers would have a clearer understanding of the concept of durability as it relates to the mobile handset, which would in turn result in a better customer experience.

3.25 It would also lead to a reduction in the costs that are incurred by suppliers who assess devices on a case-by-case basis to determine whether a claim can be made under the ACL, as devices older than 24 months would not need to be assessed at the supplier's expense.

3.26 Likewise, the scope of what is and what is not a 'major' failure in respect of products and services under the ACL should be clearer. In its June 2016 submission CA provided examples of the type of guidance that may be provided, specific to the issue of differentiating between major and not major failures[3]. It maintained that this would be a useful way to guide businesses and consumers on interpreting this part of the consumer guarantees regime and, as mentioned above, suggest that a detailed inquiry with a range of industry experts and sector-specific customer input would be required to effectively achieve an effective outcome in this regard.

3.27 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 also be useful because what is reasonable will vary depending on the circumstances. For example, a 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).

3.28 The Interim Report asks the question as to whether multiple minor failures could (or should) equate to a 'major' failure. Again, CA considers that the issue of multiple non-major failures is one of clarification rather than change. Guidance as to what kinds of minor defects could lead to a major defect in the telecommunications industry would be useful. For example, if an issue with a mobile handset has occurred more than once, but can be easily fixed for a reasonable price by way of a repair; or if similar problems are not reported by other consumers and a replacement of the handset would consequently seem appropriate, CA queries whether a full refund would be necessary in that circumstance.

3.29 The Interim Report also suggests that an unsafe product could indicate a 'major' failure. CA believe this is already adequately covered under section 260(e) of the ACL, which specifies that a product must be safe to be considered of 'acceptable quality'. In its current form, the law already provides that there is a major failure if

goods are not of "acceptable quality", and therefore changes to the definition of 'major' failure in respect of this point are not necessary.

When should a refund be provided to customers?

3.30 In relation to refunds specifically, CA considers that it is reasonable to provide refunds where goods purchased fail within days, weeks, or even months of purchase, because these goods are not easily categorised as reasonably durable. However, taking the example of the mobile handset again, if the handset were to fail several years after purchase, the position is not as clear-cut and a customer may become frustrated when they try to return the handset on the basis of a major failure and their claim is rejected. Because the transaction is not a high value transaction, the customer would be unlikely to obtain legal advice in this situation, resulting in a negative customer experience. On the other hand, the retailer may try to save costs and simply provide a refund when the customer requests it, without properly assessing the nature of the fault with the handset, which is also not ideal. Each time a customer makes a similar claim it needs to be considered on a case-by-case basis, which is also costly.

3.31 Because the situation differs from product to product, and products need to be assessed on a case by case basis, this is yet another reason why it would be useful for industry specific guidelines that suggest what constitutes a 'major' failure for goods in a particular industry because this directly feeds into whether or not a customer can request a refund.

How can the process involving the mandatory notice for warranties against defects (WAD) be improved?

3.32 CA submitted in its response to the Issues Paper in June 2016 that the mandatory text is no longer required. The ACL provisions already ensure that consumers are protected. Section 18 prohibits misleading and deceptive conduct, and section 29(m) prohibits false or misleading representations, including concerning the effect of a warranty. Consumers are now well aware of these rights in relation to products and services.

3.33 CA made the following recommendations regarding the mandatory text:

a. as a first preference, the provisions should be amended to remove the prescribed text that must currently be included in any document that evidences a 'warranty against defects'; or

b. as a second preference, the text itself should be amended to ensure that it is not confusing or lacking in alignment with the other provisions in the ACL that relate to warranties against defects; and

c. 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

d. 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:

   - did not authorise the preparation of the WAD notice; and
   - 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.

3.34 Further, CA submits that the mandatory text requirement imposes an ongoing cost burden on businesses, and in its current form it is not accurate.

3.35 The requirements to include the text in packaging, or online impose an ongoing cost burden on businesses. In addition, the inaccuracies in the mandatory text can create uncertainty when consumers attempt to interpret and rely on that text. This can lead to disagreements, or even disputes. Aside from a negative customer experience that can result from these kinds of interactions, any costs incurred when managing the WAD and its interpretation are likely to be passed on by businesses to consumers.

3.36 As CA noted in its June 2016 submission, there are a number of problems with the prescribed text. These problems could be rectified if the text were revised, as follows:

a. referring not only to 'goods', but also 'services', where applicable;

b. clarifying that the supplier can in fact limit the liability for goods/services not of a kind acquired for personal, domestic or household use; and

c. clarifying the remedies position of manufacturers who offer a warranty against defects.

3.37 Accordingly, compliance with the prescribed text in its current form 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. CA therefore believes that costs associated with the current inaccuracies in the wording would be reduced if the issues with current wording of the mandatory text were rectified.

3.38 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 notices provided by manufacturers to consumers in a retail context.

3.39 In relation to placement of the text, telecommunications service providers are already required to make their standard customer terms available to customers in various forms, including on their website. CA submits that it would be preferable to also include the text in only one spot on a supplier's website that is easily accessible to a consumer.

3.40 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.

3.41 If it is to remain, the mandatory text requirement should be clarified as outlined above. The current text is not suitable in many situations and is even misleading in some respects. As CA submitted in June 2016, at a minimum, the text should be amended to ensure that it is aligned to the provisions in the ACL that relate to warranties against defects. For example, including references to 'services' as well as 'goods'. CA maintains this position in this submission.

Product Safety

In the Interim Report, CAANZ seeks views regarding the current Product Safety regime, asking questions including:

- Would a general safety provision provide a more effective and proportionate response to product safety issues as compared against the current regime?

CA responds on this issue below.

3.42 The Interim Report asks 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.

3.43 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.

3.44 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.

3.45 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.

3.46 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.

3.47 Given ACMA's power to address industry specific product safety issues, CA believes it is unnecessary for the ACL to introduce further regulation in the form of a general prohibition on the supply of unsafe goods.

3.48 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.

3.49 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.

Unfair contract terms

In the Interim Report, CAANZ seeks views regarding Unfair Contract Terms, and asks a range of questions including:

- Should the use of terms previously declared 'unfair' by a court be prohibited?
- Should ACL regulators be enabled to compel evidence from a business to investigate whether a term is unfair?
- Should the list of examples of terms that may be unfair in section 25 of the ACL be expanded?

CA responds on these issues below.

Should the use of terms previously declared 'unfair' by a court be prohibited?

3.50 CA does not believe that it is currently warranted to prohibit the use of terms previously declared unfair by the courts.

3.51 In determining whether a term of a standard form contract is unfair, a court may consider any matter that it thinks relevant, and must take into consideration the contract as a whole. Accordingly, it is clear that the particular circumstances of each contract will impact on whether or not a term of that contract may be unfair, and thus a specific term may be unfair in the context of one contract but not another.

3.52 For example, a term that may cause a significant imbalance in the rights of the contracting parties in one contract may not do so in another contract if that other contract includes a separate reciprocal right that more evenly balances the rights of both contracting parties.

3.53 Therefore, it is not appropriate to look to effectively apply 'blanket prohibitions' on the use of particular types of terms based on assessments made in the context of one particular contract.

Should the list of examples of terms that may be unfair in section 25 of the ACL be expanded?

3.54 Section 25 of the ACL already contains a lengthy non-exhaustive list of examples of terms that may be unfair. These examples are necessarily quite broadly stated, and it is recognised that in many cases those types of terms can equally be fair and reasonable. While it is useful for businesses and consumers to be guided to give particular consideration to particular common types of terms that may be more likely to risk being unfair in many circumstances, the broader this list becomes the more uncertainty it creates and the risk of disproportionate impacts grow.

3.55 Additionally, regarding the further potential examples of unfair contract terms referenced in the Interim Report, several may be considered to overlap with examples in the existing 'grey list', or represent types of contractual terms that are already likely to be prohibited in relevant circumstances by other laws.

3.56 It is also questionable whether other examples are as compelling or likely to be consistently problematic as examples already in the 'grey list', particularly in the context of application of the provisions to relevant B2B contracts. For example, the Interim Report refers to clauses that make a contract the 'entire agreement' between the parties (thereby excluding, for example, prior verbal representations made). In many cases, this type of clause will help maximise certainty for the parties, and will be aligned with the unfair terms regime's interest in promoting contractual transparency.

3.57 There is also a risk that, if suppliers perceive there is a growing level of uncertainty about their ability to enforce a range of contractual terms, some will consider

compensating for this by adjusting the one area that is free from unfair terms scrutiny – namely upfront prices.

Should ACL regulators be enabled to compel evidence from a business to investigate whether a term is unfair?

3.58 As noted above, section 25 of the ACL contains a lengthy non-exhaustive list of examples of terms that may be unfair in the circumstances of a particular contract, and the nature of this area of law means that the notion of "unfairness" will inevitably involve some subjective assessments. Accordingly, there is a very broad scope for potential review of contracts and a real risk that empowering regulators to compel evidence from businesses in the course of such reviews could give rise to disproportionately high compliance costs. It is a duplication of a process that is already appropriately handled by Courts and Tribunals.

3.59 Rather than amending the unfair terms provisions again, CA submits the appropriate focus for this area of law is to continue to be on ensuring productive regulator engagement with businesses to help guide business efforts to comply with the terms. CA notes that this occurred in the lead-up to the recent extension of the unfair terms regime to small business contracts, with the ACCC reporting good cooperation from stakeholders across a range of industries.

3.60 CA does, however, consider that it would be appropriate to reconsider the value threshold that is used to determine which small business contracts are subject to the unfair terms provisions following the recent extension of the unfair terms regime. Specifically, CA considers that the current provisions result in the regime applying to many contracts that cannot truly be considered 'small business contracts', but rather are potentially high value contracts between large businesses. For these contracts, CA considers it is not appropriate for the unfair terms provisions to apply. Instead, the contracting businesses should be expected to undertake their own due diligence before contracting, and the principle of sanctity of contract should be allowed to prevail.

3.61 CA's main concern relates to the use of the concept of 'upfront price' (as defined). This is because many volume driven contracts contain 'upfront prices' which are based on a per unit construct. For these types of contracts, a focus only upon the individual upfront or unit price per good or service will not be reflective of the overall spend or value of the relevant transaction. For example, franchise or dealership arrangements involving small businesses often involve a range of fees, payments and commissions that may only be payable (or conditional upon) events occurring, such as the making of a sale or the ordering of a product. In many instances, there are no fixed payment requirements, or any minimum sales or order requirements. In these cases, there is a real risk that the definition of 'upfront price' means that certain payments, fees and commissions are excluded from the calculation of the thresholds and contracts with an annual value well in excess of the thresholds are captured by the regime.

Unsolicited Consumer Agreements

In the Interim Report, CAANZ seeks views regarding the current ACL provisions relating to unsolicited consumer agreements questions including:

- Should the current balance and breadth of the provisions be maintained?
- Should the cooling-off period be replaced with an opt-in mechanism requiring consumers to confirm the sale within a limited time before an agreement is valid for some or all agreements?
- Should additional rights and protections be introduced for consumers entering into enduring service contracts?

CA responds on these issues below.

Should the current balance and breadth of the provisions be maintained?

3.62 CA considers the current provisions relating to unsolicited consumer agreements are, by and large, working appropriately and provide effective protection to consumers who are a party to unsolicited sales made away from a supplier's business or trade premises. CA is also aligned with the indications in the Interim Report that CAANZ considers that a stronger evidence base would be required to support any significant reframing of the provisions.

3.63 In particular, CA believes that there is insufficient evidence of consumer harm to support some of the more radical proposals raised in submissions to date, such as banning door-knocking and unsolicited telephone calls altogether. CA also notes that some of the concerns stakeholders in the Review have raised about the circumstances in which unsolicited consumer agreements are formed, such as consumers being told by sales representatives that they can sign up for a government funded course, only to receive notification of a substantial VET-FEE-HELP debt at a later date, are capable of being addressed by application of other legislative provisions designed to protect vulnerable consumers – such as the prohibition of unconscionable conduct.

3.64 However, as noted in CA's June 2016 submission, CA considers that there are a handful of specific areas where more limited adjustments to the unsolicited consumer agreement provisions in the ACL would be beneficial. In summary, these are:

a. Suppliers should be permitted (at their discretion) to offer customers the option of receiving goods or services within the 10 day cooling off period, 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. 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).

b. 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. 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.

c. More guidance on (or a definition of) the wording "other than the business or trade premises of the supplier" as used in defining the term 'unsolicited consumer agreement' in section 69(1)(b)(i)) of the ACL should be provided. That guidance or definition should take into account the fact that when a customer visits a professionally operated pop-up **store** 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.

d. A distinction should be drawn between scenarios where: (a) staff of a pop-up store definitively leave the area in and around that pop-up store, and interact with customers; versus (b) interactions which 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.

e. 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.

f. 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. CA believes that consumers in both situations 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. CA does not consider the distinction between the 2 types of agreements is warranted.

Please refer to CA's June 2016 submission for more detail and supporting commentary in relation to the above changes.

Should the cooling-off period be replaced with an opt-in mechanism requiring consumers to confirm the sale within a limited time before an agreement is valid for some or all agreements?

3.65 As noted above, CA considers that, as the current provisions relating to unsolicited consumer agreements are, by and large, working appropriately, a strong evidence base is required to support any significant reframing of the provisions. Moving from an opt-out to an opt-in mechanism is an example of a change that would be very significant, as it would require more from both the consumer and the supplier. A consumer would have to contact the supplier to effectively opt-in, and the supplier would have to adjust its business processes to accommodate opt-in requests coming in at unspecified times.

3.66 Further, as CA noted in comments in section 2 of this submission, consideration should be given to whether such a change risks giving rise to disproportionate or unnecessary costs on business, or inadvertently resulting in adverse consumer experiences. If so, the importance of having particularly strong evidence to support the need for the change grows.

3.67 In this context, CA notes that introducing an opt-in mechanism would have real potential for material adverse impacts for businesses and consumers. For example:

a. Requiring a consumer to opt-in a second time (i.e. following the first acceptance of the service from the unsolicited sale) is burdensome to the consumer and there is a risk that consumers would simply forget to opt-in by the specified date.

b. It would increase administrative costs on businesses, who would need to implement processes to deal with more incoming contacts relating to opt-ins or uncertainty about the next step in the transaction process.

c. Suppliers currently have a definite date on which to supply services or dispatch goods (so as they comply with the specified cooling off period), but the uncertainty of an opt-in mechanism could lead to further delays and uncertainty around these activation/delivery aspects. This would not result in a good experience for consumers.

3.68 Taking into account these factors, CA does not believe that replacing the cooling-off period with an opt-in mechanism would advance consumer interests or is necessary to address any demonstrated consumer harm from the current regulatory approach.

Should additional rights and protections (such as extended cooling off periods) be introduced for consumers entering into enduring service contracts or 'high risk' transactions?

3.69 The Interim Report asks whether additional rights and protections should apply to enduring service contracts. CA does not believe that this is necessary. A case has not been made out in the Interim Report that the cooling off aspect of the unsolicited consumer agreement regime is failing customers who are parties to an enduring service contract.

3.70 The Interim Report suggests that an extended cooling off period would assist customers who did not understand the documentation when signing up or were not aware of the agreement until after their first bill arrived. From CA's perspective, if a customer is not aware of what they have entered into until they have received the first bill, it would seem like the issue lies in disclosure, documentation and communication between the business and customer during the sales process itself. Consumer already have a range of rights and avenues of redress if this is the result of misleading or other mis-selling practices by suppliers.

3.71 Regarding application of extending cooling off periods, it is noted that, in the experience of CA members, customer complaints relating to unsolicited consumer agreements in the telecommunications sector are weighted firmly on the side of frustration due to delay in ability to access goods or services, due to application of the cooling off period restrictions on supply, rather than coercion or pressure sales. Accordingly, CA is strongly opposed to this idea.

Penalties and Remedies

In the Interim Report, CAANZ seeks views regarding the current penalties and remedies regime, asking questions including:

- Is the current financial penalties regime an effective deterrent for businesses?
- Are there other types of non-punitive orders which could be effective?

CA responds on these issues below.

Is the current financial penalties regime an effective deterrent for businesses?

3.72 CA considers that the administration and enforcement of the ACL is generally effective. CA also considers that the scope of penalties and other remedies that can be imposed by courts 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.

3.73 The Interim Report asks whether maximum financial penalties are sufficient to deter highly profitable misconduct, or whether alternatively, they could be more closely aligned with penalty regimes of other laws.

3.74 CA is strongly opposed to an increase in the maximum financial penalties and considers that the options proposed do not promote proportionate, risk-based enforcement. Further, there is no evidence that an increase to the maximum penalty is the best way to deter improper conduct. In its view, the enforcement regime must be considered on a holistic basis to understand the most appropriate deterrents.

3.75 The Interim Report states that, for a penalty to effectively deter future breaches of the ACL, it must adequately reflect the nature and gravity of the breach and be sufficient to not be considered a 'cost of doing business'. CA thinks it is unreasonable to imply that a breach of the ACL is simply a 'cost of doing business'.

3.76 CA members consider a breach of the ACL a very serious offence. Over and above the amount of any fine, there are significant consequences and risks to a company

brand and reputation for conduct in breach of the ACL. A focus on the financial penalty fails to acknowledge the reputational damage which may be caused by contraventions of the ACL. Reputational damage – as caused by the negative publicity associated with a breach – is difficult to quantify. However, for large companies it is likely to be significant.

3.77 Further, there is also the personal risk for engaging in deliberate and deceitful conduct. CA notes that a court may disqualify a director from managing corporations for a contravention of the ACL and there is precedent for this action.

3.78 As previously stated in this submission, CA members believe the ACL is continuing to operate as an effective tool in support of consumer policy in Australia. CA believes that the main improvements that could be made are clarifying areas of ambiguity, as this would help businesses with their efforts to ensure compliance. For now, CA believes this should be the focus rather than increasing penalties.

Are various types of non-punitive orders effective?

3.79 CA notes that the Interim Report states that "some stakeholders submitted that where a business is required to carry out a community service order, but it is not qualified or trusted to give effect to that order themselves, they should be allowed or required to hire a third party to give effect to that order. Such a requirement would likely require the business in breach to pay for the third party to provide the community service".

3.80 A court can impose a non-punitive order such as community service, disclose certain information, publish an advertisement, and implement a compliance or education and training program.

3.81 The Interim Report implies a level of mistrust of a business' intentions or ability to carry out non-punitive orders. CA considers that the onus must be on a business to ensure that a non-punitive court-imposed order is carried out. However, an order should not prescribe the way in which an order must be carried out.

3.82 If a business is unqualified to fulfil the terms of the order, then the onus is on that business to determine how it will meet its obligations.

3.83 In its June 2016 submission, CA submitted that refinements to the current infringement notice process could be made. CA believes it is particularly important that consideration be given to measures that would help ensure there is more rigour and transparency around the issuance of infringement notices in the future. That would help ensure this regulatory tool is applied in a proportionate manner.

Enhancing transparency in online shopping

In the Interim Report, CAANZ seeks views regarding purchases made online, asking questions including:

- Are current measures sufficient to ensure price transparency in online shopping?
- Should pre-selected options be prohibited?
- Alternatively, should any associated fees or charges be required to be included in the upfront price?

CA responds on these issues below.

Are current measures sufficient to ensure price transparency in online shopping?

3.84 In relation to this section of the Interim Report, CA considers that existing regulations, if applied, are appropriate to provide a sufficient level of transparency for consumers.

3.85 Most notably, the existing consumer protection provisions in the ACL (such as prohibitions against false and misleading representations) may be applied to good

effect to address the types of 'digital economy' related issues raised in the Interim Report.

3.86 CA believes that it is unnecessary to seek to particularise each and every form of conduct or representation, or to address particular technology-related scenarios, where those representations or that conduct would be adequately addressed by the existing prohibitions under the ACL, notably as to the making of false or misleading representations, as well as the more specific, but nevertheless expansive, prohibitions in the ACL in respect of particular categories of representation or conduct.

3.87 In addition to the ACL, the telecommunications industry is already subject to a range of other regulatory instruments that incorporate a significant number of consumer protection-related information provisions in relation to the manner in which it sells and supplies telecommunications products to Consumers. Those protections apply to online interactions, as well as to in store or phone interactions.

3.88 In particular, the industry is subject to the Telecommunications Consumer Protection Code (TCP Code), which governs the advertising and sale of telecommunications products and services to consumers.

3.89 The TCP Code sets out very clear and prescriptive requirements which have the effect of mandating transparency around the advertising and sale of such products. It requires the inclusion in advertising of the minimum quantifiable price; if that full minimum quantifiable price is made up of various components, the TCP Code would require Telcos to call out what those components are). These obligations (amongst others set out in the TCP Code) seek to ensure price transparency, regardless of medium of advertising or sale.

3.90 The TCP Code also requires telecommunications providers to create Critical Information Summaries for the services that they offer to consumers. Those Summaries must state "the inclusions, exclusions and any important conditions, limitations, restrictions or qualifications for that offer, where applicable." These summaries must be made readily accessible to customers, and again, regardless of the sales medium the consumer is interacting with, and must be provided to customers prior to the sale in all but a limited range of instances, arising outside of an online sales context.

Should pre-selected options be prohibited?

3.91 The Interim Report proposes two options aimed at further enhancing transparency in online shopping, the first being an outright prohibition on using pre-selected options during a booking or payment process that results in consumers incurring additional fees at the final booking or payment stage.

3.92 CA believes that a prohibition on the use of pre-selected options is unnecessary, and could potentially have a negative impact on consumers, particularly where the pre-selected options (such as ancillary bolt-ons or add-ons) are in the consumer benefit. For example, an option/add-on/bolt-on may be pre-selected as part of the overall purchase because it gives the consumer the opportunity to purchase it at a more favourable price, vs purchasing it as a standalone product.

3.93 Without the ability to pre-select options, it would then be necessary to narrow consumer choice and force consumers to adopt a pre-selected bundle, or to increase the number of selections that a consumer was forced to make in a particular transaction by requiring that they uniquely select every option, even in places where the inclusion of an option was likely to be frequently, but not universally adopted. For example, a provider of a broadband service may wish to allow a customer to choose from a range of modems, or indeed to choose to bring their own modem. In that instance, it may wish to offer customers the pre-selection of a mid-range model as the default choice likely to be adopted by the majority of customers, whilst nevertheless allowing them the freedom to choose a more expensive option, or to choose to not get a modem.

3.94 In that instance, the existing prohibitions on false or misleading representations would guide how the product and pricing was depicted in a manner which could ensure transparency for the customer; the supplier would, for instance, need to be mindful to ensure that:

a. they clearly represented that a modem was required to use the service, especially if they were to indicate a price that did not include cost of a modem;

b. they did not represent the price of the service without the default-selected modem option was the price inclusive of that modem; or

c. the particular modem was a mandatory part of the service, where the customer had the option of separately sourcing a modem from another provider.

3.95 All of the above would be properly regulated by existing provisions in the ACL, without requiring bespoke regulation or prohibition of pre-selected options.

3.96 CA considers that the risk of introducing specific new prohibitions in this area is that they may lead to even more persistent and rigid regulation in a sector of Australian commerce that is innovative and evolving. This could introduce unintended costs and complexity when, for example, businesses want to offer the same goods and/or services or combinations of goods and/or services in different channels that suddenly have different regulatory requirements.

Alternatively, should any associated fees or charges be required to be included in the upfront price?

3.97 As an alternative to a prohibition on the use of pre-selected options, the Interim Report proposes requiring that any additional fees or charges associated with pre-selected options be included in the upfront price.

3.98 As noted, CA considers that the provisions of the ACL, including its prohibitions in the ACL on certain representations and conduct, are adequate to ensure transparency of pricing in an online shopping context.

3.99 However, if the view is formed that the existing ACL provisions are not sufficient, CA submits any measures over and above the existing framework of the ACL should be industry specific, and apply only to those industries whereby consumer benefit would be enhanced by additional measures. CA believes that given the additional obligations imposed on telecommunication providers pursuant to the TCP Code which prevent suppliers from staying silent on any additional fees (whether those fees relate to pre-selected options, ancillary bolt-ons or add-ons, compulsory hardware costs, installation costs or delivery fees), additional measures are not necessary for consumers of telecommunications products.

3.100 Further, if additional measures are to be imposed, CA submits that measures requiring additional fees and charges associated with pre-selected options be included in the upfront price would provide further protection for consumers purchasing certain sorts of products or services, and that this approach would be preferable over a blanket prohibition on the pre-selection of those options, which may have a detrimental impact on consumers.

3.101 CA believes that a requirement to include in a displayed "upfront price" may inadvertently result in an outcome which is inconsistent with the broader objectives of the ACL, by creating a perception that the pre-selected – and hence priced in – inclusions are a necessary, not optional, part of the product or service, and that the price with those optional inclusions that is displayed as the "upfront price" is the minimum quantifiable price for the service, and not merely the minimum quantifiable price for the pre-selected combination of options.

4. Recap of key recommendations CA made in its June 2016 submission and which relate to areas that are not a significant focus of the Interim Report

4.1. CA notes that the additional issues it submitted in its June 2016 submission, but that are not a key focus of the Interim Report, warrant consideration. The recommendations set out below are significant issues for CA members in this respect and CA requests further consideration be given to them by CAANZ.

Component Pricing

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.

4.2. 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.

4.3. 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.

4.4. 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.

4.5. 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.

4.6. 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.

4.7. 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.

Administration and Enforcement of the ACL – Infringement notices

CA considers that 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.

4.8. 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.

4.9. According to the Explanatory Memorandum for the legislation, 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... ".

4.10. Despite this, the penalty risk for companies in respect of conduct contravening the ACL is significant.

4.11. 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 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.

4.12. 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.

4.13. 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.

4.14. 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.

Published by:
COMMUNICATIONS
ALLIANCE LTD

Level 12
75 Miller Street
North Sydney
NSW 2060 Australia

Correspondence
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
E info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507