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Treasury/Consumer Affairs Australia and New Zealand (CAANZ) Consultation RIS

Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework

COMMUNICATIONS ALLIANCE SUBMISSION

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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.

INTRODUCTION

Communications Alliance (CA) welcomes the opportunity to provide this submission in response to the Consultation Regulatory Impact Statement (RIS) on *Clarification, simplification and modernisation of the consumer guarantee framework.*

CA welcomed the review of the Australian Consumer Law (ACL) to ensure that consumer interests continue to be protected. As explained in our June 2016 submission to that process, CA considers that while it is important to review legislative instruments from time to time, the ACL on the whole remains fit for purpose.

Current protections

While the ACL is a key instrument for consumer protection in Australia, it does not stand alone. Many industries have industry specific regulation which operate alongside more general regulation such as the ACL. The telecommunications industry is one of those.

Industry specific programs and regulation utilise specialist industry information more efficiently and address consumer protection rights in a tailored way. The telecommunications industry in Australia is governed by a considerable number of sector specific instruments that already incorporate consumer protection measures e.g. the Telecommunications Consumer Protection (TCP) Code, the Telecommunications (Consumer Protection and Service Standards Act) 1999, Part 6 of the Telecommunications Act 1997 and others.

ACL regulators also have a range of civil, administrative and criminal enforcement remedies at their disposal, including in particular public warnings for conduct of public interest or concern.

Collectively, these instruments and the ACL provide customers with a wide range of protections and rights.

However, multiple layers of regulation also give rise to high compliance costs, impacting customer pricing and attempts to innovate and streamline in order to improve service and offerings. Accordingly, CA considers it vital that customer protection regulation be streamlined and clear of inconsistencies, avoiding unnecessary 'red tape.' Given the breadth and scope of general and sector-specific instruments already in place, Industry views that it is important to thoroughly analyse any suggested additions to determine if there are significant problems to be addressed, if the proposed changes actively address those problems in the most efficient and streamlined way possible, and to identify any unintended consequences – a common occurrence in a complex regulatory and technical environment.

Our position

With these considerations in mind, CA views that the parts of the existing consumer guarantee framework being considered by this Consultation RIS are appropriately protecting consumers, and that the status quo should be retained. Any potential for consumer law improvements that may have been identified during this process would be better pursued through more efficient means such as industry specific guidelines (as we elaborate on in this submission).

Where consumers have incomplete information, regulation is often seen as the obvious response for imperfections in the market. However, we respectfully submit that the value of guidelines, education and awareness campaigns can be substantial, as is direct and continuous dialogue between the industry and the public for the provision and dissemination of information. We strongly believe that these tools in combination with the public warning

tools at the regulator's disposal are the appropriate tools for increasing consumer awareness of their rights and penetrate more effectively than changes to the law.

Additionally, redress through the courts and alternative dispute resolution processes has simplified. For example, the overriding purpose of the Civil Procedure Act in NSW is to provide a 'just, quick and cheap' resolution for the parties. Parties are now encouraged to resolve disputes themselves or attend mediation before commencing proceedings. These changes help to quash outdated views about the Court system and reduce the need to broaden consumer protection laws.

Chapter 1: Definition of "consumer"

Increasing the threshold in the definition of "consumer" from $40,000 to $100,000

Our Position

We support maintaining the status quo.

The purpose of the ACL is to improve consumer wellbeing through consumer empowerment and protection, recognising that there can be an imbalance in power between consumers and businesses in the market place. These protections help to even out that imbalance and provide consumers with certain rights that cannot be contracted out of.

CA understands a key driver behind the proposed change to the definition of "consumer" is the evolution in costs of goods since the original threshold was set. However, it is worth noting that the average price of many consumer goods (such as many consumer electronics) has decreased since the ACL was introduced.

Additionally, there has been an evolution in consumer empowerment. Any previous imbalance in the information accessibility by suppliers and their consumers has been altered by the increased access to information such as product and price comparison data, and consumer reviews, readily available through mediums like the internet. With purchasers now better positioned than even to make informed decisions about goods and services, and to readily compare the terms offered by different suppliers, it is arguable that a common justification for the need for high levels of regulatory intervention in 'everyday' transactions has been removed. Further, the courts system and other forms of redress have become more streamlined and easier to access for consumers.

All of this calls into question whether there is a pressing need for change. To the extent such a need can be identified, the concern is that an increase of the type proposed in the RIS would have costs that far outweigh any benefit that would be obtained.

If the monetary threshold of $40,000 was increased to $100,000 in the ACL definition of "consumer", it will capture a wider range of large business to business transactions. Historically such transactions have not been captured by the ACL, and for good reason. Transactions of this nature will usually involve parties with a greater symmetry in their resources and bargaining power, who are able to negotiate their respective rights and obligations to achieve the right balance of terms on price and supply. Few of the reasons that justify regulatory intervention in transactions relating to individual consumers apply to transactions between large businesses. Indeed, the change would complicate and potentially add costs to the transaction process.

The Consultation RIS suggests that many businesses require the same protection as consumers and provides case studies relating to truck owner operators, agricultural excavators and a water tank. Whilst some arguments can be made in support of this, which sector-specific regulation might help address, it is vital that the impact of extending the scope of the ACL more generally to cover transactions of this nature does not outweigh the costs in terms of the uncertainties and implementation costs (in turn having the potential to impact customer pricing) such changes would create in many important sectors that are already highly regulated.

In the examples on below we illustrate some of these issues as they relate to the telecommunications and technology sectors.

Examples

- The current definition of a "consumer" includes mum and dad buying a new mobile phone from their local technology store. The proposed definition of "consumer" might include a business acquiring business mobile plans for employees. As long as the price of the mobile plans does not exceed the $100k threshold, the business can argue that they fall within the definition of "consumer" and utilise the ACL

protections, including the consumer guarantees. It is a reasonable expectation that a business undertaking purchases of this scale in a competitive marketplace like the telecommunication sector should be incentivised, and in a position, to negotiate terms and conditions of supply and in so doing prioritise what is most important to them when it comes to price and supply clauses, rather than the transaction automatically being subject to a regulatory regime initially designed to protect smaller-scale consumers and thus placing wide-ranging obligations on the supplier that will necessarily curtain pricing flexibility. Transactions of this nature will already be impacted by sector-specific legislation in many cases, and further regulatory intervention has the potential to further complicate and heighten inefficiencies in the transaction process.

- This principle is also illustrated by the example of a technology store purchasing laptops for their employees directly from a laptop distributor. In this example case, the terms of a bulk purchase may have already been negotiated, as that store purchases laptops for resale on an ongoing basis from the distributor. However, in the specific case of this transaction, they were not intended for resale, and thus if the value is under $100k, the store can argue that they fall within the definition of "consumer" for this purchase.
  The distributor and store businesses are already familiar with the terms of their agreement and the quality of the goods sold, as they negotiated the terms under 'laissez faire' commercial transaction principles. The ACL changes might actually confuse and complicate the law for parties who are unfamiliar with it and interfere with the agreements businesses have already made, and their understanding of the law. We also respectfully submit that it is not the overriding purpose of the ACL to protect large business transactions and it is not within community expectation for the ACL to encompass these scenarios. Businesses should be allowed to continue to act under the terms of their negotiated agreements and laissez faire principles.

Impacts of proposed change

The proposed change would have significant cost and operational impacts. Below we have offered insight into how it would impact telecommunications Retail Service Providers (RSPs). This would of course change depending on the size and operations of the RSP.

Additionally, RSPs are only one section of our membership – the proposed changes would impact across our membership, with differing costs and operational changes required to adapt.

Examples of the impact provided from our RSP members are as follows:

- Updating of systems and processes to ensure that the sale of goods or services reflect the new threshold amount;
- Training of all staff to educate them in respect of the wider protection coverage with the new threshold amount:
  - this includes providing training to store staff, digital, device care centres and call centres;
  - other business units would also need to undertake further training and spend further resources, as large business transactions would potentially be captured by the increased monetary threshold. Business centre staff, business call centre staff and potentially other business units covering enterprise or government agreements would need to be familiar with such amendments;
  - the costs and resources of such training would be quite substantial. At point 44 the costs are described as 'minimal. We respectfully disagree; the costs of

training and resources would be considerable for some of our members. It is difficult to quantify the cost but it certainly would not be minimal.

- Other members of the company such as lawyers, procurement and commercial teams would need to spend considerable resources reviewing, renegotiating, advising on and overhauling commercial agreements between businesses to account for such amendments and to review commercial transactions to determine whether the ACL is applicable to them;

The costs of complying with such changes will be extensive, and may be particularly onerous for some businesses. In theory, the cost of complying with such changes may be so high to some businesses that it may severely reduce their ability to offer competitive pricing, or limit their ability to continue operating. Competition in the market place may shift as larger scale businesses monopolise the market, as they are more readily able to meet the costs of compliance.

Other anticipated impacts are as follows:

- Insurance premiums go up as a result of a wider range of products protected by the ACL;
- Cause and effect scenario - manufacturers and businesses:
    - will likely seek to renegotiate contractual terms to offset the cost of such ACL claims, particularly given the cost of such claims will become more expensive and burdensome.
    - may increase the retail price of such goods and services, meaning consumers will be paying higher prices for the same goods and services.

      It is also possible that businesses will increase the price of goods and services to a price above the threshold to avoid being captured by the ACL.
- The impact on other avenues of redress such as the Telecommunications Industry Ombudsman (TIO), tribunals, commercial mediation centres and the courts also needs to be considered. For example, currently state tribunals such as NCAT have authority to hear business disputes. Will these changes mean businesses will refer to the TIO instead?

These changes may also impact the balance of power, authority, resources and funding for these bodies, and it could result in longer wait times for individual consumers seeking redress, as complex business disputes infiltrate these channels.

Conclusion

At point 33 of the Consultation RIS, it says some consumers have 'been unjustifiably excluded from the regime over time'. With respect, we see no evidence of this in our industry and respectfully seek to keep the status quo or at least maintain it for our industry.

If there are concerns about specific industries, we would emphasise the benefit of industry specific actions. For example, if a concern as identified with transactions relating to machinery, one option may be to expressly state that 'automotive or machinery' transactions of up to $100k are included in the definition. Therefore transactions in other industries that are not in need of amending, and not the intention of the Treasury's proposed changes (such as the communications and industry technology industry, which as mentioned above is already heavily regulated), will not be impacted and unintended consequences will be limited.

Chapter 2: Clarifying the consumer guarantees remedies

1. Failure within a short period of time and 2. Multiple failures

Our Position

We support maintaining the status quo in relation to both proposals set out in Chapter 2: Clarifying the consumer guarantees remedies.

Communications Alliance members are concerned with the proposals and do not support amending the ACL to expand the definition of major failure to include the 2 scenarios set out in the Consultation RIS.

This Chapter says that the purpose of the proposed changes are to:

a) better clarify the existing definition of a major failure; and

b) help consumers better understand their rights.

These changes do not provide a definitive, exhaustive, expressed definition of a major failure or when consumers are entitled to remedies under the ACL. It provides examples of what could constitute a major failure but is by no means a clear, finite and expressed definition. We query whether this is the right approach.

There is generally a lack of clarity around:

- key ACL terms relating to consumer guarantees such as what is a "major failure", or what constitutes "acceptable quality" and "reasonable" durability; and
- the appropriate length of a time a good should be expected to last, which will be different for different categories of goods e.g. $1,000 mobile handset vs $25,000 car.

The lack of guidance on these issues creates complexity not only for consumers but businesses who must make their own assessment on these matters in the context of the goods and services they offer or purchase.

The proposals also change the meaning of what a major failure can be, in a substantive way, as it is allowing non-major failures / minor faults to be captured as a major failure, yet there is no guidance around what a minor fault may be.

It is suggested in this Chapter that consumers are not aware of their rights. The telecommunications industry provides a great deal of support and guidance for consumers regarding their rights. Each RSP develops the most appropriate way to support and inform their customers, but the range of support provided commonly includes all or most of the following:

- providing ACL training to staff, together with scripting where required, in order for them to be able to provide high standards of care to customers;
- signs in relation to consumer guarantee rights displayed in our stores;
- dedicated customer-facing ACL team to manage device failures;
- ACL consumer guarantees webpage;
- a simple, customer-friendly device failure webform;
- detailed policies and process documents regarding consumer guarantee rights.

The ACCC has also placed a great deal of focus on the telecommunications industry over the years, so providers have had extensive guidance and opportunities to develop policies and processes which are compliant with the ACL.

Communications Alliance acknowledges that this may not be the case in all industries, but we respectfully believe we do not need additional regulation or change and that there are

more appropriate methods to address industry-specific concerns and to educate and support consumers.

Alternative Solutions

If consumers need broader education and awareness, then it might be more productive and effective to instead better inform the public of their rights with industry specific guidelines, social media, marketing campaigns, etc. to achieve a better result.

Products, and the variance in expectations, differ greatly between industries. We respectfully submit that detailed industry guidelines are a better option, explaining what constitutes a major or non-major failure within the relevant industry, and when consumer guarantee rights apply. Useful practical examples included in the guidelines would be a more appropriate solution.

Whilst the ACCC has previously provided guidelines, they are not industry specific, so the examples are not always relevant. Those guidelines could be updated with more industry specific sections and examples. We believe this would be a more effective and cost-efficient way of achieving some of the aforementioned key aims of the proposed changes in industries involving high volumes of relevant transactions.

Failure within a short period of time

Under Option 2, if a consumer is entitled to a refund or replacement without having to demonstrate a major failure within a short period of time (e.g. 30 days), it would impact in the following ways:

- increase the number of refunds and replacements, including in those scenarios where a refund or replacement would not be the appropriate solution (see example below);
- consumers would discard repairable goods with non-major failures / minor faults which would:
    - impact the environment; and
    - result in a considerable increase in costs for suppliers and manufacturers to produce replacement goods or provide refunds.

Under Option 3, where a different time period is specified for high value goods based on a monetary threshold, we believe this introduces too many inconsistencies and will result in confusion and non-compliance.

We support maintaining status quo, as this means businesses and traders avoid the considerable and onerous increase in resources and costs due to:

- increased production of replacement goods or refunds;
- updating commercial arrangements with third parties and manufacturers; and
- updating internal policies and processes.

The status quo also minimises waste and environmental impact, and by keeping costs down, costs of goods for consumers remains low.

Example

Under the suggested proposals (Option 2 and/or Option 3), an easily resolvable software problem could result in the unnecessary and inappropriate remedy of a replacement or refund of a device. A range of circumstances – for example, a consumer could upload inappropriate software onto their device, fail to update the software, or the software supplied could have an unknown bug – could cause a non-major failure/minor fault/minor issue, with the result being, that if the problem occurred within the specified period of time

under the ACL, the customer would be able to seek a refund or new replacement without needing to prove a major failure.

This remedy would not likely be the most appropriate or justified in the circumstances, nor would it be what the community would expect as a remedy when a simple assessment of the device and software upgrade or installation would resolve the failure. In many cases the software upgrade or installation could be done remotely. A refund or brand-new replacement device when a software upgrade could suffice would be excessive and wasteful.

Impacts of proposed change

Impact on the business

RSP members of Communications Alliance who sell devices have outlined potential impacts on their businesses, including the following:

- A need to invest in **updating systems and processes, including IT systems, policies, and documentation,** to ensure that they recognise when a consumer is entitled to their choice of remedy. For example, systems would need to be updated to the specified period of time from the date of purchase to entitle the consumer to a refund or replacement; the costs of doing so would be significant across the range of customer service and information services used, and changing documentation for larger providers is an extremely costly and time intensive process;
- **Training of all staff** to educate them about the new law and adjusting customer service practices; this extends to store staff, digital and call centres. This would also require review and quality control to ensure consistent messaging across all customer touch points. The costs and resources of such training would be quite substantial; and
- Product teams may end up spending unnecessary **time and resources reviewing products** before launch to make them "fail proof" beyond the extent expected by the community.

It is important to note that the cost of implementing the necessary changes for compliance may be too high for smaller providers, or if providers adapt they may then be unable to meet the greater costs of providing replacements and refunds, impacting their competitiveness and ability to operate in particular product markets, or forcing them to downsize or ultimately become insolvent.

Our members consider that manufacturers and businesses will likely seek to renegotiate contractual terms to offset the cost of such increased ACL claims, particularly given the frequency of claims for refunds and replacement devices will increase substantially and become more costly and burdensome. We also note that some manufacturers reimburse businesses when an ACL claim is processed, in these cases not only will the RSPs be impacted, but also manufacturers.

These changes would likely ultimately increase the retail price of goods and services, as businesses may need to pass on the increase in expenditure to continue to operate, meaning consumers will be paying higher prices for the same goods and services.

The consumer will be worse off financially under these proposed changes. The price of goods and services in Australia is already relatively high so changes such as this may not be appreciated by the community, as it conflicts with other important aspects of a sales transaction that the consumer community values, such as keeping the price of goods competitive.

Time impact

CA members disagree that less time will be spent determining whether the consumer is entitled to a refund. The Consultation RIS says that the retailer would have no obligation to provide a refund unless there has been a failure to meet the guarantees. However, goods will still need to go through the same return process, likely being sent to off-site service and

technology service centres for assessment in order to determine whether they are faulty, regardless of whether the goods have a major or non-major fault. Therefore this would not reduce the time spent determining whether the consumer is entitled to a refund.

Environmental impact

These amendments may not reflect community expectation and sustainable living values.

If the law is amended, there is a likely increase in return of goods and increased manufacturing of replacement goods. There are also costs associated with the increase in waste, and this will have a significant impact on the environment with increased energy consumption, resources, pollution and carbon footprint.

Consumers would increasingly choose to discard often repairable goods in favour of new replacements or request refunds so they can purchase other goods.

Increase in fraud occurring

A specified period of time may increase the risk of abuse, fraudulent activity and gaming by consumers. If rejecting goods for a refund is made easier, consumers may look to use the goods and then speculatively request a refund. Potentially, this could include consumers seeking a refund on a change of mind basis, rather than the good not being of acceptable quality.

Proposal

As outlined previously, a proportionate solution to address the confusion and uncertainty that lies with determining whether a major failure has occurred could include the following:

- Practical guidelines for the benefit of both consumers and suppliers, as at the moment there is limited guidance;
- Increased and improved consumer awareness and education;
- Greater clarity and certainty of provisions;
- Industry specific guidelines - for example, the ACCC has committed to providing specific guidance on criteria for determining a major failure in relation to new car defects and failures. This is the right approach in resolving the ambiguity around "major failures" in appropriate context (industry specific).

  A similar guide for sectors such as the telecommunications industry would be beneficial, with a detailed inquiry taking place to 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. This could then be assessed and where appropriate endorsed by a regulator such as the ACCC.

Multiple Failures

CA members agree that clarification would be beneficial in understanding what constitutes a major failure vs a non-major failure. However, we do not feel the proposals in the RIS are the best way to provide clarity.

Resolving this issue consumers and businesses sometimes face (determining what constitutes a major failure) by proposing to make multiple minor failures amount to a major failure is problematic. It will be difficult to know when there have been multiple minor failures that amount to a major failure, particularly if a customer goes to the manufacturer for a remedy in the first instance and then the seller in the second instance. This will pose complications and potentially be overwhelming as businesses try to communicate with the various stakeholders (consumers, manufacturers) on this level. Under this example, a seller may potentially be in breach of the ACL under these proposed changes without knowing, as they have no access to the manufacturer's systems and previous fault records.

The principles-based nature of the consumer guarantees provision is intended to take into account all of the relevant circumstances, with the basic threshold test for a major failure being "whether a reasonable consumer would not have purchased the goods had they known the nature and extent of the failure at the outset".

What would be helpful for both consumers and businesses here, is clarification, with examples and guidance of where a supplier has failed to comply with a consumer guarantee i.e. the nature and extent of a failure that constitutes a major failure, and examples of a minor failure.

CA recognises that there are ACCC Consumer Guarantee Guidelines for Businesses and Lawyers, as well as ACCC Consumer Guarantee Guidelines for Consumers, and detailed information on the ACCC website that inform us about the law and consumer rights in this area.

The current information, while helpful, doesn't provide enough industry specific examples in order to fully understand the definitions of major and minor failure. A possible example of a solution to this concern can be found in the 'proposal' section below, whereby we provide industry specific examples. We do not view that amending the law will resolve the problem – and it will in fact drive up compliance costs - but we would welcome industry specific guidelines.

Impacts of proposed change

The impacts and costs would be similar to the above section on failure within a short period of time, as making any changes in compliance and operations is expensive and complex. We have re-emphasised some of the costs below, but this does not necessarily capture all required changes and impacts.

RSP members of Communications Alliance who sell devices would need to undertake the following steps to comply with the proposed change:

- Invest in updating systems and processes to ensure that they recognise that multiple non-major failures, where appropriate, equate to a major failure:
    - Option 2: It is unclear how systems would be adjusted under option 2 - to recognise that a major failure has occurred on the basis of multiple non-major failures, particularly where there is no numerical threshold; if left to businesses and consumers to determine the number of non-major failures required in order to amount to a major failure, this would result in greater uncertainty for both businesses and consumers.
    - Option 3: If a number was set as proposed under option 3, this threshold test may not be appropriate to apply across all industries, product types and

monetary values. Whether multiple non-major failures can collectively be considered to amount to a major failure would depend on the facts of each case.

- Training of all staff to educate them in respect of learning the new law and adjusting customer service practices; this extends to store staff, digital, device care centres, and call centres.

The costs and resources for both updating systems and processes and training would be quite substantial. It is important to note that if the cost of implementing the necessary changes for compliance may be too high for smaller providers, or if the providers adapt they may then be unable to meet the greater costs of providing replacements and refunds, impacting their competitiveness and ability to operate in particular product markets.

Manufacturers and businesses will likely seek to renegotiate contractual terms to offset the cost of such increased ACL claims, particularly given the frequency of claims for refunds and replacement devices will increase and become more costly and burdensome. Some retailers may need to increase the retail price of such goods and services to pass on the increase in expenditure, meaning consumers will be paying higher prices for the same goods and services.

Time and environmental impact

Similar to the above line of questioning in relation to the proposed changes reducing time needed for a consumer to receive an appropriate resolution, we disagree that less time will be spent determining whether the consumer is entitled to a refund. Goods will still need to go through the same return process, including possibly being sent for assessment in order to determine whether there is a fault (regardless of whether it is major or minor).

The increase in returned goods – and thus increased manufacturing and waste – will have a negative environmental impact as well.

Increase in fraud occurring

By amending the law to express that multiple failures equate to a major failure, this may increase the risk of abuse, fraudulent activity and gaming by consumers. If rejecting goods for a refund is made easier, consumers may look to use the goods and then speculatively request a refund. Opportunists could fraudulently allege their device has a minor fault on multiple occasions in order to achieve major failure status and seek a refund.

Without any further clarity around what constitutes a minor failure, businesses will be cautious and provide a refund or brand-new device to replace what could be a perfectly functional device. Potentially, this could also include consumers seeking a refund on a change of mind basis, rather than the good not being of acceptable quality.

Proposal

A table setting out industry specific examples and a ledger for added guidance might be a better solution. For example (note this is only a draft example and has not been fully endorsed by all Communications Alliance members):

Device type	Defect	Major failure, Minor failure or Consumer damaged*?	Comments
Mobile handset or tablet device	Liquid ingress*.	Consumer Damaged.	It is common in our industry for handheld devices to come into contact with water and cause damage. Examples include leaving a device in a steamy bathroom, a baby slobbering on the device or spilling liquid on the speaker.
Mobile handset or tablet device	DOA*. Device won't start-up.	Major failure*.	In this instance, it is considered a major failure because the consumer would not have purchased the device had they known about the manufacturer fault. The consumer is entitled to choose their remedy i.e. a repair, replacement or a refund.
Mobile handset or tablet device	Software outdated and needs updating.	Minor failure*	It is considered a minor failure as the device can be repaired by installing updated software. The business will provide an appropriate remedy such as a repair.
Mobile handset or tablet device	DOA and Liquid Ingress	Major failure.	Where the device has both a manufacturers fault and consumer damage, a consumer guarantee right still applies.

** Consumer damaged means: damage to the device caused by the consumer or as a result of the consumer's actions. It is not a major or minor failure covered by consumer guarantees.*

** Liquid ingress means: damage caused by water to the device.*

** DOA means: the device was dead on arrival and would not start up. It is a manufacturer fault and not the fault of a consumer.*

** Major failure: in this instance, it is considered a major failure because the consumer would not have purchased the device had they known about the fault. The consumer is entitled to choose their remedy ie. a repair, replacement or a refund.*

With respect, the changes proposed in the Consultation RIS don't provide an exhaustive, all-inclusive complete definition of what a major or minor failure is – as this is practically impossible, and so would not resolve the issue consumers and businesses are facing about when consumers are entitled to reject goods and choose a remedy. In the absence of a complete and clear definition, clarity as to what constitutes a major failure and minor failure would be more appropriately provided through guidelines and industry specific examples, similar to the draft example above. This would improve consumer confidence and understanding.

Chapter 3: Enhanced Disclosure for Extended Warranties

Our Position

We support maintaining the status quo.

CA members do not see an inherent problem when it comes to the current ability of consumers to make informed decisions about extended warranties. The Consultation RIS states that 'some' consumers experience difficulties, but does not expand on any data or research. In the absence of quantitative data, we do not support changing the existing regulatory regime for extended warranties. This will increase the compliance burdens on businesses, where there is a lack of evidence to support the need for such proposed changes.

We disagree with the comments in the Consultation RIS relating issues like time constraints at the time of purchase, pressures to make a quick decision in the sales environment, or a lack of information (Point 11 of Chapter 3). In the vast majority of cases, we believe issues relating to the speed of transactions are due to consumers preferring to transact in as fast and simple way, and we believe this is an important point to consider in the context of proposals to add new disclosure obligations which may only frustrate consumers in terms of adding time and more detail to be covered in the transaction process. In an environment where consumer guarantee rights provide the right underlying safeguards for consumers, we believe the costs (to businesses and consumers) of making changes in the nature of the options set out in the RIS outweigh any benefit that could be derived overall.

Retail Service Providers already provide a great deal of support and guidance for consumers regarding their rights. CA members have included the following as examples:

- Training to staff, in order for them to be able to provide high standards of care to customers;
- Caution in sales processes and scripting to make sure consumers understand what they are buying, and in particular when they are buying an extended warranty product, that they are informed of the distinction to their existing consumer rights under the ACL;
- Signs in relation to consumer guarantee rights displayed in stores; and
- Detailed policies and process documents regarding consumer guarantee rights.

At point 14 of Chapter 3 of the Consultation RIS, it says "*where consumers are not aware of their statutory rights under the ACL, including the consumer guarantees, they may be more inclined to consider that they should purchase an extended warranty, and may be more susceptible to purchasing an extended warranty, that offers no real benefit above the ACL.*" We respectfully submit that if the concern is the lack of accessible information regarding the ACL, we see the value of education and awareness campaigns to be the better approach than making changes to the law in relation to extended warranties.

Although this RIS does not propose an education campaign as an option, we do consider, as mentioned in the preceding paragraph, the value of education and guidance as the right tools to promote consumer awareness. These tools, together with industry specific regulation, achieve good outcomes for consumers as they are relevant, accurate (as the industry experts have a hand in providing relevant information), minimise red-tape, and keep costs low.

The proposed amendments to the ACL impose an unnecessary cost on industry, which we respectfully submit outweighs the potential benefits.

Impacts of proposed changes

Option 2 states that transparency around extended warranties would be enhanced through a disclosure regime and a cooling off right, and that traders would be required to provide oral advice where reasonably practicable and provide a written agreement.

CA is not sure how valuable the proposed changes to the law will be for consumers. RSPs offer clear customer information regarding our extended warranty product not only in our customer terms but also in our scripting to staff.

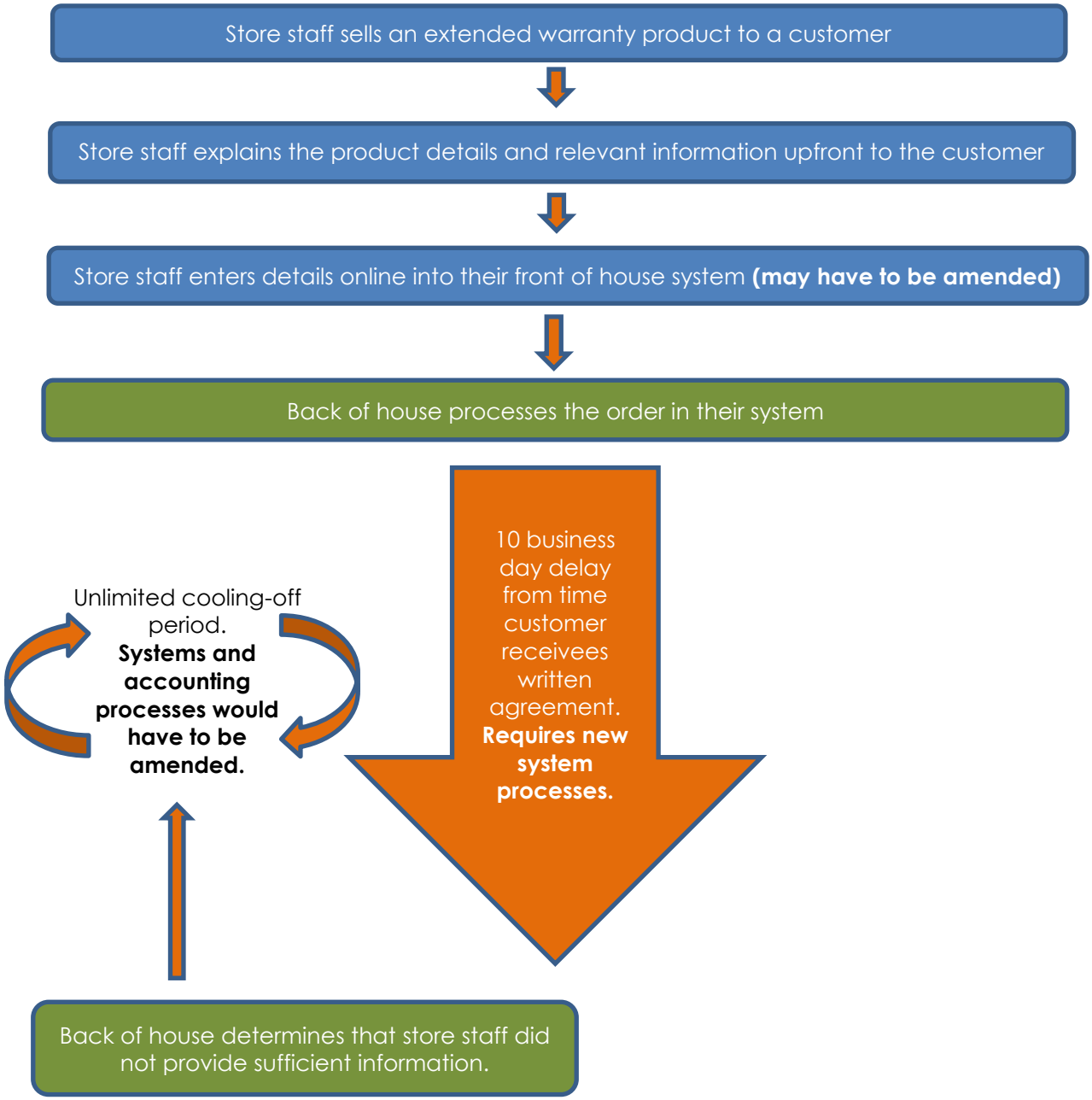
There would be a significant cost impact to businesses in meeting the detail and practical aspects of the proposed changes. Particularly, if they are required at point of sale to set out a summary that compares two products (the extended warranty and guarantees under the ACL), this proposed change will be time-consuming and costly. As set out in Point 76, traders would need to be careful and ensure that such comparisons do not mislead consumers, and in order to ensure compliance, may need to seek advice from lawyers.

Members have suggested they would need to undertake a range of activities to implement changes, including the following;

- Engage staff (e.g. lawyers) internally (and externally for smaller businesses who do not have internal lawyers and seek legal advice) to undertake a review of existing documentation, and create further documentation where required to keep in line with the proposed changes. For example, assessing the exact delineation between the warranty and the consumer law.
- Undertake training, and hence incur training costs, to ensure call centre and store staff understand the changes in law and disclosure requirements, so they can provide adequate oral advice as required under the proposed consumer law. Training costs vary depending on the size of the business – while larger companies incur significant costs to scale, smaller businesses are often less able to absorb the necessary costs at all.

  Additionally, it is important to bear in mind that for telecommunications providers (and quite possibly for the broader retail space), a high proportion of the retail and customer service workforce are younger or take on the job as a part-time role, and already have an overburdening amount of information to learn and understand in order to comply with a plethora of regulations.
- Review commercial arrangements with third parties and manufacturers (who also offer such products); and
- Spend considerable costs on reviewing and updating policies, systems and arrangements. In particular, there would be quite a lot of work around developing and providing additional information, including:
    - scripting to provide to staff for the oral disclosure component;
    - assessing and modifying existing documentation relating to extended warranty products;
    - investigating and creating a cooling-off period function into our computer systems. IT technicians would need to be engaged (and/or taken off other projects) to design and implement the functional capability into systems, and connect disparate IT systems together so that they can talk to each other to communicate the necessary information (i.e. – providers may have different systems for billing, sales, customer relationship management, etc).

For example:



Other impacts:

- There is the potential for further confusion amongst both consumers and businesses by having another cooling off period under the ACL, and potentially staff not fully understanding which cooling off period is relevant to a claim (i.e. unsolicited consumer agreements vs extended warranties);
- Educating the business to ensure that the comparison of the relevant consumer guarantee and the protections provided by the extended warranty product is not misleading; for smaller businesses who do not have in-house legal teams, they may face external legal costs when seeking legal advice in relation to the changes;
- Amending accounting processes and systems to enable the provision of refunds during the cooling-off period. This will have an ongoing cost impact on the business in administering the cooling-off right;

- The proposed changes in the ACL may diminish the availability or desirability of extended warranties in the market.

Proposal

CA recommends increasing consumer awareness of their rights through an education campaign and/or increased guidance.

Chapter 4: Access to consumer guarantees for goods sold at online auction

Our Position

CA supports maintaining the status quo, as the proposed amendments to the ACL impose an unnecessary cost on our industry, which we respectfully submit outweighs the potential benefits.

Practical implications

Whilst we do not sell second-hand goods or sell goods at auction, we may however be impacted by these proposed changes if our goods are sold by a third party at an online auction.

Example

For example, if our goods are sold by a third party at an online auction, such as the Grays Online Auction website example provided in the Consultation RIS, and those goods are defective, it may be difficult to establish and process a consumer guarantees claim if the online buyer comes to us, as we operate on a proof of purchase model. It becomes challenging because this consumer may or may not have proof of purchase from the original owner of the goods, and we did not sell the goods directly and were not involved in the online auction.

An online auction receipt is not as easy to accept or process in RSP systems as an RSP branded receipt of purchase, and may not provide sufficient information that matches to internal systems in order to process the claim smoothly. Delays may occur while the claim is investigated and assessed, and RSPs may need to liaise with a manufacturer in order to process the claim. There is also a risk of fraudulent behaviour.

RSPs are also not permitted to discuss a customer's account with a third party, such as an online buyer, due to privacy constraints. This would present difficulties processing the claim on a customer's account.

The financial costs of processing these claims would be very costly for RSPs, as some manufacturers may not recognise the second-hand purchases and might refuse to reimburse RSPs for such ACL claims. This would put RSPs out of pocket for the full cost of remedying the defective goods.

Other impacts

- Causing confusion amongst the community as to when these rights apply, as there are still exemptions under the proposed changes. An ordinary interpretation of an 'online auction' might include eBay for example.
- Amending accounting processes and systems to enable the provision of remedies for goods purchased through online auctions.
- Costs and resources in training staff and updating systems, policies and processes.

Proposal

As the concern is specific to online auctions, and we submit it is unreasonable to place significant cost burdens on unrelated businesses, we suggest creating a set of guidelines that deal with online auctions. This could include requiring or setting out guidelines for online auctioneers or online sellers to describe the quality of the goods and other standards prescribed under the consumer guarantees regime. For example, some online sellers already describe the goods as refurbished or repaired, and this could be expanded to describe the

quality in more detail. 'EUC' is often used to describe goods sold online as in excellent used condition. 'GUC' is often used for good used condition, etc. This level of detail would assist consumers in making well informed purchases, and if goods don't meet that standard then a remedy may be sought from the auction business.

We would also recommend limiting liability to immediate sellers or online auctioneers. Businesses (such as telecommunications providers) should be excluded from liability for consumer guarantee claims resulting from the sale of goods at an online auction, whereby the business was not involved in the sale. This could also include requiring online auctioneers or online sellers to provide a statement with any purchase informing consumers about their ACL rights and provide contact details should they need to process a claim.

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