



# **Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law**

Submission by the Australian Communications Consumer Action  
Network to the Treasury on the Consultation Regulation Impact  
Statement

11 February 2022

## **About ACCAN**

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

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

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# General comments

ACCAN thanks the Treasury for the opportunity to comment on improvements to the consumer guarantee and supplier indemnification provisions in the Australian Consumer Law (ACL).

There is overwhelming evidence to suggest that regulatory intervention is needed to improve ACL provisions relating to accessing remedies and supplier indemnification. ACCAN's comments will focus on the needs and experiences of communications consumers particularly in relation to accessing remedies, but also regarding supplier indemnification for telecommunications products and services which do not meet consumer guarantees. In addition to our comments, we endorse the joint submission of CHOICE, Consumer Action Legal Centre, Consumer Credit Legal Service WA and WEstjustice and point to the need for reform across all consumer markets as put forward in this submission. Consumer Action Law Centre, Consumer Credit Legal Service WA, and WEstjustice have also endorsed our submission.

Telecommunications are essential services. It is critical that where there is a problem with a device or service, a person can quickly access a fair remedy. However, ACCAN submits that communications consumers are not always able to access remedies for consumer guarantee failures. Pursuing a remedy can be incredibly time-consuming, and too often communications consumers are left out of pocket or without a working or suitable phone or internet service while pursuing a remedy. The ACL, and indeed the Consultation Regulation Impact Statement (RIS), does not provide a sufficient level of guidance or consideration for the status of services in relation to consumer guarantees.

As market stewards, governments have an active responsibility to consumers to ensure that markets work fairly and efficiently, especially where markets are complex and consumers may have difficulty navigating them.<sup>1</sup> It is therefore essential that Treasury adopts reforms to the ACL which would improve consumers' ability to access remedies for consumer guarantee failures, and improve the supply chain efficiency and indemnity to provide consumers timely and fair access to remedies.

## ACCAN's view on the Consultation RIS options

### Part A: Receiving remedies

ACCAN urges the Consumer Senior Officials to adopt Part A Option 3.a. in the Decision RIS. These amendments would prohibit suppliers from not providing a remedy for a consumer guarantee failure as required by law. Failure to provide a remedy should incur civil penalties proportionate to the misconduct. This legislative change should be implemented across the whole of the Australian economy to support all consumers to access the remedies they are entitled to. While a consumer, supplier and manufacturer education and guidance campaign may expand awareness of consumer guarantees, only enforceable ACL amendments will provide a powerful enough incentive to encourage suppliers to provide remedies when required, as demonstrated by the success of certain improved consumer protections in the telecommunications sector.

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<sup>1</sup> Consumer Policy Research Centre 2020, *The experiences of older consumers: towards markets that work for people*, [https://cprc.org.au/app/uploads/2020/07/Markets-for-People-Report\\_2July2020\\_compressed-1.pdf](https://cprc.org.au/app/uploads/2020/07/Markets-for-People-Report_2July2020_compressed-1.pdf)

## Part B: Supplier indemnification

ACCAN supports Part B Options 3.a. and 4.a. of the Consultation RIS. These options prohibit manufacturers and importers from failing to indemnify suppliers where a consumer guarantee failure falls within their responsibility. They also prevent manufacturers and importers from retaliating against suppliers seeking indemnity. These reforms will support suppliers to offer timely and fair remedies to consumers whose phone and internet products and services do not meet consumer guarantees. Consumers should be confident that regardless of where responsibility for a consumer guarantee failure lies, a remedy will be fair and quickly accessible. Clarifying and improving the fairness of supply chain arrangements will contribute to this end.

## Summary of communications consumer issues

ACCAN's submission will focus on the following points:

- Consumers do not always receive the remedies they are entitled to.
- Consumers spend too much time negotiating remedies.
- Stronger rules about providing remedies will incentivise fairness.
- Further consideration and guidance is needed on how consumer guarantees apply to phone and internet services.

Given ACCAN's scope is limited to issues affecting phone and internet consumers, we do not answer each consultation question in turn and instead offer our feedback in relation to relevant systemic issues facing communications consumers.

## List of recommendations

**Recommendation 1:** That the Decision RIS proposes reforms to the way in which consumer guarantee failures are managed under the ACL.

**Recommendation 2:** That the Decision RIS finds that civil prohibitions are necessary to improve access to remedies and indemnification arrangements under the ACL.

**Recommendation 3:** That the Decision RIS supports a bold enforcement regime to ensure compliance with ACL reforms.

**Recommendation 4:** That the Decision RIS highlights the need for telecommunications-specific guidance on the application of consumer guarantees targeted at both consumers and industry.

**Recommendation 5:** That the Decision RIS considers instances where suppliers should proactively offer remedies to affected consumers.

**Recommendation 6:** That the Decision RIS recommends Options 3.a. and 4.a.

**Recommendation 7:** That the Decision RIS explicitly states that where a repair takes too long as part of the provision of a remedy, a consumer should be entitled to replacement or refund.

# 1. Response to Part A: Remedies

## 1.1. Consumers do not always receive the remedies they are entitled to

As the Consultation RIS notes, there is extensive evidence that consumers experience immense barriers to accessing remedies for consumer guarantee failures due to the limited incentives for suppliers and manufacturers to comply with their ACL obligations.<sup>2</sup>

ACCAN is frequently contacted by consumers regarding telecommunications product and service failures they have had difficulty seeking remedies for, for a variety of common reasons including:

- Difficulty getting in contact with their telecommunications retail service provider (**RSP**) due to a lack of contactability, excessive wait times for customer service, or inaccessible communications channels.
- Unfair dispute resolution processes where an RSP offers an unsuitable remedy, or refuses to offer a remedy at all.
- Buck-passing between RSPs and wholesale network operators, where the parties either fail to co-ordinate to provide a remedy, or refuse to take responsibility for resolving the problem.
- Consumer, supplier and manufacturer confusion about the status of telecommunications products and services, including Internet of Things and other software-enabled goods, under the ACL.

### **Case study 1: Consumers unable to contact a telco about a consumer guarantee failure**

In June 2020 a consumer contacted ACCAN about issues with their NBN broadband and home phone service. The consumer's telco offered general customer support via online communication methods only. The consumer's phone and internet service had stopped working and the consumer did not own a smartphone to access mobile broadband and make contact with their telco. In this circumstance, the consumer was unable to communicate with the telco to inform it of the failure and request a remedy.

In November 2020, another consumer with the same telco contacted ACCAN for assistance. The consumer was Deaf and communicated using SMS relay via the National Relay Service. The consumer's internet service was not working properly, so they could not use the telco's website to lodge a fault and seek assistance. The telco's complaints-only phone number was not easily located on its website, meaning that the consumer did not know how to contact the telco to request a remedy.

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<sup>2</sup> The Treasury 2021, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law: Consultation Regulation Impact Statement*, on behalf of Consumer Senior Officials, [https://treasury.gov.au/sites/default/files/2021-12/c2021-224294-cgsicris\\_2.pdf](https://treasury.gov.au/sites/default/files/2021-12/c2021-224294-cgsicris_2.pdf)

### Case study 2: Consumer unable to claim repairs for a damaged device

In 2021, Mika (name changed) purchased a Samsung mobile phone handset on a repayment plan from his telco. He dropped the handset which then stopped working, raising concerns about the durability of the handset he had purchased. Mika contacted his telco about the issue and was assured he would be able to return the device for repairs at no cost to him. When he attempted to do so, his telco changed its advice and would not arrange for the device to be repaired, but said Mika still needed to make his repayments. Mika spent several months disputing this with his telco but was unable to resolve the issue, and instead went to the Telecommunications Industry Ombudsman (TIO). The TIO decided that a \$100 gift card from the telco was a sufficient remedy for Mika. Mika stopped paying for his service out of frustration, and his service was terminated. He was unsure whether he would be pursued by debt collectors for the amount owed on the damaged device.

The number and nature of issues present in TIO complaints are useful indicators of the barriers experienced by consumers when pursuing a remedy.

**Figure 1: Issues present in TIO complaints in 2020-21<sup>3</sup>**

Issue	Number of complaints involving issue in 2020-21	% of total issues in 2020-21
No or delayed action by provider	46,533	39.0%
Service and equipment fees	39,584	33.2%
No phone or internet service	15,593	13.1%
Delay establishing a service	14,170	11.9%
Intermittent service or drop outs	10,913	9.1%
Resolution agreed but not met	10,275	8.6%
Provider uncontactable	8,800	7.4%
Failure to cancel a service	8,775	7.3%
Slow data speed	7,122	6.0%
Problem with add-on feature	4,344	3.6%

More than 1 in 3 issues reported to the TIO in 2020-21 involved a provider failing to act or delaying action in response to a complaint. Just under 1 in 10 issues involved an unreliable service problem, and more than 1 in 10 issues related to a lack of service altogether. There were more than 10,200 instances reported where a provider had agreed to a complaint resolution, but did not meet the agreement. This is a clear indication that consumers consistently experience difficulties when pursuing

<sup>3</sup> Telecommunications Industry Ombudsman 2021, *Annual Report 2020-21*, [https://www.tio.com.au/sites/default/files/2021-09/TIO\\_AR\\_Accessible\\_LR.pdf](https://www.tio.com.au/sites/default/files/2021-09/TIO_AR_Accessible_LR.pdf)

remedies for consumer guarantee failures, and need to seek time-consuming external dispute resolution avenues to access the remedies they are entitled to.

Case studies and complaints data are the tip of the iceberg when quantifying consumers' issues accessing remedies: as the Consultation RIS acknowledges, many consumers absorb the cost of consumer guarantee failures due to the fatigue and inconvenience of seeking a remedy. The telecommunications sector is considered one of the least trusted sectors by consumers, with the Consumer Policy Research Centre's Sector Scorecard finding that RSPs are ranked last for user experience, accessibility and supportive provider practices, and second last for advice and customer service.<sup>4 5</sup>

**Recommendation 1:** That the Decision RIS proposes reforms to the way in which consumer guarantee failures are managed under the ACL.

## 1.2. Consumers spend too much time negotiating remedies

In 2020 ACCAN commissioned research to understand the consumer cost of poor customer service and long call wait times. As the Consultation RIS indicates, time spent resolving an issue imposes a genuine cost to consumers, as the time could have been spent doing something else.

The study found that between February 2019 and February 2020, consumers spent 7.6 million hours in contact with their telecommunications provider in order to resolve issues, and a large proportion of this time was spent on hold.<sup>6</sup> Using a survey which showed the average time consumers spent in contact with their provider to resolve issues, and previous research which placed a value on consumers' time, ACCAN estimated that the time consumers spent trying to resolve issues with their telco provider cost between \$106 - \$132 million between February 2019 and February 2020.<sup>7 8 9</sup>

**Case study 3: Regional consumer left without reliable service for 4 months**

Amanda (name changed) is a phone and internet customer living in the Perth hills area. She contacted her telco at the end of 2019 to switch over to the NBN. When Amanda switched, she experienced an extremely unreliable phone and internet service. Her internet dropped out frequently, with dropouts lasting from a few hours to several days at a time. Her fixed phone service wasn't working at all, and

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<sup>4</sup> Consumer Policy Research Centre 2021, *Consumer insights series: Sector Scorecard*, <https://cprc.org.au/app/uploads/2021/09/Secotor-scorecard-sep21.pdf>

<sup>5</sup> Roy Morgan 2021, *Supermarkets, Retail, Consumer Products and Technology are the industries with the highest Net Trust Scores*, media release, <https://www.roymorgan.com/findings/8746-roy-morgan-risk-monitor-by-industry-july-2021-202107150455>

<sup>6</sup> Colmar Brunton, 2020. Still Waiting... Costing wait times for telecommunications consumers, [https://accan.org.au/files/Submissions/2020/Still%20Waiting\\_v1.1.pdf](https://accan.org.au/files/Submissions/2020/Still%20Waiting_v1.1.pdf)

<sup>7</sup> Ibid.

<sup>8</sup> ACCAN & Synergies 2019, Please hold: costing telco customer wait times, <https://www.synergies.com.au/wpcontent/uploads/2019/08/Public-report-Please-hold-costing-telco-customer-wait-times.pdf>

<sup>9</sup> ACCAN 2020, *The cost of still waiting*, <https://accan.org.au/files/News%20items/Still%20waiting%20analysis%20report%20v.1.1.pdf>

she had no mobile coverage in her home. Frustrated, she contacted her telco multiple times to complain about her unreliable service over a 4-month period, but the issues persisted.

One morning, Amanda realised that her infant daughter was having breathing difficulties. Her phone connection, VoIP via the NBN, didn't work, and due to limited mobile coverage in her area, she wasn't able to call 000. Luckily, she was able to apply first aid.

For a total of four months, Amanda experienced constant internet dropouts and no phone service, with no mobile coverage to rely on. Despite contacting her telco numerous times and indicating that her service was not meeting consumer guarantees, the telco did not provide any form of remedy.

### 1.3. Stronger rules about providing remedies will incentivise fairness

The Consultation RIS considers whether education and guidance campaigns for consumers, suppliers and manufacturers will improve the status quo regarding access to remedies and supplier indemnification. Accessible and effectively implemented education and guidance campaigns can support consumers to understand their rights under consumer law and equip them to advocate for a remedy in the event of a consumer guarantee failure. However, there is no evidence to suggest that education and guidance prevents suppliers' systemic non-compliance with consumer law, especially considering that the burden for responding to non-compliance and enforcing ACL rights currently falls to the consumer on an individual level via court or tribunal. As the paper itself notes:

Helping consumers to understand their rights does not necessarily mean business compliance with the consumer guarantees will increase. It may only marginally assist consumers when negotiating with suppliers or manufacturers, given the inherent power imbalance between the parties and the difficulties for consumers in asserting their rights.<sup>10</sup>

Therefore, while education and guidance campaigns provide practical support to consumers seeking remedies on an individual level, these cannot be considered an adequate response to the problem at hand. Namely, that consumers do not always have access to remedies they are entitled to, and suppliers face difficulty being indemnified where responsibility for a consumer guarantee failure lies with a manufacturer or importer. The Decision RIS must recommend the introduction of civil prohibitions to prevent the consumer and supplier detriment that has been identified, in addition to education and guidance campaigns.

Recent improved regulation of some aspects of the telecommunications sector is a valuable example of how the risk of incurring civil penalties is an effective deterrent for poor industry conduct. For example, the strengthening of mobile number pre-porting authorisation rules, violation of which can incur civil penalties, has decreased the incidence of mobile number theft.<sup>11</sup> Additionally, the

<sup>10</sup> The Treasury 2021, op. cit.

<sup>11</sup> Telecommunications Industry Ombudsman 2021, *Defending phone and internet accounts from fraudsters*, [https://www.tio.com.au/sites/default/files/2021-11/Defending%20phone%20and%20internet%20accounts%20from%20fraudsters\\_fa\\_HiRes%20CLEAN.pdf](https://www.tio.com.au/sites/default/files/2021-11/Defending%20phone%20and%20internet%20accounts%20from%20fraudsters_fa_HiRes%20CLEAN.pdf)

Telecommunications Complaints Handling Standards and NBN service rules, other recently introduced and directly regulated instruments, have contributed to lower numbers of telecommunications complaints year on year.<sup>12 13</sup>

**Recommendation 2:** That the Decision RIS finds that civil prohibitions are necessary to improve access to remedies and indemnification arrangements under the ACL.

**Recommendation 3:** That the Decision RIS supports a bold enforcement regime to ensure compliance with ACL reforms.

## 1.4. Further consideration is needed on how consumer guarantees apply to phone and internet products and services

The practical implementation of consumer guarantees for telecommunications products and services has never been straightforward due to their nature, complexity, and supply chains which can obscure which party is responsible for the consumer guarantee failure. To resolve a telecommunications device or service issue, consumers may need to engage with any combination of the following parties:

- Telecommunications service providers and network operators
- A device manufacturer (e.g. Apple, Samsung)
- A device supplier (e.g. JB Hi-Fi, Kogan)
- App/software developers
- Ombudsmen (e.g. the TIO)
- Consumer protection bodies and regulators (e.g. the ACCC, the ACMA, state and territory Fair Trading offices)
- Content aggregators and providers (e.g. Netflix, app stores)

It is difficult for communications consumers to understand and advocate for their rights under consumer law. There have been numerous calls for the development of telecommunications-specific guidance on the application of consumer guarantees to improve consumer and industry understanding, including clarification on when remedies are entitled and what those remedies may look like.<sup>14 15</sup> ACCAN again calls for the development of telecommunications-specific guidance on the application of consumer guarantees, particularly in the following instances.

### Provision of services with due care and skill

The ACL states that services must be delivered with acceptable care and skill or technical knowledge and taking all necessary steps to avoid loss and damage.<sup>16</sup> This does not mean that consumers should

<sup>12</sup> Telecommunications (Consumer Complaints Handling) Industry Standard 2018, <https://www.legislation.gov.au/Details/F2021C00265>

<sup>13</sup> ACMA, NBN service rules for telcos, <https://www.acma.gov.au/nbn-service-rules-telcos>

<sup>14</sup> Telecommunications Industry Ombudsman 2016, *Review of the Australian Consumer Law 2016*, [https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Telecommunications\\_Industry\\_Ombudsman.pdf](https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Telecommunications_Industry_Ombudsman.pdf)

<sup>15</sup> ACCAN 2016, *Australian Consumer Law Review*, <https://accan.org.au/files/Submissions/Australian%20Consumer%20Law%20Review%20ACCAN%20submission.pdf>

<sup>16</sup> ACCC, *Consumer guarantees*, <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>

be guaranteed a totally uninterrupted service, but it does mean that suppliers of a service have significant responsibility to their customers relating to how services are delivered, regardless of what the service is and where responsibility for the mechanics of the service lie.

In the telecommunications context, it is exceptionally difficult for a consumer to argue that due care and skill has not been taken in delivering a service. This makes it difficult to demonstrate consumer guarantee failures, especially in the case of broadband reliability and performance issues.

Broadband service performance and reliability issues are one of the most common communications consumer problems.<sup>17</sup> Resolving and seeking remedies for broadband issues is exceptionally complex for consumers for a variety of reasons, including buck-passing responsibility between wholesaler network operators and RSPs, and difficulties isolating the cause of a broadband service issue, as well as which party is liable for it. A prime example of this is the difficulties consumers have experienced regarding poorly performing NBN Fibre-To-The-Node (FTTN) services.<sup>18</sup>

#### **Case study 4: Consumer unable to fix ongoing NBN performance problems**

Ross (name changed) is an NBN FTTN home broadband customer in Terrigal, NSW. He and his neighbours routinely experience service dropouts and poor download and upload speeds due to the limitations of the FTTN network in their area. Ross experienced 952 service disruptions in one month, with a total duration of 5 hours.

Ross has been in frequent contact with his RSP and with NBN Co to resolve his broadband issues, but has been unsuccessful. His RSP informed him that it had referred the issue to NBN Co but there was nothing further it could do, because NBN Co was responsible for the performance problems. NBN Co told Ross that his broadband issues may be due to in-home wiring or equipment, despite Ross re-wiring his house and purchasing new devices and equipment in pursuit of a solution. NBN Co was unable to provide further assistance because it is a wholesale service provider, and insisted Ross contact his RSP.

In May 2021, NBN Co announced that some premises in the Terrigal area would be eligible for a technology upgrade from FTTN to Fibre-To-The-Premises (FTTP). Months later, Ross discovered his premises was not in the upgrade footprint, and his broadband issues will persist indefinitely.

NBN Co's Wholesale Broadband Agreement (WBA4) sets out NBN Co's definition of a service fault (10 or more dropouts within a 24-hour period), and outlines the compensation that RSPs may be able to claim from NBN Co in the event of a service fault.<sup>19</sup> ACCAN has concerns about the limitations of this definition, given that RSPs under the WBA4 are not supported to compensate consumers for poorly performing services outside that definition. This undermines the ease with which a consumer may access a remedy, as RSPs have financial and legal obligations under the ACL, but the cause of the

<sup>17</sup> TIO 2021, op. cit.

<sup>18</sup> IT News 2021, Telstra, Optus, TPG to face court over underperforming FTTN services  
<https://www.itnews.com.au/news/telstra-optus-tpg-to-face-court-over-underperforming-fttn-services-568372>

<sup>19</sup> NBN Co, SFAA - Wholesale Broadband Agreement - Service Levels Schedule – nbn™ Ethernet Product Module,  
[https://www.nbnco.com.au/content/dam/nbnco2/documents/wba/wba2/SFAA\\_WBAEthernetServiceLevels\\_markup\\_CIRR\\_emediation\\_20180313.pdf](https://www.nbnco.com.au/content/dam/nbnco2/documents/wba/wba2/SFAA_WBAEthernetServiceLevels_markup_CIRR_emediation_20180313.pdf)

consumer guarantee failure is the technical responsibility of NBN Co. Additionally, there is no current specific legislative requirement for RSPs to immediately and directly pass on NBN Co's service fault rebates.<sup>20</sup> An additional concern here is that the definition of a service fault permits an unacceptable degree of service disruption for households using the service, as less than 10 drop outs in a 24 hour period could make the service unusable. It is not clear what rights are available under ACL service guarantees in these circumstances, nor how consumers would exercise them.

ACCAN has significant concerns about the lack of case law and guidance relating to the provision of essential services, including telecommunications, under the consumer guarantees. The Consultation RIS essentially overlooks the status of services in supplier indemnification processes. There is a significant need for more clarity surrounding RSPs' and wholesale network operators' obligations under the consumer guarantees, so that consumers are supported to access remedies where they are entitled to them.

**Recommendation 4:** That the Decision RIS highlights the need for telecommunications-specific guidance on the application of consumer guarantees targeted at both consumers and industry.

## Mobile service outages

Mobile service outages are a recurrent problem for many communications consumers. Service outages can range from extremely inconvenient to life-threatening, and have a disproportionate impact on mobile-only internet users who wholly rely on mobile connectivity. Last financial year saw mobile coverage and mobile equipment issues in TIO complaints increase by 9.3% and 7.3% respectively.<sup>21</sup>

There is no tailored legislative mechanism to ensure that consumers can access fair remedies where mobile services fail, unlike fixed voice services which are in some circumstances covered by the Customer Service Guarantee.<sup>22</sup> Industry responses to mobile service failures vary significantly. At worst, industry responses to mobile service failures involve delays in resolving network faults without consumer compensation or provision of an interim service.<sup>23 24</sup> At best, RSPs provide ad-hoc or piecemeal remedies, for example, a day's worth of free mobile data, or a small refund on request, but these offers are on the RSPs terms.<sup>25 26</sup> Without clarification on how remedies should be managed in these circumstances, consumers are left to pursue remedies without practical knowledge or support, or accept lesser remedies than may be available under the ACL.

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<sup>20</sup> NBN Co, op cit., section 1.4.f.

<sup>21</sup> Telecommunications Industry Ombudsman 2021, op. cit.

<sup>22</sup> ACMA, *The Customer Service Guarantee*, <https://www.acma.gov.au/customer-service-guarantee>

<sup>23</sup> Sydney Morning Herald 2021, *The Sydney suburb that's been without proper internet since April*, <https://www.smh.com.au/national/nsw/the-sydney-suburb-that-s-been-without-proper-internet-since-april-20210715-p589xu.html>

<sup>24</sup> ABC News 2021, *Five-day 3G, 4G outage in remote community caused by rodents sparks calls for tailored services*, <https://www.abc.net.au/news/2021-01-23/call-for-better-remote-internet-after-rats-cause-outage/13072896>

<sup>25</sup> Finder 2021, *Vodafone outage causes customer backlash: What can you do?*, <https://www.finder.com.au/vodafone-outage-australia-april>

<sup>26</sup> ACCAN 2016, op. cit.

## Internet of Things products

There is a growing acknowledgment that consumer guarantees need to adapt to keep up with the changing and increasing complexity of digital products and services.<sup>27</sup> For example, the Productivity Commission’s Right to Repair inquiry found that the increasing popularity of Internet of Things<sup>28</sup> (IoT) devices has created difficulties for consumers accessing repairs in the event of a consumer guarantee failure, and that repair facilities are not always available.<sup>29</sup>

Under the ACL, IoT products should be durable and fit for purpose. However, ACCAN’s IoT policy position highlights issues with the status of IoT products under consumer guarantees.<sup>30</sup>

- Planned obsolescence – where a device is designed so that within days of a warranty period expiry, users find their devices cease to function and the cost of repair exceeds that of replacement – is commonplace.
- New release devices quickly become incompatible with software updates and consumers are either left with expensive and useless purchases or are forced into a position where it is more cost effective to buy a new device. This increases sales for the manufacturer but has negative flow-on effects for not only the consumer but also the environment.
- It is unclear how consumer law guarantees surrounding quality and durability apply to IoT products. It is extremely difficult for consumers to estimate the durability and life cycle of IoT products, and know when they are entitled to a remedy.

### Case study 5: Consumer purchase of a non-durable IoT-enabled product

Sarah (name changed) purchased a Sony digital alarm clock that could sync with her Apple iPhone via a downloadable Sony smartphone app. The phone plugged into the alarm clock via a physical port, and the alarm clock could play music, set alarms, and use other features via the smartphone app’s controls. Within two years, Sony stopped updating the alarm clock’s smartphone app, meaning that it soon became incompatible with the iPhone’s operating system. When the app was no longer compatible with the iPhone, Sarah could not use any of the alarm’s special features. The alarm clock had cost a little under \$100, and Sarah felt its smart features should have lasted longer than 2 years. She did not request a remedy because she did not know whether she was entitled to one. Sarah would not have purchased the alarm clock if she had known its smart features would fail within 2 years.

<sup>27</sup> Lindsay, D, Wilkinson, G & Wright, E 2022, *Regulating to Protect Security and Privacy in the Internet of Things (IoT)*, draft report to ACCAN, unpublished.

<sup>28</sup> Internet of Things products include internet-enabled consumer products like smart fridges, virtual home assistants (e.g. Alexa), wearables (e.g. FitBit), and so on.

<sup>29</sup> Productivity Commission 2021, *Right to Repair: Productivity Commission Inquiry Report*, <https://www.pc.gov.au/inquiries/completed/repair/report/repair.pdf>

<sup>30</sup> ACCAN 2021, *Internet of Things Position Statement*, [https://accan.org.au/files/Policy%20Positions/PP%202021/Internet%20of%20Things%20Position%20Statement%20short\\_FINAL.pdf](https://accan.org.au/files/Policy%20Positions/PP%202021/Internet%20of%20Things%20Position%20Statement%20short_FINAL.pdf)

## Mechanisms for accessing remedies

The onus for seeking a remedy for a consumer guarantee failure falls to consumers under the ACL. In the telecommunications sector, where service failures are common and can affect large numbers of consumers, ACCAN believes, in the interest of fairness, that there is scope for the ACL to require suppliers to proactively approach consumers to offer them a remedy, where the supplier is aware of a consumer guarantee failure. The development of a legislative obligation to offer a remedy where a consumer guarantee has not been met delivers an overall net benefit for government, consumers and industry, as it would reduce the need for civil proceedings where non-compliance has occurred.

**Recommendation 5:** That the Decision RIS considers instances where suppliers should proactively offer remedies to affected consumers.

## 1.5. Other comments

### Maximum penalty and infringement notice amounts

The deterrent effect of compliance regimes can be undermined if profit from breaching behaviour outweighs the penalty. Thus, it is essential that civil prohibitions recommended by the Decision RIS are proportionate to the misconduct. As it stands, maximum penalty and infringement notice amounts are too low to act as a deterrent in many cases. ACCAN has previously supported increases to ACL penalty and infringement notice amounts and believes that this area should be under constant review.<sup>31</sup>

### Implementing of ACL reforms

Consumers and suppliers need to be adequately supported to report instances where a remedy was entitled but not given. Currently, the ACCC is only able to pursue enforcement action for systemic or particularly egregious ACL compliance issues, prioritised within its budget. The ACCC should be adequately resourced to improve its ability to investigate complaints and identify systemic ACL breaches. Consideration should also be given to the roles, jurisdictions, and resourcing of relevant Ombudsmen schemes to support consumers' access to ACL remedies at an individual complaint level.

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<sup>31</sup> ACCC 2018, *Consumer law penalties set to increase*, media release, <https://www.accc.gov.au/media-release/consumer-law-penalties-set-to-increase>

## 2. Response to Part B: Indemnification

As ACCAN has indicated earlier in this submission, the Consultation RIS largely overlooks indemnification issues in a service delivery context, meaning that proposals related to indemnification have limited applicability to consumers of phone and internet services. However, ACCAN is aware of numerous instances where a consumer has had difficulty accessing a remedy related to a hardware failure due to supply chain complexities. Indemnification difficulties between RSPs and hardware manufacturers ultimately prevent consumers from accessing the remedies they are entitled to, because these difficulties can create unreasonable delays, and suppliers are incentivised to avoid bearing the financial burden of manufacturer faults.

In principle, ACCAN supports Options 3.a. and 4.a. to prevent manufacturers from failing to indemnify suppliers when a consumer guarantee failure falls within their responsibility, and to ensure suppliers do not face retaliation for enforcing their indemnity rights.

Additionally, the Decision RIS should consider circumstances where products returned for repair as part of a consumer guarantee failure take too long to be assessed and fixed. In these circumstances, consumers should be confident that if a product has not been repaired or returned within a reasonable period of time, this constitutes a major fault and the consumer should be given a replacement or refund. Greater clarity for the assessment of faults will support consumers to access remedies, and also establish benchmarks for manufacturers and suppliers working together to provide a remedy.

**Recommendation 6:** That the Decision RIS recommends Options 3.a. and 4.a.

**Recommendation 7:** That the Decision RIS explicitly states that where a repair takes too long as part of the provision of a remedy, a consumer should be entitled to replacement or refund.

ACCAN's submission has been endorsed by the following organisations:



Consumer Action Law Centre



Consumer Credit Legal Service (WA) Inc.



WEstjustice