

## Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Yoogalu Pty Limited ACN 002 269 132.

### 1. Person giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Yoogalu Pty Limited ACN 002 269 132 (**Yoogalu**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (CCA).

### 2. Background

#### *Warranty Plans Industry*

- 2.1 The Australian Consumer Law (ACL), being Schedule 2 to the CCA, contains guarantees in Division 1 of Part 3-2 which provide consumers with a basic, guaranteed level of protection for goods and services which they acquire (the **consumer guarantees**). Consumers who are supplied with goods and services that fail to meet the consumer guarantees are entitled to certain remedies under Part 5-4 of the ACL, including a repair, replacement or refund depending on the circumstances.
- 2.2 Many retailers of electronic and household appliances offer extended warranties cover or customer care plans (**Warranty Plans**) at the point of sale. Warranty Plans generally give consumers contractual rights (for a defined period) to certain remedies such as a repair or a replacement of faulty goods and to some consequential losses, subject to certain exclusions.
- 2.3 The ACCC considers that there is an overlap between some of the rights available under some of the Warranty Plans and the rights and remedies already available to consumers under the consumer guarantees, in the event that goods prove to be faulty (whether a minor or major failure to comply with the consumer guarantees) in a relevant period (the **Overlap**).
- 2.4 The ACCC is concerned about the marketing practices in the industry for the supply of Warranty Plans in Australia (the **Industry**), including the content of the Warranty Plans terms and conditions provided to consumers at the point of sale.
- 2.5 Specifically, the ACCC is concerned about the following practices which have the potential to confuse or in some cases mislead consumers if information provided to consumers is not sufficiently clear:

#### *Insufficient disclosures*

- 2.6 The ACCC is concerned about the promotion of Warranty Plans in a way that does not identify with sufficient clarity:
- (a) the degree of the Overlap; or
  - (b) the contractual rights being provided that go beyond those rights and remedies already available to consumers under the consumer guarantees.

#### *Value Representations*

- 2.7 The ACCC is concerned about the use of representations that Warranty Plans provide some benefits which may overlap with the consumer guarantees – in circumstances where those benefits do overlap.
- 2.8 The ACCC is concerned about the use of representations to the effect that rights under a Warranty Plan are additional to rights and remedies available to consumers under the ACL – in circumstances where some of those features overlap with those ACL rights and remedies.

### *Price Representations*

- 2.9 The ACCC is concerned about the use of representations to the effect that the price of the Warranty Plan does not include any cost attributable to the rights and remedies available to consumers under the ACL – in circumstances where certain costs may have been for rights that overlap with the rights and remedies already available under the consumer guarantees.

### *Yoogalu Pty Limited*

- 2.10 Yoogalu was incorporated and registered in New South Wales, Australia in 1981 and is a wholly owned subsidiary of Harvey Norman Holdings Limited ACN 003 237 545 (**Holdings**).
- 2.11 Related entities of Yoogalu own or lease shopping complexes, in Australia, branded with one or more of the trade marks Harvey Norman®, Domayne® and Joyce Mayne® (**Trade Marks**) (**Branded Complexes** and each a **Branded Complex**).
- 2.12 In relation to any particular Branded Complex, a related entity of Yoogalu (**Franchisor**) grants separate franchises (**Franchises** and each a **Franchise**) to independent franchisees (**Franchisees** and each a **Franchisee**) to use certain intellectual property of Holdings or its related entities, to conduct the retail business of the Franchisee (**Franchisee Business**) at or from a store within that particular complex (**Physical Store**), pursuant to the terms of a franchise agreement (**Franchise Agreement**).
- 2.13 Neither Yoogalu nor any of its related entities control, or have any ownership interest in any Franchisee or the Franchise Business of any Franchisee.
- 2.14 Neither Yoogalu nor any of its related entities sell goods from any of the Branded Complexes.
- 2.15 Yoogalu was involved in planning, designing and creating 'Product Care', which is a bundle of contractual rights accompanying a purchase by a consumer of a consumer electronic good, domestic appliance or white good (**Product Care**). Yoogalu was also responsible for reviewing, approving and making recommendations in relation to the Product Care terms and conditions, including to the Franchisees offering products with Product Care to consumers in Australia (**Relevant Franchisees**).
- 2.16 Product Care can be purchased only with the purchase of a physical product. Product Care cannot be purchased by itself. Product Care provides a consumer with a once off replacement of their product (which they purchased with Product Care), and some associated costs, subject to the published terms and conditions of Product Care.
- 2.17 Yoogalu has cooperated with the ACCC in achieving industry reform.
- 2.18 Yoogalu acknowledges the ACCC's concerns about the marketing practices in the wider industry for the supply of Warranty Plans and, in recognition of its involvement outlined in paragraph 2.15 above, Yoogalu has offered this Undertaking to the ACCC in order to help set a new industry benchmark for the promotion and supply of Warranty Plans.

### **3. Commencement of this Undertaking**

- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Yoogalu; and
  - (b) this Undertaking so executed is accepted by the ACCC,
- (the **Commencement Date**).
- 3.2 Upon the commencement of this Undertaking Yoogalu undertakes to assume the obligations set out in Part 4 for the purposes of section 87B of the CCA for a period of 2 years.

#### 4. Undertaking

##### *Information for consumers about ACL rights*

- 4.1 Yoogalu undertakes that it will, within 90 days of the Commencement Date:
- (a) provide to the Relevant Franchisees an amended Product Care brochure (made available in print form and online) that includes, as a minimum, the information consistent with Annexure A of this Undertaking (the **essential information**); and
  - (b) recommend that Relevant Franchisees utilise the amended Product Care brochure when they offer products with Product Care to consumers in Australia.
- 4.2 Yoogalu further undertakes to provide the ACCC with a copy of the revised Product Care brochure no later than 7 days after being provided to Relevant Franchisees.
- 4.3 For the avoidance of doubt, if Yoogalu recommends any changes to the rights provided by Product Care during the term of the Undertaking, Yoogalu may do so without ACCC approval, provided that:
- (a) the changes do not have the effect of removing the essential information from the Product Care brochure;
  - (b) to the extent that any new right is added to Product Care for which there is a comparable right under the ACL, Yoogalu will amend the comparison table in Annexure A consistently with the approach taken in the existing comparison table; and
  - (c) a copy of the changes are provided to the ACCC within 14 days of such recommendation being made.

##### *Compliance training*

- 4.4 In this part, a reference to '**Compliance Training**' means training which:
- (a) covers the essential information; and
  - (b) explains that the making of representations inconsistent with the essential information may be false or misleading and contravene the ACL and should not be made, including, for example, any representation that a consumer may not have rights or remedies outside the manufacturer's warranty period; or that a consumer is required to purchase an extended warranty product to have rights or remedies for faulty goods.
- 4.5 Yoogalu currently provides Relevant Franchisees with training on consumer rights under the ACL. Yoogalu further undertakes that it will:
- (a) at its own expense, within 60 days of the Commencement Date, develop and provide annual Compliance Training for Yoogalu staff involved in making recommendations about Compliance Training to Relevant Franchisees;
  - (b) at its own expense, within 60 days of the Commencement Date, develop an online Compliance Training course and within 90 days of the Commencement Date make it available to Relevant Franchisees' store managers or appropriate sales staff of each Relevant Franchisee (**Relevant Franchisee Personnel**);
  - (c) at its own expense, include Compliance Training in the regular training that Yoogalu recommends to Relevant Franchisee Personnel; and
  - (d) use reasonable endeavours to encourage Relevant Franchisees to, on an ongoing basis, have their store managers and relevant sales staff complete the online Compliance Training course referred to above in paragraph 4.5(b) or incorporate the content of that online Compliance Training course into the Relevant Franchisees' own compliance training programs, or otherwise train their relevant sales staff in that regard.

*Compliance monitoring*

- 4.6 Yoogalu confirms it has developed a program designed to monitor whether representations made by Relevant Franchisees' staff in relation to the sale of products with Product Care are consistent with the content of the Compliance Training (**Compliance Monitoring Program**).
- 4.7 Yoogalu confirms that the Compliance Monitoring Program includes the following features:
- (a) a measurement mechanism to assess whether Relevant Franchisees, through their staff, are making representations to consumers inconsistent with the essential information (**measure of compliance**); and
  - (b) anonymous visits to a sample of Relevant Franchisee stores (**mystery shopping deployments**) to ascertain satisfactory compliance with the measure of compliance, to be conducted annually by a suitably qualified independent third party.
- 4.8 Yoogalu undertakes that it will during the term of this undertaking:
- (a) continue the Compliance Monitoring Program;
  - (b) in the event of failure to comply with the measure of compliance by a Relevant Franchisee, request the Relevant Franchisee:
    - (i) to provide supplementary Compliance Training for Relevant Franchisee Personnel of that Relevant Franchisee; and
    - (ii) to have their store managers and relevant sales staff complete Compliance Training, additional to that referred to in paragraph 4.5(d) above, or incorporate additional Compliance Training into the Relevant Franchisees' own compliance training programs, or otherwise provide additional Compliance Training for their relevant sales staff in that regard.
  - (c) in the event of material persistent systematic failure to comply with the measure of compliance by a Relevant Franchisee, Yoogalu (as a representative of the relevant Franchisor) will:
    - (i) remind the Relevant Franchisee that when dealing with consumers, it is contractually bound to adhere to the highest standards of honesty, integrity, fair dealing and ethical conduct, and to comply with the ACL; and
    - (ii) use reasonable endeavours pursuant to the relevant Franchise Agreement to withdraw any approval previously granted to the Relevant Franchisee to offer products for sale with Product Care until such failure is satisfactorily addressed.
- 4.9 Yoogalu undertakes that it will provide the ACCC within 30 days of the Commencement Date with details of the content of the Compliance Monitoring Program, including the proposed program of Relevant Franchisee monitoring.

*Compliance Reporting*

- 4.10 Yoogalu undertakes to report to the ACCC:
- (a) within 200 days of the Commencement Date, on the status of the development and distribution to Relevant Franchisees of the online training course referred to in paragraph 4.5(b) above;
  - (b) yearly, starting within 260 days of the Commencement Date on:
    - (i) the proportion of Relevant Franchisees to whom the training of the kind referred to in paragraphs 4.5(c) above has been provided;
    - (ii) a summary of the results of the mystery shopping deployments including the list of Relevant Franchisees participating;

- (iii) a summary of actions of Yoogalu and/or the Relevant Franchisees known taking any actions of the kind referred to in paragraph 4.8(b); and
- (iv) any instances of Yoogalu taking any actions of the kind referred to in paragraph 4.8(c) above.

4.11 For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable inquiries of Yoogalu in respect of its compliance with this Undertaking, including in relation to reporting provided to the ACCC pursuant to paragraph 4.10, and Yoogalu will respond to such inquiries within a reasonable period of time.

## 5. Acknowledgements

5.1 Yoogalu acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

### Executed as an Undertaking

Executed by Yoogalu Pty Limited ACN 002 269 132 pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature 

Print name 

Date 2.5.2017

Signature 

Print name CARY MERY

Date 2.5.17

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

Date

and signed on behalf of the Commission:

  
Chairman

Date 11/05/2017

## Annexure A

### Essential Information

#### Summary of the consumer's relevant rights and remedies under the ACL

The Australian Consumer Law (**ACL**) protects consumers by automatically giving them basic, guaranteed rights for goods they purchase (**Consumer Guarantees**) at no charge. For example, the ACL requires that, taking account of the nature of goods, the price, any representations made by the supplier or manufacturer and other relevant circumstances, the goods must be free of defects, do what they are meant to do, be safe, durable and acceptable in appearance and finish, be fit for any particular purpose that the consumer makes known and comply with any description given or any demonstration model used.

In the event of a breach of a Consumer Guarantee where there is a major failure of the goods, consumers are entitled to reject the goods and choose a replacement or refund and claim compensation for any reasonable foreseeable loss or damage suffered by consumers as a result of the failure. Where the failure does not amount to a major failure, consumers are entitled to have the supplier repair or replace the goods or provide a refund (at the supplier's choice). Whether a specific failure breaches a Consumer Guarantee and a consumer is entitled to a remedy under the ACL will depend on the circumstances.

Consumer Guarantees have no set time limit but generally last for an amount of time that is reasonable to expect in the circumstances, given factors including the cost and quality of the goods, the use made of the goods or any representation made by the supplier or manufacturer. In some instances, manufacturers of goods provide a warranty in respect of their goods (a **Manufacturer's Voluntary Warranty**) which is separate to the Consumer Guarantees. The exact amount of time that Consumer Guarantees last in the case of a specific purchase varies depending on the circumstances.

Consumers with a claim for breach of a Consumer Guarantee should contact the supplier of the goods at first instance. If You are unable to reach resolution with the supplier as to the remedy, You should seek independent advice and/or contact the ACCC (contact details below) or Your state/territory fair trading body.

#### A comparison of these rights and remedies and the features provided by Product Care

The following table is a summarised comparison of Consumer Guarantees and the protections offered by the purchase of a product with Product Care (the **Product**). Please note that this table is a summary only and is not a substitute for obtaining legal advice on the ACL and reading the full Terms and Conditions contained in this document, as certain limitations and exclusions apply in certain circumstances, including an exclusion if You fail to use the Product in accordance with the manufacturer's care instructions or if the Product is accidentally damaged. In addition, You can visit [www.accc.gov.au](http://www.accc.gov.au) for more information on the Consumer Guarantees. Please note that, in addition to the protections below, You may have additional rights against a manufacturer under a Manufacturer's Voluntary Warranty.

Protection	ACL rights and remedies	Rights Under Product Care
How long does the protection against defects last?	The protection lasts for a reasonable period from the date of delivery until the defect becomes apparent. Some circumstances in determining what is reasonable include the nature of the Product, the price, the way it is used and any statements or representations made about	The number of years shown in Your Original Documents. Protection commences after the expiry of the Manufacturer's Voluntary Warranty Period.

Protection	ACL rights and remedies	Rights Under Product Care
	<p>the Product.</p> <p>The duration of coverage may overlap with and exceed the term of the Manufacturer's Voluntary Warranty and/or Product Care.</p> <p>The relevant period can only be determined by reference to the individual circumstances of your purchase.</p>	
Am I protected if the product is defective?	<p>Protection where the Product is not of 'Acceptable Quality', 'Fit for Purpose', or does not 'match the description'.</p> <p>Depending on the circumstances, this may include protection against defects such as mechanical or electrical failure or faults caused by fair wear and tear and internal overheating.</p>	<p>Protection if there is an Eligible Fault.</p> <p>An Eligible Fault may include faults caused by fair wear &amp; tear, condensation, humidity, internal overheating or dust.</p> <p>Subject to Eligible Fault Exclusions.</p>
What remedies are available if the product is defective and protection is available?	<p><i>Major Fault</i></p> <p>Where the fault is a "major fault" (as defined in the ACL) or cannot be remedied, you may be entitled to reject the product and obtain a refund or replacement of the product. You are responsible for returning the product to the supplier (including the cost of doing so) unless this cannot be done without significant cost because of the nature of the failure or the size, height or method of attachment of the product.</p> <p><i>Fault not major</i></p> <p>Where the fault is not a "major fault" and can be remedied, you may require the supplier to remedy the failure within a reasonable time. In these circumstances, the supplier is entitled to choose to repair or replace</p>	<p>In respect of an Eligible Fault and subject to the Terms and Conditions and this brochure:</p> <ul style="list-style-type: none"> <li>• replacement of the Product with a new like for like product that is the nearest equivalent to the Product;</li> <li>• if a suitable replacement is not available, a store credit to be used in the selection of a replacement product of Your choosing, or a cash settlement will be provided to You in Our discretion; and</li> <li>• payment of freight costs associated with the assessment of the Product.</li> </ul>

Protection	ACL rights and remedies	Rights Under Product Care
	<p>the goods or provide a refund.</p> <p><i>Consequential losses</i></p> <p>You may also be entitled (by legal proceedings against the Supplier or Manufacturer) to claim consequential losses.</p>	
Who is obliged to provide the remedy for a defective product if protection is available?	<p>Supplier (if seeking a repair, refund or replacement, or if you commence proceedings to claim damages).</p> <p>Manufacturer (if you commence proceedings to claim damages).</p>	Supplier (Us) via Our service agent – phone: 1300 200 020
Cost of coverage	No cost	The cost of Product Care.
Is a Technical Assistance Helpline available to help with my product?	Not required under the ACL but some suppliers and manufacturers do provide a helpline.	Yes, during the Term call 1300 200 020 during the hours of 9:00 am to 5:00 pm on Monday to Friday.
What happens if I receive a remedy for a defective product?	Any replacement product or repair will be covered for a reasonable period depending upon the circumstances in the same way described above under the heading "How long does the protection against defects last?"	Other than the additional benefits set out in clauses 36 to 43, the Product Care term ends upon the replacement of the Product or Us providing You with a store credit or cash settlement.

#### **Additional rights and benefits under Product Care not available under the ACL**

We appreciate that You may want the certainty of knowing that if products with Product Care are faulty that they are covered for a specific time period.

When You purchase a product with Product Care, You are obtaining certainty as to the period of coverage and the remedy You will receive and the convenience of having the replacement process managed for You by Us via Our service agent.

You will be entitled to the benefits set out below that are not available under the ACL, subject to the Terms and Conditions:

- You know the exact period of cover for an Eligible Fault.
- Certainty that you will obtain a replacement if there is an Eligible Fault.
- The additional benefits set out in clauses 36 to 43.
- Toll Free technical assistance.

The ACCC's contact details  
 Australian Competition and Consumer Commission  
 1300 302 502  
 Indigenous Infoline: 1300 303 143  
[www.accc.gov.au](http://www.accc.gov.au)