



Level 6, 179 Queen Street
Melbourne, VIC 3000

info@consumeraction.org.au
consumeraction.org.au
T 03 9670 5088
F 03 9629 6898



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By email: australianconsumerlaw@treasury.gov.au

Manager
Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Manager

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

The Consumer Action Law Centre (**Consumer Action**), WEstjustice, National Association of Community Legal Centres (**NACLC**) and Federation of Community Legal Centres (Victoria) Inc. welcome the opportunity to comment on the Consultation Regulation Impact Statement (**RIS**).

The Australian Consumer Law (**ACL**) plays a critical role in helping to empower and protect consumers, allowing them to operate with confidence in the marketplace. Following on from the Australian Consumer Law Review (**Review**), the RIS assesses options for addressing the problems identified in the Review relating to consumer guarantees.

Consumer guarantees are at the core of consumer trust and confidence. Consumers need to know that the products they purchase will be safe, lasting and without faults, and that services will be fit for purpose and provided with due care and skill. Consumers also need to know that the representations made about the goods and services they purchase are correct, and that they have effective options for redress where those goods or services fail to meet the consumer guarantees. Low-income and vulnerable consumers can experience particular barriers to access redress when consumer guarantees fail, as they can have increased difficulty in negotiating directly with businesses and may find redress processes more onerous.

Our casework reveals that for many consumers, particularly low-income and disadvantaged consumers, the current consumer guarantee protections need improvement in order to provide an equitable balance between

consumer and trader rights and accountabilities. Older people and newly arrived consumers experience particular difficulties in enforcing their rights under the ACL. These consumers are more likely to have little or no understanding of their rights under the ACL, have low capacity to self-advocate, lack financial resources to support legal action and find tribunal processes stressful and time-consuming. Others experience a fear of the legal system itself or practical difficulties in accessing dispute resolution forums as they live outside inner-metro areas.

Given that the object of the *Competition and Consumer Act 2010* (Cth) is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection', we urge that the benefits and costs to consumers be given priority in considering the options in the RIS. In our view, there is a sufficient body of evidence to show that information and education provision alone is not an effective protection for consumers making choices in complex markets. Effective strategies must include legislative change to clarify and improve consumer protections where they are currently failing.

The following summary provides an overview of our recommendations in response to the RIS:

- Chapter 1 considers options for addressing the threshold in the definition of 'consumer' for business purchases. We support the update of the threshold value proposed in Option 3, from \$40,000 to \$100,000. We also support the proposed indexation under this option but have suggested that indexation be applied every three years rather than annually, in order to maintain the value of the threshold and keep things simpler for consumers and business.
- Chapter 2 considers options to clarify the consumer guarantees remedies where failures occur within a short period of time. We strongly support Option 3A. This option clarifies a consumer's right to choose a refund or replacement for a failed good within a specified time period without needing to prove a major failure. Under this option we presume that a consumer could exercise this right for all goods up to 30 days and that an extended time period would apply for high-value goods such as whitegoods and cars. We suggest that this extended time period should be set at six months and that the value threshold should take account of the value of second-hand whitegoods and cars to ensure that low-income consumers are not excluded from additional protections.
- Chapter 2 also contemplates options to clarify that multiple non-major failures in a good can collectively amount to a major failure under the consumer guarantee regime. We strongly favour Option 3, that the number of non-major failures be specified, on the basis that it is a generic, industry-wide approach and clarifies the law for both consumers and traders. We also suggest that the legislation allow courts to exercise discretion where consumer detriment is high or in the event of a safety concern.
- Chapter 3 considers the behavioural biases, time constraints and lack of accessible information that can make it difficult for a consumer to make informed decisions about whether to purchase an extended warranty. We strongly support an opt-in process to confirm an agreement for an extended warranty within a limited period, as posed in Option 3. We also support the period of 10 business days suggested in the RIS. Under this option consumers would also have the added protections of product information and disclosure.
- Chapter 4 considers the consumer guarantee exemptions that apply to auctions and noted the increasing numbers of transactions that are now made in online auctions. We undertook specific research on the consumer protections in New Zealand where all consumer guarantees have now been



extended to auctions. We found that – contrary to concerns that this may negatively impact businesses – there were benefits to both consumers and businesses. We strongly support the extension of consumer protections to all auction sales as posed in Option 4.

Our comments are primarily focused on chapters 2 and 3 of the RIS as these relate to core issues raised in our Legal Practice casework. Our comments are detailed below.

About the contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

The Federation of Community Legal Centres

The Federation of Community Legal Centres is the peak body for Victoria's community legal centres (**CLCs**) and Aboriginal legal services.

At the Federation, we pursue our vision of a fair, inclusive, thriving community through being a respected and influential advocate. Together with our members and communities, we work unrelentingly to dismantle unjust systems that perpetuate racism, sexism, homophobia, ableism, economic injustice and other inequalities.

We work to build a stronger and more effective community legal sector, we provide services and support to CLCs, and we represent CLCs to stakeholders and the wider community.

National Association of Community Legal Centres

The NACLCLC is the peak national body for all **CLCs** in Australia. Its members are the eight state and territory associations of CLCs that represent around 190 CLCs across Australia. Some Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services have chosen to join state and territory CLC associations and so also now come under the NACLCLC umbrella.

Community legal centres are independent, not-for-profit community based organisations. They provide free legal help – including information, referral, legal education, advice, casework and representation services – to hundreds of thousands of people across Australia every year, at times when they most need it.

WEstjustice

WEstjustice provides free legal assistance and financial counselling to people who live, work or study in the cities of Maribyrnong, Wyndham and Hobsons Bay. We are one of Victoria's largest CLCs with more than 40 professional staff.

WEstjustice provides both education and complex casework services. We have a hybrid specialist–generalist model. Whilst delivering a generalist legal service, we also have six core specialist areas: consumer, employment, tenancy, family violence, fines and crime.



WEstjustice works with a range of disadvantaged clients to provide targeted and tailored services. We have a particular focus on working with newly arrived migrant and refugees. A majority of our clients are migrants and refugees, and a large portion of our clients speak a language other than English. We have done in-depth work to highlight the needs of this group in the areas of consumer, energy and telecommunications markets.



Chapter 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000

Background

The application of many but not all of the ACL consumer protections is contingent upon a claimant establishing that they are a 'consumer' as defined by the ACL. One of these definitions states that a person is a 'consumer' if they acquire goods or services that do not exceed the monetary threshold of \$40,000. The 2017 ACL Review Final Report (**the Final Report**) found that the extent of consumer and small business protection afforded by the ACL had been eroded, as the real value of the monetary threshold had declined. The decline in the value of the threshold means that certain purchases not ordinarily made for personal, domestic or household use that were once covered under the ACL are no longer covered. The RIS poses three options with the aim of ensuring that the monetary threshold remains fit for purpose.

Consideration of RIS options on monetary threshold

As a general principle we agree that the threshold should be updated and the value maintained to ensure that consumers, including small business consumers, have access to appropriate protections. This would encourage consumer confidence and help to promote robust and competitive markets.

Resetting the threshold level to \$100,000 to take account of inflation by accounting for increases to the consumer price index (**CPI**) seems an appropriate approach.

Option 1: Maintain the status quo

We do not support Option 1. Maintaining the status quo does not address the findings of the Review that the effectiveness of the \$40,000 threshold has diminished over time. Similarly, it does nothing to tackle a future diminution of monetary value. Option 1 is likely to reduce the effective protection of consumers over time (including small business consumers) and increase dispute resolution costs.

Option 2: Increase the threshold in the definition of consumer from \$40,000 to \$100,000

Option 2 is not our preference. Although this option extends the consumer definition threshold to \$100,000 and restores the real value of the threshold to that established in 1986, without further indexation or a review mechanism this threshold amount would again diminish over time as the value of goods and services increases.

Option 3: Increase the threshold in the definition of consumer from \$40,000 to \$100,000 and apply indexation

We support Option 3 as it updates the value of the threshold with an automatic adjustment to ensure values are maintained over time. We suggest a downside to a frequent or annual indexation is less certainty for consumers about whether their good or service falls within frequently changing thresholds. To reduce both compliance costs for businesses and consumer confusion, we support CPI indexation being applied every three years. The reviewed threshold amount must be effectively communicated to businesses and should be prominently displayed on the Australian Competition and Consumer Commission (**ACCC**) website.



Chapter 2: Clarifying the consumer guarantees remedies

Background

The ACL's consumer guarantees set broad principles for the standards of goods and services that are supplied to consumers. It also sets out the rights and obligations of consumers and traders when those standards are not met. The Review found there was consumer and trader uncertainty about what remedies are available and in what circumstances. Consumers have a right to reject goods and choose a refund or replacement remedy if the good is subject to a major failure. If the failure is non-major the trader is obliged to provide a remedy but may choose whether to offer a repair rather than a refund or replacement.

These consumer guarantees are often poorly understood by consumers and traders alike. There is particular confusion about whether a failure to meet consumer guarantees within a short period of time is considered a major failure and whether multiple non-major failures can collectively amount to a major failure. The Review proposes changes to the ACL to make it clear that where a good fails to meet consumer guarantees within a short timeframe, consumers can choose a refund or replacement regardless of whether the failure is major.

Consumer Action casework

In formulating our response to Chapter 2, we have drawn on our legal casework experience.

In the past 12 months Consumer Action had 926 calls to our legal advice line where 'Consumer Guarantees Breach' was flagged as an issue. Of those 926 cases, 476 cases (51 per cent) related to a 'Consumer Good' and 347 (37 per cent) related to a 'Consumer Service'. At least 59 per cent of these callers were recorded as being on low incomes including Centrelink benefits. The callers were located across 68 local government areas in Victoria.

The range of goods consumers sought assistance about was very broad. Seventy-five types of 'Consumer Goods' have been recorded in 'Consumer Guarantees Breach' calls to our legal advice line over the past 12 months.

Figure 1: Calls relating to 'Consumer Goods' – April 2017 to April 2018

Type of 'Consumer Goods' – Top 5	As % of total 'Consumer Guarantee Breach' calls	As % of total 'Consumer Goods' calls	Number of Consumer Goods calls
Motor vehicle – used	19.44%	37.82%	180
Motor vehicle – new	7.67%	14.92%	71
Electrical goods	7.13%	13.87%	66
Furniture	2.81%	5.46%	26
Solar panels	2.05%	3.99%	19



Eighty-two types of 'Consumer Services' have been recorded in 'Consumer Guarantees Breach' calls over the past 12 months.

Figure 2: Calls relating to 'Consumer Services' – April 2017 to April 2018

Type of Consumer Services – Top 5	As % of total 'Consumer Guarantee Breach' calls	As % of total 'Consumer Services' calls	Number of Consumer Services calls
Tradesperson	10%	27%	95
Motor mechanic	6%	17%	58
Private school/ college	4%	10%	35
Storage or removalist	2%	5%	19
Travel and transport	2%	5%	19

Problem 1: Failure within a short period of time

The lack of clarity in the ACL about what constitutes a major or minor failure leaves consumers at a disadvantage in negotiating with traders about when they can exercise their rights for a refund, repair or replacement. A trader will commonly claim that a failure is minor to reduce their obligations for a refund or replacement and instead only offer a repair.

In the case of non-major (minor) defects, there is no clear time period during which a trader must make a repair ('reasonable' time remains an ambiguous concept). As demonstrated by our case examples below, this can also lead to a cycle of ongoing repairs over months or years.

In the event of a dispute about whether the failure is major or minor, the burden of proof lies with the consumer who is at an increased disadvantage as the complexity of the product increases. Motor vehicles is one example of a complex consumer product.

We receive more calls to our Legal Practice about motor vehicles than any other consumer product category. The level of difficulty in resolving these disputes is heightened for consumers because multiple parties are often involved, including motor vehicle dealers, manufacturers and mechanics. It can be difficult for individual consumers to resolve disputes because of the complexity of identifying the scope and cause of the fault where multiple parties can be responsible (and potentially trying to shift blame). Motor vehicle disputes often involve highly technical questions regarding the original state of the vehicle, what damage may have been incurred following delivery, whether the vehicle can be repaired and at what cost. Negotiating directly about highly technical matters can put the consumer at a disadvantage in determining the 'major' or 'minor' nature of the fault and the accountable party. Independent expert technical reports are often prohibitively expensive.



This complexity is also a characteristic of energy technology products and services that are now increasingly being marketed to Australian homes, including low-income and vulnerable consumers.

Consumer Action's 2017 report *Knock it off! Door-to-door sales and consumer harm in Victoria*¹, found many examples of the high-pressure sale of inappropriate or unaffordable solar products to people experiencing vulnerability or ill-equipped to withstand these tactics.² It then followed that these consumers were often least likely to understand the technology and its impacts, or to assert their rights in the event of a failure.³

Our casework provides numerous examples of where lack of clarity about what constitutes a major or minor failure results in long and difficult negotiations and detriment for consumers.

In the following case studies, repairs have been offered, however refunds or replacements have not been offered due to uncertainty about what constitutes a major failure, or trader unwillingness to accept a major failure had occurred. In some cases, the consumer has had the product repaired but has needed more repairs and the consumer remained dissatisfied with the outcome. While ACL s260(c) provides that if goods cannot be repaired in a reasonable amount of time there is a major failure, more than one repair does not automatically make this so.

John's story

John (name changed) told us that he bought a new bicycle from a bicycle retailer in 2016, along with some accessories. Less than two months after purchase, John says that some of the spokes on the back wheel of the bicycle broke. John said he took the bicycle back to the retailer, who repaired the spokes for a fee. John told us that two days after the repair the spokes broke again. The retailer replaced the wheel at no cost to John the following weekend. However, John said that the spokes on the replacement wheel also broke. After yet another repair, the spokes broke for a fourth time. After the fourth time, John says that he requested a full refund, but the retailer would only continue to repair the spokes and said John was not entitled to a refund as he had changed his mind.

John said he made a complaint to Consumer Affairs Victoria, but Consumer Affairs told him that his only avenue for redress is Victorian Civil and Administrative Tribunal (**VCAT**) or the courts.

Case study provided by Consumer Action Law Centre

Yaza's story

In 2017, Yaza (name changed) bought a 2004 Toyota Corolla at a car yard for \$6,500. The salesperson told him the car was in good roadworthy condition. Yaza asked to take a test drive. He was told to sign the contract of sale before test driving, but that the contract was not binding until money changed hands. Yaza signed the contract and, because there was almost no petrol, took the car for a test drive around the block. The contract of sale was marked 'vehicle sold without RWC' (registered roadworthy certificate), however Yaza cannot read or write English and did not understand what that meant. The trader disputed this saying it was made clear to both Yaza and his relative (who spoke English well). When Yaza purchased the vehicle, he was told it came

¹ Consumer Action, Loddon Campaspe Community Legal Centre, WEstjustice (November 2017) *Knock it off! Door-to-door sales and consumer harm in Victoria*. Available at: <https://policy.consumeraction.org.au/2017/11/20/knock-it-off/>

² *ibid.*, p. 13.

³ *ibid.*, p. 25.



with 12 months warranty, however no warranty documents were provided on sale. On the way home, the vehicle was shaking and felt unsafe to drive. Yaza then learnt a RWC was required for motor registration transfer. When he took the car for repair, the mechanic said the vehicle was unsafe and beyond economic repair. Yaza contacted the trader to reject the vehicle but the trader refused a refund.

Yaza was a refugee on a low income and was able to be assisted by a CLC, which sent a letter of demand to the trader rejecting the vehicle pursuant to the ACL, and breach of the *Motor Car Traders Act 1986* (Vic). The centre sought a full refund plus damages for Yaza. However, the trader disputed any breach of the law and said Consumer Affairs Victoria (CAV) had confirmed he was within his rights to refuse a refund. The trader offered to repair the vehicle to roadworthy condition free of charge, however Yaza rejected this offer, having already purchased another vehicle. Following contact from the centre, CAV undertook a compliance visit to the trader, providing advice about trader obligations and proposing conciliation. The trader then agreed to provide a full refund on return of the vehicle. The impact had been significant for Yaza, who was pleased to have the refund for his replacement car.

Case study provided by WEstjustice

Suzanne's story

Suzanne (name changed) told us that she bought a bed frame and mattress from a bedding store in January 2017. Suzanne said she paid approximately \$7,500 for both, and had asked for a specific bed frame and mattress. Suzanne told us that the bed frame and mattress were to be delivered in six to eight weeks.

After 13 weeks, Suzanne said the bed frame and mattress were finally delivered but the frame made creaking noises and was installed with legs facing the wrong direction. Suzanne also said the base didn't match the demonstration model or the description. Suzanne said the bed frame was horizontally divided, but that the installers had been unable to connect the two pieces with the brackets provided.

Suzanne said she asked for the mattress and bed frame to be removed, along with a refund from the store. Suzanne told us that the store claimed that the issues were minor, and only offered a repair.

Suzanne applied to VCAT and instructs that her dispute has since resolved.

Case study provided by Consumer Action Law Centre

Lack of effective external dispute resolution

Our casework confirms that consumers who try to enforce their consumer guarantee rights face a number of barriers in small claims tribunals or courts. In Victoria, the VCAT application fees can be a significant barrier to effective dispute resolution, particularly for consumers on low incomes.⁴ Additional consumer costs also accumulate, including hiring legal assistance (as there are limited free legal services available) and the costs associated with being absent from work.

⁴ Note: Application fees for claims between \$15,001 and \$100,000 are \$467.80 for standard, \$668.30 corporate and \$156.40 health care card. Hearing fees apply for claims between \$15,001 and \$100,000 for days subsequent to the first day of hearing, ranging between \$348.40 and \$1,761.80 standard, \$497.70 and \$2,516.90 corporate and \$156.40 for health care card. It is of note that disputes regarding revocation of an agreement about the sale of a car with a cash price of \$40,000 or less is \$62.70 standard, \$89.60 corporate and \$31.40 health care card. Fee waivers are available for some low-income consumers. See: <https://www.vcat.vic.gov.au/resources/goods-and-services-fees>



Under the ACL, the burden of proof to establish whether claims are major or minor falls to the consumer. In the absence of the requisite technical knowledge to determine the validity of a claim, VCAT frequently requires applicant consumers to produce expert reports and witnesses before it will accept a claim involving complex facts. Motor vehicle and solar products frequently fall into this complex category. Technical reports are frequently in excess of \$1,000, which is prohibitively expensive for our clients.

In addition, complex cases such as motor vehicles often run for longer than one day, incurring costs for the additional day of hearing. VCAT may recognise that a person is in financial hardship but refuse to reduce fees because of the likely length of the proceeding. This resource barrier for consumers on low incomes results in well-resourced parties prevailing purely on the basis of attrition. Delays are another barrier for consumer resolution, particularly where disputes involve goods that are essential to everyday wellbeing such as energy supply or a car to support travel to work or the transport of children to school.

In our view, clarifying the consumer guarantees regime would encourage traders to resolve complex disputes internally, and would provide consumers with more certainty about the application of consumer guarantees to their situation. The barriers to accessing justice under the current regime outlined above demonstrate the importance of avoiding complex, lengthy and costly disputes in courts and tribunals.

Appropriate timeframe to apply for a ‘short period’

We agree with discussion canvassed in the RIS, that problems are likely to be detected early for a range of goods and services. However, our casework confirms that with more complex products and services, problems may not be easily detected within one month of purchase. Clearly this applies to motor vehicles, where it may be unreasonable to expect failures to occur in the first six months, or in solar technologies where promised performance may only be detected by comparing subsequent bills.

When analysed by type of problem, the Survey⁵ also shows that the timeframe for detection of defects varies considerably by good or service, with consumer problems related to services more likely to be one year after the initial purchase.

Examples of consumer problems where a significant number of matters were identified after one month are set out below:

Figure 3: Consumer problems detected after one month⁶

Problem type	Detected 1–6 months	Detected 6 months – 1 year	Detected 1 year +
Motor vehicles	17%	6%	14%
Building &	18%	7%	12%

⁵ The Australian Government the Treasury and EY Sweeney (May 2016) *Australian Consumer Survey 2016*, p. 44. Available at: <http://consumerlaw.gov.au/files/2016/05/ACL-Consumer-Survey-2016.docx>

⁶ *ibid.*, p. 44.



renovating			
Electronics & electrical	19%	8%	13%
Utility	21%	6%	18%
Banking, financial & insurance	20%	9%	16%

The industries where consumers were more likely to take action to solve a problem were in problems related to ongoing services such as banking or financial services (90 per cent), utility services (89 per cent) and telecommunications services (88 per cent).⁷ Notably, these are all services where external dispute resolution options are available.

On 2 August 2017, the ACCC accepted a court enforceable undertaking from Holden in relation to alleged misrepresentations to consumers and Holden dealers about their rights and obligations under the consumer guarantee provisions of the ACL.⁸ Pursuant to this undertaking, Holden will implement a policy whereby a consumer is entitled to a remedy if they experience a defect within 60 days of purchasing their new vehicle that causes it to become immobile and no longer driveable. We suggest that this indicates the one month timeframe for complex products, such as motor vehicles, is inappropriate.

International approaches: time periods and onus of proof

Despite this option not being within the scope of the RIS, we consider that consumer guarantee provisions would be significantly enhanced by adopting the stronger UK and Singaporean protection that puts the onus of proof on the trader (at least for the first six months). Shifting the onus of proof would require a retailer to demonstrate that any defect was not present when the goods were bought, rather than this burden being on the consumer. This would address the current information asymmetry between traders and consumers, reduce the cost burden on consumers in pursuing remedies through tribunals or courts and encourage traders to increase their focus on the quality of goods provided.

Comparisons are made in the RIS to the consumer guarantee rights under the *Consumer Rights Act 2015* (UK),⁹ which was reformed following similar concerns to those expressed in Australia about the consumer guarantee law requiring a case-by-case application. In the UK, the right to reject is limited to 30 days from the date the product is bought. After 30 days, the retailer has an opportunity to repair the goods regardless of consumer preference. However, if an attempted repair or replacement is unsuccessful, consumers can claim a refund or reduction in price if they want to keep the goods. Other protections apply to repairs where these would produce unreasonable outcomes.

⁷ *ibid.*, p. 46.

⁸ Australian Competition and Consumer Commission (December 2007) *New Car Retailing Industry – A market study by the ACCC*, p. 64.

⁹ Available at: <http://www.legislation.gov.uk/ukpga/2015/15/section/20/enacted>



An important feature of the UK law is that the onus of proving that a defect was not present at the time of purchase remains with the retailer rather than the consumer for the first six months – and after that the onus reverts to the consumer.

Similarly, although some goods and services are exempted, the Singaporean model for consumer guarantees operates on the basis that if a defect is found within six months of delivery, the onus of proof is on the retailer to prove that the defect did not exist at the time of purchase. The consumer can make a request for repair or replacement and if that is not possible, can ask for a reduction in price or a full refund. In cases where legal action is required consumers may seek recourse through Small Claims Tribunals (up to \$10,000).¹⁰

Under the European Union Directive on consumer guarantees there is a lesser timeframe applied for consumers to inform traders of a fault or defect within two months after its discovery and their directive also lacks clarity about major and minor defects.¹¹ However, we note the purpose of the EU directive is to create a legal minimum standard from which individual member countries can build greater protections.

In our view it is reasonable for a consumer to assume that a good is in working order when purchased and that it should continue to work for a reasonable amount of time. If a fault is detected within six months it is also reasonable to assume that the good was faulty upon purchase, or soon after. Consumer confidence would be enhanced by adopting a six-month timeframe and granting the consumer discretion over the remedy they seek—repair, preplacement, price reduction or full refund. The six-month timeframe would ideally be adopted for all goods. However, we acknowledge that this option is not presented in the RIS. Our alternative position is that a six month timeframe be adopted under Option 3A for higher value goods.

We have provided a case study below where goods have failed after more than one month from purchase.

Harry's story

Harry (name changed) said that he bought a used car in 2016, which was a 2012 model. Harry said the car started to have problems two to three months after purchase. Harry said the car was having 'shuddering issues' as well as 'rough' changing of gears, particularly when accelerating fast. Harry said the car revved very high sometimes, then 'shot forward' in an uncontrollable manner. Harry said that it was 'alarming' when this happened and he felt it was a safety issue.

After raising his concerns with the manufacturer, Harry said that he was told that a clutch replacement had occurred nine days before he bought the car. Harry later found out that the car also had the transmission reprogrammed the previous year. Harry said he asked for a refund, but this request was refused. Harry told us that the manufacturer has offered to replace the clutch, but Harry is concerned this will not fix the problem.

¹⁰ Ministry of Trade and Industry Singapore, *General Advisory on Amendments to the Consumer Protection (Fair Trading) Act and Hire Purchase Act (Lemon Law)*, 5 May 2012. Available at: <https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection-%28Fair-Trading%29-Act-and-Hire-Purchase-Act.aspx>

¹¹ See: https://europa.eu/youreurope/citizens/consumers/shopping/guarantees-returns/index_en.htm



Consumer protections for higher value goods

When determining the threshold for ‘higher value goods’, we urge Treasury to consider setting this threshold at a level that would not exclude lower-income consumers who generally make lower-value purchases than wealthier consumers.

A case in point would be a distinction between new and used cars as suggested as a possible alternative in this RIS option. According to the Australian Securities and Investments Commission’s (ASIC) MoneySmart Cars mobile app, there is an almost equal divide between new and second-hand car purchase, with 51 per cent of consumers selecting a new car. Fifty-nine per cent of consumers use loans or financing to purchase their car.¹² As illustrated by our casework, motor vehicles are often critically important to a consumer regardless of whether the car is new or used. From an equity perspective, we suggest that basing extra protections on new rather than used cars would further disadvantage vulnerable consumers.

While the Consumer Survey noted a higher proportion of survey respondents experienced problems with products other than motor vehicles, 56 per cent reported that motor car disputes had not been resolved to their satisfaction. In 2016–17 our Legal Practice received 1,098 calls about car problems from consumers and community workers in Victoria, with 20.7 per cent of these about motor vehicles (higher than any other product category).¹³ The value proposition posed by the role of the motor vehicles in the lives of consumers would indicate that an arbitrary distinction between new and used vehicles in the application of the consumer guarantees would be inequitable.

We suggest that in applying a threshold figure for higher value goods, for example cars or household goods, the RIS should consider the purchase thresholds of low-income and vulnerable consumers.

Consideration of RIS options on failures within a short period of time

The RIS proposes three options to address the lack of clarity around what constitutes a major failure by amending the law to specify that where a good fails to meet the consumer guarantees within a short period of time, consumers can choose a refund or replacement without need to prove the failure is major. It proposes three options to clarify a consumer’s right to choose a remedy when a failure occurs within a short period.

Option 1: Status quo

We do not support Option 1. This option does not improve the current lack of clarity in the law. It considers instead the potential non-regulatory options of regulator guidance and education to facilitate better understanding by consumers and traders. While we are supportive of actions to better inform consumers of their rights in general, research has shown that information and education is not an effective form of consumer

¹² See: <https://www.moneysmart.gov.au/life-events-and-you/life-events/buying-a-car/car-buying-in-australia>

¹³ Consumer Action (October 2017) *Supplementary submission to the ACCC New Car Retailing Inquiry*, p. 1. Available at: https://www.accc.gov.au/system/files/Consumer%20Action%20Law%20Centre%20-%20supplementary%20submission%20October%202017_0.pdf

protection.¹⁴ Community legal education for newly arrived consumers in particular is generally ineffective, as these consumers enter into many consumer relationships within the first months of arrival. Educating newly arrived consumers about their rights before they enter into their first basic consumer agreements is therefore almost impossible.

Option 2: Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure. The proposed period is 30 days.

This is not our preferred option. While this option clarifies consumer rights in the law to choose a refund or replacement of a good that has failed within a specified time period, we believe that the ‘short period’ of 30 days is insufficient. If this option was selected, we recommend the period be extended to six months.

Option 3: Option 2, but specify a different time period for high-value goods, such as motor vehicles and white goods, based on a monetary threshold, during which a consumer is entitled to a refund or replacement without needing to prove a major failure

Approach 3A: A longer period of time for high-value goods

We support Option 3—Approach 3A. This option clarifies consumer rights in the law to choose a refund or replacement of a good that has failed within a specified time period. Under this option we presume that the short time period of 30 days would apply to all goods and a longer time period would be extended for high-value whitegoods and cars. We suggest that this extended time period should be set at a minimum of six months and that the value threshold should take account of the value of second-hand whitegoods and cars, which are more often purchased by lower-income households.

Approach 3B: No short period of time (status quo) for high-value goods

We do not support this option.

Problem 2: Multiple non-major failures

Background

The second problem posed in Chapter 2 is whether multiple non-major failures can be collectively considered a major failure under the ACL. This arises because the current wording is unclear and courts and tribunals have given conflicting interpretations of the law. The ACL Review proposed that the law be amended to clarify that multiple non-major failures can collectively amount to a major failure under the consumer guarantees regime. Three options are proposed.

¹⁴ For example, see Professor Lauren Willis’s analysis of the failure of mandated disclosure and financial literacy in protecting consumer interests: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667 and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105384. The Financial System Inquiry also acknowledged the limitations of disclosure in promoting good consumer outcomes. See: <http://fsi.gov.au/publications/final-report/overview/approach-to-financial-system-regulation/>.



Our casework confirms that consumers are commonly caught in an extended loop of multiple repairs, typically when traders try to avoid their obligations under consumer protections for a major failure.

We suggest that the current 'reasonable' test as a threshold for multiple failures and the application of this requirement by consumers within the current law is impracticable and leads to protracted disputes. The lack of clarity provided by the courts confirms our view.

We propose that further research perhaps within the next Survey may be of assistance in determining the optimum number of minor failures that should constitute a major failure. Based on our casework experience, we recommend that an appropriate number be no more than three failures.

We note however, that the legislation should still allow for discretion in the courts for special cases, where the consumer detriment high. Similarly, safety issues that are likely to cause serious injury should also qualify as a major failure for the purposes of the consumer guarantee regime.

Celia's story

Celia (name changed) bought a new car in December 2016, and noticed it shuddering. Celia says that she had to bring the car back to the dealer four times before the mechanics found the issue. It then took two months for the manufacturer to assess the problem, and Celia was then told it would take between a week and a month for her to get the car back. Finally in June 2017, the manufacturer claimed that the problem related to the transmission and offered to repair the vehicle.

However, after the transmission was replaced, Celia told us that the car was shuddering again and the dashboard light came on when the car was off. In July 2017, Celia told us that she wrote to the manufacturer and said that she wanted to reject the car. After test driving the car and detecting the fault, Celia told us that the manufacturer wanted to fix the car again. Celia was only offered a new car a few days later, after Consumer Action assisted Celia to enforce her legal rights.

Case study provided by Consumer Action Law Centre

Consideration of RIS options on multiple failures

Option 1: Status quo

We do not support this option as it does not address the ACL Review finding and would maintain the existing problem, providing no additional clarity for consumers or traders.

While the RIS analysis proposes that the current law provides a pathway for consumers to seek a refund, the lack of clarity is much more likely to see consumers in dispute with traders about their rights or potentially seeking clarification through small claims or courts. This option does nothing to increase consumer confidence in the marketplace.

Option 2: Clarify that multiple non-major failures can amount to a major failure

We do not support this option. Although it provides more certainty to consumers that they can pursue their rights to have multiple failures treated as a major failure, it does not provide sufficient clarity in the law and it is therefore likely that the courts will still be left to clarify how many failures constitute a major failure on a case-by-case basis.



Option 3: Specify the number of non-major failures that can amount to a major failure

We strongly support this option on the basis that it is a generic, industry-wide approach and clarifies the law for both consumers and traders. We recommend that a maximum of three non-major failures should amount to a major failure. We also suggest that the legislation should allow for exemptions for courts to exercise discretion where consumer detriment is high or in the event of a safety concern.



Chapter 3: Enhanced disclosure for extended warranties

Background

The ACL Review acknowledged that consumers sometimes have difficulty in determining whether extended warranties offer value for money and recommended enhancing disclosure regarding extended warranties. The RIS suggests that although there is evidence that there is a problem that may warrant regulatory intervention, there is a lack of data about the size of the problem. The ACL Review recommended enhancing disclosure on extended warranties. Three options are proposed.

Extended warranties are problematic for consumers due to a wide range of factors including the typical sales model, the dubious value of the add-on products themselves and behavioural biases impacting on the consumer's decision-making.

Relationship between extended warranties and add-on insurance

Extended warranties may or may not be insurance and therefore regulated by ASIC as financial products. Irrespective of whether they are insurance products, extended warranties and the way they are sold bear many similarities to the widespread problems seen with add-on insurance (see below at page 21).

However, the financial product distinction is critical to how regulators can address the consumer harm caused by pressure selling of poor-value extended warranties. ASIC's work on add-on insurance sold in car yards shows how this distinction impacts the regulator's effectiveness in addressing the consumer harm caused by extended warranties. It appears to be caused by avoidance of financial services regulation by some warranty providers.

In the case of the three types of extended car warranties commonly sold through car yards:

- Mechanical Breakdown Insurance policies are financial products and regulated by ASIC,
- Dealer-issued warranties are considered a product of the car dealer and are 'administered' by a warranty company. They could fall within the incidental product exemption under section 763E of the *Corporations Act 2001* (Cth), which would mean they are not regulated by ASIC and consumers would need to have their disputes dealt with by a Tribunal, rather than the Financial Ombudsman Service (**FOS**), and
- Discretionary Risk Products (**DRPs**) are not considered insurance products, but are financial product. They give the warranty provider complete discretion as to whether to pay a claim.

In relation to extended warranties sold in-store with other consumer goods, such as appliances, in our experience, these would normally be products that fall within the incidental product exemption and are in effect contracts between the store and/or a third party giving the customer the right to repair and replacement.

When a consumer buys an extended warranty, they are not aware of these distinctions between products and the impact it will have if they make a claim or have a dispute.

Extended warranty transactions – similarities to unsolicited sales

Extended warranties are commonly offered on big ticket purchases such as cars, whitegoods, computers and mobile phones. These purchase transactions are commonly stressful for consumers because of the size of the



financial commitment. That stress is heightened where the purchases are driven by necessity and where a loan is needed to support the purchase.

Extended warranties are typically marketed to the consumer immediately after they have committed to the purchase or financing of their good. Consumers may to varying degrees have researched or compared their options in making their purchase, but it is much less likely that they will have considered guarantees or extended warranty products. It is at this vulnerable point that the consumer may be pressured to make a decision.

In 2010, Consumer Action jointly published a research report with Deakin University outlining the results of an investigation by Dr Paul Harrison, a behavioural economist, into the psychological techniques used to sell maths education software through in-home sales.¹⁵ We suggest that despite the fact that extended warranty sales occur in retail stores, they share many of the characteristics of unsolicited sales out-of-store. In the add-on warranty sales transaction, the consumer has already purchased the good and is 'approached unannounced' to purchase a good they had not sought of their own volition. These sales are commonly made on the basis of commission and therefore subject to high-pressure sales tactics.

The negative impacts of 'hard sell' techniques are now more widely understood and this understanding has already been incorporated into public policy through the ACL to some extent. Regulators issue public advice to warn consumers against 'hard sell' (ASIC's MoneySmart website, notably the 'avoid sales pressure' example).¹⁶

The high-pressure sale of add-on warranties, similar to unsolicited sales generally, is an inherently uncompetitive and anachronistic sales avenue. They are uncompetitive because they capture the consumer, with one option being offered, directly working against the rational choice ideal of consumers making well-informed autonomous choices in an open and competitive market.

Consumer information at point of sale not a solution

We consider that many extended warranties constitute a systemic exploitation of consumers and that information and disclosure measures such as providing a brochure are not a sufficient protection for this type of transaction.

The unsolicited nature of the current sales model for warranties suggests that for a consumer to benefit from product and protection information, the timing of the provision of the information should be separated from the decision about the purchase of the good. In its 2017 *New Car Retailing Industry* report, the ACCC states that:

*... given the volume and complexity of information provided to consumers at the point of sale, oral explanations about consumer guarantees may not be enough to adequately inform them of their rights.*¹⁷

¹⁵ Harrison, Paul et al. (March 2010) *Shutting the Gates: An analysis of the psychology of in-home sales of Educational Software*, Deakin University and the Consumer Action Law Centre, p. 23. Available at: <https://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf>

¹⁶ See: <https://www.moneysmart.gov.au/borrowing-and-credit/borrowing-basics/avoiding-sales-pressure.pdf>

¹⁷ Australian Competition and Consumer Commission (December 2017) *New Car Retailing Industry – A market study by the ACCC* p. 53.



Even when the consumer is provided with clear verbal advice about their rights at the time of sale, they are unable to properly assess this information due to the condition now recognised as ‘consumer fatigue’. For a consumer to realistically benefit from an extended warranty they need to compare consumer guarantees against the potential costs and benefits of extended warranties as well as other potential extended warranty offers.

The ACCC recognised this in the findings of its new car retailing report:

By the time a consumer has navigated this process, it may be difficult for them to also absorb and understand information about consumer guarantees, manufacturer warranties and extended warranties. For example, a consumer in this circumstance is unlikely to have the motivation or incentive to consider in detail, the features of an extended warranty product offered to them, and compare these to the rights they already have under the consumer guarantees and manufacturer warranty.¹⁸

A review of a Harvey Norman ‘Product Care’ extended warranty disclosure document reveals a 20-page document. A comparison of the features of the extended warranty against the rights and remedies available for free under the ACL is hidden in an annexure of the document.¹⁹ Even a close reader would have difficulty interpreting some of the information in this brochure, which includes potentially misleading impressions, such as assistance not being available to help with respect to ACL rights and remedies. We are aware that the ACCC has, as part of enforceable undertakings with various businesses that sell extended warranties, required inclusions of comparison with ACL rights in disclosure documents.²⁰ However, we are not aware of any evidence that this has been effective to enhance consumer understanding. An important conclusion of the 2016 Financial System Inquiry was that ‘mandated disclosure is not sufficient to allow consumers to make informed financial decisions’.²¹

An additional failure in the ACL is that traders do not have a regulatory requirement to provide full disclosure²² and this is mirrored by trader behaviour. The ACCC’s report cites feedback from its consumer and business questionnaire that:

... some dealers and third-party suppliers of extended warranties do not disclose important details about the extended warranty that would allow the consumer to assess its value to them, including the full cost of the product and any cover exclusions.²³

‘Cooling-off’ vs ‘opt- in’ models

¹⁸ *ibid.*, p. 51.

¹⁹ See: <https://www.productcareclaims.com/asset/media/31072017-productcare-electrical.pdf>

²⁰ For example, see: <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/domestic-general-services-pty-ltd-s87b-undertaking> and <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/yoogalu-pty-ltd-s87b-undertaking> and <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/virginia-surety-company-inc-s87b-undertaking> and <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/wfi-insurance-limited-trading-as-lumley-retail-warranty-s87b-undertaking>

²¹ The Australian Government the Treasury (November 2014) *Financial System Inquiry Final Report*, p. 193.

²² We note that the ACL does prohibit misleading omissions, however, these can be difficult to prove.

²³ Australian Competition and Consumer Commission (December 2017) *New Car Retailing Industry – A market study by the ACCC* p. 52.



Consumer Action's 2017 report, *Knock it off! Door-to-door sales and consumer harm in Victoria* explores the pros and cons of 'cooling-off' and 'opt-in' protections within the context of unsolicited sales.²⁴ The report states that from their inception, cooling-off periods have been adopted on the basis that they 'protect consumers from the so-called hard sell' by giving the consumer who has agreed to a contract a period in which to reassess their decision without penalty.²⁵ The consumer can decide not to proceed with a pressured sale purchase away from the distorting influence of the salesperson.

Introduced first in the *Hire Purchase Act 1964* (UK), the 'cooling-off' model has been adopted in multiple consumer protection jurisdictions around the world. In 2011, the ACL attempted to curb door-to-door sales by restricting allowable times and mandating a ten-day cooling-off period. However, Consumer Action's report cites research that questions the effectiveness of this model. Two studies and a third survey conducted by Professor Jeff Sovern in 2010, lead him to the conclusion that:

*These numbers show such a low rate of rescission that they raise serious questions about the effectiveness of cooling-off periods.*²⁶

In 2016 Consumer Action commissioned research by Dr Paul Harrison (assisted by Dr Josh Newton) to examine the relative effectiveness of cooling-off and opt-in models from a behavioural economics perspective.²⁷ Based on the findings of his research, Dr Harrison concluded:

*The problem with the current cooling-off periods is that they operate after a customer has taken ownership of something or signed an agreement. Our research finds cooling-off periods simply don't overcome many of the inherent biases of human behaviour.*²⁸

We note that the newly arrived consumers in particular often experience fatigue associated with engaging in complex English conversations, when English language skills are very limited. They are therefore even more vulnerable when high-pressure sales tactics are used to pitch products other than the good they had set out to purchase, such as extended warranties. Where an add-on product with a cooling-off period has been purchased, these consumers are unlikely to receive the language and legal support required to understand this product within this cooling-off period, and any benefit of that period is lost on them.

We consider that an opt-in model for contract agreement would be a significantly more effective consumer protection than current cooling-off provisions. Opt-in protection would ensure that fewer goods and services are mis-sold through the unsolicited sales process and more of those purchased by the consumer are genuinely wanted and represent a legitimately worthwhile and affordable purpose. We suggest that an opt-in contract model provides the only fair solution for consumers for extended warranty sales. Otherwise consumers are likely

²⁴ Consumer Action (November 2017) *Knock it off! Door-to-door sales and consumer harm in Victoria* Available at: <https://policy.consumeraction.org.au/2017/11/20/knock-it-off/>

²⁵ Sovern, Jeff, 'Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures' *University of Pittsburgh Law Review*, Spring 2014, p. 337.

²⁶ *ibid.*, p. 355.

²⁷ Note: Dr Harrison is a professor of marketing and co-Director of the Centre for Consumer and Employee Wellbeing at Deakin University in Melbourne.

²⁸ Harrison, Paul, 'Cooling-off periods for customers don't work: study' *The Conversation*, November 28, 2016. Available at: <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>

to continue to experience significant detriment in the marketplace. That being said, we note that consideration of the opt-in model on commerce needs to be carefully considered.²⁹

Value of the product

Consumer Action research has found that some add-on warranty products offer very little real value. The extreme nature of these warranty case examples provide support for adoption of an opt-in model to protect consumers under the RIS.

Our 2015 report, *Donating Your Money to a Warranty Company: Why the motor vehicle you bought might be worthless*, concluded that in relation to warranties which are DRPs:

*As far as we can tell, warranty providers can avoid paying many if not most claims, either by relying on their discretion or on one of the exclusions. We think that makes these products completely worthless.*³⁰

In our December 2015 report, *Junk Merchants: How Australians are being sold rubbish insurance, and what we can do about it*,³¹ Consumer Action recommended that consumers should be protected against purchasing junk insurance policies by mandating a compulsory delay between purchasing the primary good, and the add-on insurance policy. The report concluded that the important thing is that the nexus between the sale of the good and the sale of the junk insurance is clearly broken—so the consumer does not feel that the extended warranty is a necessary purchase.

In addition, the consumer should be required to proactively opt-in to the purchase (i.e. they should contact the salesperson to confirm the purchase, rather than the other way around). To avoid doubt—no add-on product should be sold through an opt-out process, such as a tick-box system where the consumer agrees to purchase the add-on unless they say otherwise.

These recommendations are equally applicable to extended warranties, and should be incorporated into the ACL to protect consumers from making unnecessary purchases at a time when they are vulnerable to a hard sales pitch, and are often not fully informed of their existing rights under the ACL.³²

Brian's story

In early 2016, Brian (name changed) bought a used car. The car dealer also sold him a dealer-issued warranty for approximately \$2,000. Brian told us that the car dealer told him that it was like a manufacturer's warranty

²⁹ Consumer Action (November 2017) *Knock it off! Door-to-door sales and consumer harm in Victoria*.

³⁰ Consumer Action (August 2015) *Donating Your Money to a Warranty Company: Why the motor vehicle you bought might be worthless*, p. 4. Available at: <https://consumeraction.org.au/wp-content/uploads/2015/08/DonatingYourMoneyToaWarrantyCompany.pdf>

³¹ Consumer Action (December 2015) *Junk Merchants: How Australians are being sold rubbish insurance and what we can do about it*. Available at: <https://consumeraction.org.au/junk-merchants-report-how-australians-are-being-sold-rubbish-insurance-and-what-we-can-do-about-it/>

³² ASIC's proposed model on add-insurance might not apply to non-insurance warranty products. See: <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-280mr-asic-consults-on-reforms-to-add-on-insurance-sales-to-drive-better-outcomes-for-consumers/>



and that he felt the dealer pressured him into it. He tried to seek a refund for the warranty and lodged a complaint with FOS. FOS advised him that it did not have jurisdiction to handle the dispute because the warranty was not a financial product. Brian then lodged a complaint with the Western Australian Department of Commerce. He said that they told him that they could not deal with the dispute because the dealer was unwilling to make any settlement offers and suggested he lodge a complaint in the Magistrates' Court.

Case study provided by Consumer Action Law Centre

Simplifying the complex legislative framework

We note that the RIS describes the complex legislative framework for extended warranties, which incorporates the ACL, is covered by and actionable under the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*³³ and the circumstances in which extended warranties are subject to the Corporations Act. Particular extended warranties may be regarded as financial risk and/or a contract of insurance and 'incidental product' exemptions apply in some circumstances.

We note that although amendments to the legislation to address this complexity are not proposed by the RIS, we believe the complicated legislative framework is a significant issue and may in part be responsible for some aspects of the market failure in extended warranties.

Our casework indicates that the construction of the ASIC Act and the ACL, and the way the nexus between them is expressed, can make it difficult to assess which legislation covers a particular product or service. The ACL is not clear on the issue, as the exclusion of financial services is located in the body of the Competition and Consumer Act (section 131A), not in the ACL itself. The definition of a financial product or service must then be determined with reference to the ASIC Act and its Regulations.³⁴

In the 2015 Consumer Action research report into motor vehicle warranties, Consumer Action found loopholes in the financial services law that allowed DRPs to be sold to consumers as motor vehicle warranties.³⁵ These products operate like an extended warranty with one exception: the provider has complete discretion over whether to pay a claim or not. Providers say that they are required to consider the merits of claims and exercise their discretion fairly. But our report found the contract terms allow warranty providers to exclude almost any claim. While there may be a legitimate role for DRPs as an alternative insurance option for businesspeople and community groups, they create the risk for significant detriment for consumers.

Most shortfalls in protection are likely to be an unintentional consequence of the complexity of the interaction between the ACL and the regulation of financial services. Needless to say, these areas need to be clarified – and clear, national consumer protection for financial services and products ought to be provided by importing equivalent protections from the ACL into the ASIC Act.

³³ *Australian Securities and Investments Commission Act 2001 (Cth) ('ASIC Act')* Part 2, Division 2.

³⁴ Australian Government the Treasury (2015) *Benchmarks for industry-based customer dispute resolution schemes*. Available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/benchmarks_ind_cust_dispute_reso.pdf

³⁵ Consumer Action (August 2015) *Donating Your Money to a Warranty Company: Why the motor vehicle you bought might be worthless*, p. 4.



Difficulties in enforcement

The lack of clarity in the legislative framework also makes compliance and enforcement more difficult for regulators, thereby reducing incentive for trader compliance.

In February 2016, CAV launched a Federal Court action against the retail chain The Good Guys following consumer complaints alleging that a number of their stores had breached sections 18 and 29(1)(l) and 29(1) (m) of the ACL by engaging in misleading and deceptive conduct when promoting extended warranties for its goods.³⁶ CAV inspectors posed as customers and recorded sales representations in a number of stores during which the inspectors found that sales staff had made inaccurate statements about customer warranties and failed to refer to the ACL. The sales staff had, however, provided the store's warranty brochure. CAV was unsuccessful in its action, as the court felt that statements made in the conversations were vague and general – making it difficult to conclude that the statement was an inaccurate description under the ACL. It was clear, however, that specific ACL guarantees were not brought to the attention of the inspectors, nor was any explanation about the value of manufacturer's warranty versus the ACL guarantee.

We suggest that an opt-in option for extended warranties, with oral and written disclosure, would assist effective compliance and enforcement action.

Size and extent of the problem requires regulatory change

The RIS impact analysis states that while there is evidence that 'there is a problem that may warrant regulatory intervention on extended warranties, there is a lack of data about the size of the problem.' The RIS proposes that the RIS consultation will bridge this evidence gap. We suggest that considerable consumer detriment is evident in existing data and research, including ACCC³⁷ and ASIC³⁸ reports, the ACCC's own complaint data and consumer research noted in our response. We note, in addition, that the ACCC has listed consumer guarantees/warranties as its third priority for focus in 2018, on the basis of complaint numbers and the serious nature of this detriment.³⁹

The extent of problems currently being experienced by consumers regarding extended warranties affirms the need to address these problems through appropriate regulatory responses. Waiting on further data and potentially a further review of the ACL before implementing regulatory change would have a detrimental impact on consumers and significantly reduce trust in the marketplace, particularly for motor vehicle sales. If a more comprehensive understanding of specific elements of the consumer harm resulting from mis-selling of extended

³⁶ *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22

³⁷ Australian Competition and Consumer Commission (December 2017) *New Car Retailing Industry: A market study by the ACCC*.

³⁸ Australian Securities and Investments Commission (September 2016) *Report 492: A market that is failing consumers: The sale of add-on-insurance through car dealers*; Australian Securities and Investments Commission (February 2016) *Report 470: Buying add-on insurance in car yards: Why it can be hard to say no*; Australian Securities and Investments Commission (February 2016) *Report 471: The sale of life insurance through car dealers: Taking consumers for a ride*. All available at: <http://asic.gov.au/regulatory-resources/find-a-document/find-a-regulatory-document/?filter=Report&find=all>

³⁹ Australian Competition and Consumer Commission, *2018 Enforcement and Compliance Priorities*. Available at: <https://www.accc.gov.au/publications/2018-enforcement-and-compliance-priorities>

warranties, this will require a strategic research approach. We suggest that Consumer Affairs Australia and New Zealand consider undertaking an appropriate research exercise to bridge this knowledge gap, but that this research is not required prior to making recommendations on reforms relating to extended warranties.

Consideration of the RIS options on extended warranties

The policy intent of the RIS is to ensure that consumers are able to make informed decisions about whether to purchase an extended warranty. This information should assist consumers to determine if a warranty offers value for money and provides additional protection. The objectives include that traders have an improved incentive to provide clear information, that benefits exceed costs and that traders are afforded certainty.

Option 1: Maintain the status quo

We do not support this option. As highlighted in our response above, we have identified significant failures in the current regulatory protections for consumers in relation to extended warranties. We believe that information provision in the form of regulatory updates would fail to address the most basic problems.

Option 2: Cooling-off right with oral and written disclosure

We do not support this option. Our reasons are outlined above, and are based on the findings from behavioural economics research that has taken into account the actual behaviour of consumers in different sale transaction scenarios. While a 10-day cooling-off right would be consistent with other provisions of the ACL and be a minor increase in consumer protection, we suggest cooling-off is a far less effective than an opt-in model, particularly for vulnerable consumers. Similarly, we generally support the provision of oral and written disclosure but believe that this would be more effectively combined with an opt-in model.

We also do not support the two sub-options proposed.

Option 3: Disclosure and opt-in process

We strongly support this option of an opt-in process for extended warranties – we also support the proposed opt-in period of 10 days. Our reasons for this are set out under the response to Chapter 3 above. We consider opt-in regimes to be a far more effective form of consumer protection than cooling-off.

Under this option consumers would have the added protections of product information and disclosure. Our understanding is that these protections would also be provided for online purchases with the exception of oral advice where it would only be required within reasonable circumstances.



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

Background

The ACL covers situations where goods are sold through an auction that is conducted by an agent or a person. This covers traditional auctions (face-to-face) and some online auctions where the website operator is acting as an agent for the seller. For many online auctions (including websites such as eBay) the website is not acting as an agent. Goods sold in trade or commerce by auction are sold subject to some, but not all, of the consumer guarantees. The guarantees that currently apply are to ensure that the person selling has the right to sell those goods. Goods purchased at auctions are exempted from other guarantees under the ACL on the basis that consumers should be able to inspect goods prior to auction. State and territory-specific laws also apply. The RIS has identified that there are benefits for consumers and businesses afforded through the cheap and efficient purchase and disposal of goods through auction. However, the increasing growth in online auctions presents additional problems in response to which the RIS poses four options.

Although Consumer Action's case numbers for online auction matters are currently low compared to other consumer guarantee matters, in our view consumers are less certain about their regulatory protections in these transactions than for retail transactions and are also less certain about whether and where they can seek assistance in the event that something goes wrong.

Consumer Action received 25 auction-related calls to its Legal Practice in the past 12 months. Nineteen of these matters related to traditional face-to-face auctions, five concerned online auctions and in one case the auction type was unclear.

It is also likely, as projected by the RIS, that the prevalence of purchasing through online auctions will increase significantly over time. We are concerned that if amendments to address the gap in consumer protections for auctions are not adopted in the ACL, more consumers will be left unprotected by consumer guarantees and consumer confidence in auction purchases will reduce.

We suggest that the ability to physically inspect goods while an important feature, is far from a fail-safe protection and represents a minimum standard of consumer protection. As with other purchases of goods through retailers, defects still occur over time post purchase, delivery and use of a good.

We note that Consumer Action raised the issue of disclosure with eBay some time ago, which resulted in eBay improving its disclosure process about the 'auction' exemption in the ACL.⁴⁰

International comparison: New Zealand

Background

The RIS identified information gaps relating to the level of detriment stemming from the current operation of exemptions from the consumer guarantees for auctions, while recognising the principle that consumers may incur detriment from purchasing in an online auction.

⁴⁰ Consumer Action (4 November 2011) Media Release, 'Is eBay selling consumers short?'. Available at: <http://consumeraction.org.au/media-release-is-ebay-selling-consumers-short/>



The RIS stated that:

*the impacts of this change are unclear on the New Zealand auction market in relation to the throughput of goods and the prices paid for goods at auction. These are the types of impacts that this RIS chapter is seeking information on for the Australian context.*⁴¹

The RIS predicts that extending the ACL to cover auctions would prove costly to the Australian auctioneering industry in two key ways:

- increased regulations would have the flow-on effect of bringing increased compliance costs, for example, as business are forced to redraft their disclosure statements and terms and conditions to meet the ACL requirements,⁴² and
- business would face increased costs associated with honouring consumer guarantees.⁴³

Consumer Action undertook specific research on the impact the application of consumer guarantees to auctioned goods in New Zealand has had on consumers, auctioneering businesses and the legal landscape in New Zealand. The *Consumer Guarantees Amendment Act 2013* (NZ) (**the 2013 Amendment Act**), removed the exception to providing consumer guarantees for goods sold at auction. This exception was formerly contained in s 41(3) of the *Consumer Guarantees Act 1993* (NZ), and was repealed as a result of the 2013 Amendment Act.

Profitability of the New Zealand auction industry

Our research demonstrates that despite the 2013 Amendment Act, the NZ auction industry appears as profitable and popular as prior to the amendment, and on this basis, it can be argued that the anticipated costs to Australian business might have been overstated in the RIS.

We examined the annual financial reports of New Zealand's largest second-hand vehicle retailer Turners Automotive Group (formerly Turner Auctions) in the years pre- and post- the 2013 legislative amendment to remove the auction exemption.⁴⁴ It appears that Turners did not suffer a reduction in auction activity, and instead witnessed an increase in total revenue derived from auction sales. This might indicate that suppliers and consumers did not flee the online auction space due to the flow-on effect of increased fees. Indeed, between 2011 and 2013 Turners auction revenue was \$36.5m, \$36.7m and \$36.3m⁴⁵ respectively, while in 2016 auction revenue was \$37.173m and in 2017 it was \$38.169m.⁴⁶

Since the 2013 Amendment there have been two instances of organisations acquiring controlling interests in New Zealand auction houses as part of mergers. We assume that these mergers took place on the basis that the auction houses are (and would continue to be) profitable businesses in the post-2013 amendment era. For

⁴¹ Consumer Affairs Australia and New Zealand (2018) *Consultation Regulatory Impact Statement*, p. 21. Available at: https://consult.treasury.gov.au/market-and-competition-policy-division/c2018t271629/supporting_documents/20180322Chapter_4_ConsultationRISprop14.pdf

⁴² *ibid.*, p. 18, 20, 21.

⁴³ *ibid.*

⁴⁴ Turners Automotive Group Limited (2017) *Annual Report for the year ended 31 March 2017*, p. 57. Available at:

<http://www.turnersautogroup.co.nz/site/turnerslimited/files/AR2017/Turners%20AR%20FINAL%20WEB%202017.pdf>

⁴⁵ Turners Auctions Limited (2013) *Annual Report 2013*, p. 7. Available at: <https://www.nzx.com/files/attachments/191250.pdf>

⁴⁶ Turners Automotive Group Limited, n. 4.



example, in August 2014, Mnemon Limited (MNZ) announced that it would acquire 100% of Grays (the New Zealand and Australian online auctions company) via a scrip for scrip offer to Grays shareholders, declaring that 'the scale of Grays eCommerce Group will be an important factor in leveraging economic growth across multiple sectors'.⁴⁷ Similarly, in July 2014, Turners Group NZ Limited received notice of an intention to make a full takeover offer from Dorchester Turners Limited, a wholly owned subsidiary of NZSX listed company Dorchester Pacific Limited (debt recovery and insurance sectors).⁴⁸ The takeover subsequently took place and Turners was purchased by Dorchester Pacific Limited.

Consumer protection from faulty goods

The RIS alludes to the following consumer benefits that are likely to flow from an expanded ACL guarantee regime:

- consumer protection from faulty goods (of particular benefit where consumers were unable to detect default upon inspection, or were denied an inspection due to online purchase),
- increased 'consumer confidence' in the auctioneering industry⁴⁹ – opening up a new market to more conservative consumers who had avoided auctions due to lack of guarantee.

The below case studies taken from the Motor Vehicles Disputes Tribunal of New Zealand illustrate how these benefits might be realised if the ACL were extended in line with 2013 NZ amendment.

Tribunal matters pre-2013 Amendment

In examining the tribunal matter of *Dewar v E & H Auctions Limited*, it is clear that had the tribunal found evidence of a 'competitive tender', ultimately determining that because there were no rival bids no 'competitive tender' process took place, the purchaser would not have been entitled to a purchase price refund (\$3,510) for a faulty vehicle that immediately 'overheated' and 'probably had a cracked cylinder or weeping gasket'.⁵⁰ Had the tribunal decided that a competitive tender did take place, then the exemption at s 41(3)(b) of the *Consumer Guarantees Act 1993* would have applied and the purchaser would not have been entitled to this refund for a patently faulty good.

In the matter of *Yang v Turners Auctions Limited*, the tribunal found that the negotiations subsequent to the formal auction did not amount to an extension of the auction process, meaning the purchaser was entitled to receive payment of \$3,795 to repair the fault of a faulty transmission and 'a faulty valve body'.⁵¹

Tribunal matters post-2013 Amendment

The matters of *Shaw v Kiwi Auto Auctions Limited* and *Aniterea v Budget Car Auctions 2013 Limited* demonstrate the shift in the approach of the tribunal post the 2013 Amendment Act, as in neither case was the fact that

⁴⁷ Mnemon Limited (2014) Company Announcement, 'Mnemon Limited Agreed to merge with Grays'.

⁴⁸ Dorchester (2014) *Annual Report 31 March 2014*. Available at:

<http://www.turnersautogroup.co.nz/site/turnerslimited/files/Reports/Dorchester%20Annual%20Report%20to%2031Mar2014.pdf>

⁴⁹ Consumer Affairs Australia and New Zealand, n 1 p. 22.

⁵⁰ *Dewar v E & H Auctions Limited T/A Whangarei Car Auctions* [2011] NZMVD 44 (8 April 2011).

⁵¹ *Yang v Turners Auctions Limited* [2011] NZMVD 23 (3 March 2011).



purchase was made through auction a potential bar to remedy, and thus was not an 'issue' to be addressed before the Tribunal.⁵²

In the former matter the purchaser's rejection of the faulty vehicle was 'upheld' and it was ordered that the trader take responsibility for the purchaser's collateral finance agreement and refund all payments made. In the latter case the purchaser's application to reject was dismissed, but the point remains that their claim was not dismissed outright due to purchase at action.

It is likely that NZ consumers post-2013 Amendment enter motor auctions with more confidence knowing that they have recourse through the ACL and are entitled to a hearing as to the nature of the 'fault' through the Motor Vehicles Dispute Tribunal NZ.

Confusion over application of the NZ amendment

There is some evidence that the NZ amendment has led to some confusion as to when goods sold at auction are or are not 'in trade'.⁵³ This distinction is important because consumers under the NZ legislation only have a right to a consumer guarantee remedy under the ACL if the seller was acting 'in trade'. It is likely that Australia has faced similar issues about whether activity is 'in trade or commerce'.⁵⁴

Although under NZ law an online seller is required to advertise to consumers whether or not they are a 'vendor in trade', there is still a great deal of confusion as to 'at what point a frequent user of an online auction site crosses from being a private to a commercial seller',⁵⁵ and so the distinction between private and commercial sellers online is still generally unclear. Kate Tokeley provides some useful examples in her article, 'When Not all Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern marketplace' as to the 'murky' online consumer landscape. Toekely explains how 'it is not clear whether a person who makes jewelry in his spare time and sells it in online auctions or on Facebook is acting 'in trade''.⁵⁶

As the current law 'provides little guidance on the issue of where the boundary lies between prolific online private sales activity and commercial trading', Tokeley recommended that an Australian amendment to the ACL should include an express statement so that consumers and sellers are able to autonomously gauge 'where the boundary lies'.⁵⁷

We conclude that the benefits deriving from the amendment appear to have come at little cost to the auctioneering industry, and instead has potentially enhanced the industry's future commercial prospects by bolstering consumer confidence. This said, there remains the tricky legal issue of identifying when a seller is 'in trade' and thus subject to the Act, which we suggest is an issue that should be examined in further detail.

⁵² *Shaw v Kiwi Auto Auctions Limited T/A Safeway Auto Auctions* [2014] NZMVD 107 (29 September 2014); *Aniterea v Budget Car Auctions 2013 Limited* [2015] NZMVD 29 (19 March 2015)

⁵³ Consumer Affairs Australia, n 1 p. 22.

⁵⁴ Tokeley, Kate 'When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace' *Sydney Law Review* 2017, 39(1), p. 59.

⁵⁵ *ibid.*, p. 61.

⁵⁶ *ibid.*, p. 70.

⁵⁷ *ibid.*, p. 70.



Consideration of the RIS options on auctions

Option 1: Status quo

We do not support this option. Under this option the consumer protections for traditional auctions remain minimal (rights to undisturbed possession but not to additional protections of quality or fitness of goods). This option does not increase protections for online purchases. We consider that it is unlikely that best practice will be adopted in this marketplace without regulatory requirements particularly by smaller agents.

Option 2: Goods purchased through auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales)

We do not support this option. This option increases consumer protections, but only for online auctions that do not allow a person a reasonable opportunity to inspect the goods. However, it does not increase protections for 'traditional' transactions. While acknowledging this increase in protections, we consider that the implementation of this option is a wasted opportunity to increase confidence in the auction market as a whole and to reduce consumer disputes.

Option 3: Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding), receive access to the remainder of the consumer guarantees that are available in the ACL for generic retail sales)

We do not support this option. This option does provide a broader protection for online auctions conducted through traditional auction platforms, however it fails to address problems in the auction market more broadly.

Option 4: All goods purchased through auctions will receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales)

We strongly support the extension of consumer protections to all auction sales. Our research into the NZ extension indicates that contrary to concerns raised in the RIS, consumer and market benefits have increased.

We believe that amending the ACL to apply all consumer protections to auctions, including online auctions would boost consumer confidence in the Australian market and that additional compliance costs would be absorbed through increased consumer participation.



Please contact Katherine Temple at Consumer Action Law Centre on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,



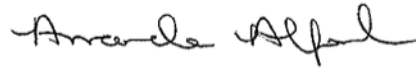
Gerard Brody
CEO
Consumer Action Law Centre



Serina McDuff
CEO
Federation of Community Legal Centres (Vic) Inc.



Denis Nelthorpe
CEO
WEstjustice



Amanda Alford
Director Policy and Advocacy
National Association of Community Legal Centres

