Decision Regulation Impact Statement

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

Consumer Affairs Australia and New Zealand

2018

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About this regulation impact statement

Background to this decision RIS

In June 2015, the Australian Consumer Affairs Ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF), asked Consumer Affairs Australia and New Zealand (CAANZ) to initiate a broad-reaching review of the Australian Consumer Law (ACL).

In March 2017, CAANZ presented the Final Report of the ACL Review (the Review).

The Review found that the introduction of the ACL had been beneficial for both consumers and traders and the ACL is generally ‘fit for purpose’. In particular, the Review found that the flexible and economy-wide approach taken to consumer guarantees within the ACL has assisted in clarifying the rights and responsibilities of both traders and consumers. However, the Review also identified ongoing difficulties with the operation of the consumer guarantee provisions, and proposed a number of amendments to the ACL, to assist with further clarification, simplification and modernisation of the law.

In August 2017, CAF supported regulatory impact assessment of seven proposals from the Review. Five of those proposals and their implementation options relate to the consumer guarantees regime in the ACL and were considered in the Consultation Regulation Impact Statement (RIS), which was released for public consultation on 9 March 2018. Consultation closed on 23 April 2018. Information about the consultation process can be found in the *Consultation* section of this Decision RIS, with a high level summary of the preferred option for each proposal outlined below. Key findings from the consultation process are discussed in each chapter.

Treasury engaged Deloitte Access Economics to calculate the costs and benefits of each option, to determine net benefits. The costings are contained in each chapter.

An overview of the ACL

The ACL is a single generic consumer protection law operating as a law of the Commonwealth and in each State and Territory. The ACL provides a system of consumer protections and remedies for consumers in relation to defective goods and services (consumer guarantees), prohibitions against misleading or deceptive conduct and unconscionable conduct, unfair contract term protections, a harmonised national product safety and enforcement system, national laws covering a number of sales practices and enforcement powers.

The consumer guarantees set out standards for goods and services supplied to consumers, and are independent of contractual arrangements between parties. They are outlined in Part 3-2, Division 1 of the ACL. Among these guarantees is section 54, which provides the consumer with the principal guarantee that goods are of acceptable quality. Other key guarantees include the guarantee of title (section 51), that the product is fit for purpose (section 55) and that the goods correspond with the description or sample model provided to the consumer (sections 56 and 57).

The structure and focus of this decision RIS

This Decision RIS is comprised of four chapters, addressing five proposals from the Review which relate to the consumer guarantee regime in some way. Each chapter outlines the implementation options. Drawing on substantial stakeholder consultations and a quantitative assessment of costs and benefits, each chapter considers which option is likely to have the greatest net benefit.

This Decision RIS is structured as follows:

1. **Chapter 1**: Increasing the threshold in the definition of ‘consumer’ from $40,000 to $100,000;
2. **Chapter 2**: Clarifying the consumer guarantees remedies (comprised of two proposals – failure within a short period of time and multiple failures);
3. **Chapter 3**: Enhanced disclosure for extended warranties; and
4. **Chapter 4**: Access to consumer guarantees for goods sold at auctions.

In considering this Decision RIS it is important to note some key features of the consumer guarantee provisions which operate as preconditions to accessing the consumer guarantees regime. These features are who is a ‘consumer’, and which party is entitled to choose the remedy where there is a failure to meet the consumer guarantees, and are the focus of chapters 1 and 2 respectively. Accordingly, these chapters set the scene for the next two chapters, which focus on disclosure obligations and auction exemptions.

An overview of the proposals and their preferred options

This section provides a high level summary of the preferred options for each of five proposals.

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

Many of the ACL’s protections (including consumer guarantees) apply only when goods or services are supplied to a ‘consumer’ as defined in the ACL. According to one of the definitions, a buyer of goods will be a consumer if the purchase price does not exceed the current threshold of $40,000 (which was introduced in 1986) and the goods are not bought for the purpose of resupply or to make a new product for a commercial purpose.

A finding from the Review is that the level of protection afforded to consumers has been eroded over time as the decline in the real value of the threshold means that certain purchases once covered under the ACL are no longer so covered. The Review proposed that the threshold amount be increased to $100,000.

To address this problem, the Consultation RIS presented three options:

1. Maintain the status quo;
2. Increase the threshold in the definition of consumer from $40,000 to $100,000; and
3. Increase the threshold in the definition of consumer from $40,000 to $100,000 and apply indexation.

Overall, increasing the monetary threshold in the definition of ‘consumer’ to $100,000 has the greatest net benefit. Feedback from consumer and small business groups noted the benefits for all consumers and supported Option 2 being taken forward with a view to ensuring the ACL definition would remain fit for purpose.

Chapter 2: Clarifying the consumer guarantees

Chapter 2 comprises of two proposals from the Review.

Failure within a short period of time

Under the current regime, where a good purchased by a consumer fails to meet one of the consumer guarantees, the consumer’s right to reject the good is dependent on whether the failure is ‘major’. If it is a major failure, consumers have the right to reject the goods within a reasonable time and choose a remedy, including a refund. If the failure is non-major, the supplier chooses the remedy, which can be a repair, replacement or refund.

The Review found that consumers and traders may be uncertain about how the right to reject goods for a refund or replacement under the consumer guarantees regime applies when there is a failure within a short period of time after purchase.

To address this problem, the Consultation RIS presented three options:

1. Maintain the status quo;
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); and
3. Within Option 3, two approaches were considered:
	1. Option 2, but specify a longer time period for high-value goods (such as motor vehicles and white goods) based on a monetary threshold; or
	2. Option 2, but with an exemption (status quo) for high-value goods.

This decision RIS identifies the status quo as the preferred option to address a single consumer guarantee failure arising within a short period of time after purchase.

While Options 2 and 3 would produce benefits associated with consumers having the right to choose their preferred remedy in a greater number of cases, this is outweighed by the significant costs that would be imposed on businesses. For example, the estimated cost of Option 2 is $1,204 million, compared to estimated benefits of $843.3 million.[[1]](#footnote-2)

It is important to note that Options 2 and 3 would result in a *non-major failure* in the short period triggering a refund or replacement right. This could produce unreasonable outcomes where very minor faults in high-value goods trigger refund rights (even if easily repairable).

Consultation conveyed that consumers are experiencing widespread problems enforcing their existing entitlement to a refund or replacement in the event of a *major* failure, even when the major failure is very obvious.

Non-major failurescan normally be fixed or resolved in a reasonable period of time. In comparison, major failuresnormally cannot be fixed or are too difficult to fix. Consultation revealed the costs would exceed the benefits of a framework where consumers would have a right to a refund or replacement when there is a non-major consumer guarantee failure in a short period of time after purchase.

Under Options 2 and 3, consultation indicated suppliers would share a disproportionate burden of the costs, in the context of persistent challenges getting indemnification from manufacturers. Consultation also revealed widespread concerns about the limited understanding or guidance on the concept of ‘non-major failure’; a concept that would become more important if the other options presented were pursued.

Further, the legislative options set out in the consultation RIS would not address the challenges consumers face, highlighted in consultation, getting remedies in cases of repeated failures or in cases of cycles of failed repairs. The options considered in the second part of this Chapter, in response to Problem 2: Multiple Failures, are targeted at this issue.

Multiple failures

The consumer guarantees provisions are currently unclear about whether multiple non-major failures can collectively be considered a major failure. This has resulted in uncertainty for both consumers and businesses. The 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.

To address this problem, the Consultation RIS presented three options:

1. Maintain the status quo;
2. Clarify that multiple non-major failures can amount to a major failure; and
3. Specify the number of non-major failures that can amount to a major failure.

The preferred option is to clarify that multiple non-major failures can amount to a major failure, entitling the consumer to a refund or replacement, without specifying the number. This option has the greatest net benefit and received broad support during consultation. It represents an appropriate response to some of the most significant problems identified, including in relation to ‘cycles of failed repairs’.

Chapter 3: Enhanced disclosure for extended warranties

The Review noted that it was sometimes difficult for consumers to determine if an extended warranty offers value for money and provides the additional protection they seek. The Review recommended enhancing disclosure in relation to extended warranties by requiring:

* agreements for extended warranties to be clear and in writing;
* additional information about what the ACL offers in comparison; and
* a cooling-off period of 10 working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed orally and in writing.

To address this problem, the Consultation RIS presented three options:

1. Maintain the status quo;
2. A legislative amendment comprising a cooling-off right, oral disclosure and written disclosure; and
3. Oral and written disclosure with an opt-in process.

The preferred option is enhanced disclosure for extended warranties in the form of written information comparing the value of an extended warranty, simple oral disclosure at point of sale and a cooling-off right. This option has the greatest net benefit and received the strongest support amongst stakeholders.

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

Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the ACL on the basis that, typically, consumers purchasing from traditional auctions have had the ability to inspect goods and identify defects prior to purchase. However, such an ability does not extend to auctions that occur in an ‘online only’ manner. The traditional rationale for the exemptions is difficult to apply when the forum does not provide for the opportunity to inspect the goods.

The Review proposed modernizing the ‘sale by auction’ exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

To address this problem, the Consultation RIS presented four options:

1. Maintain the status quo;
2. Goods purchased through online 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). The status quo remains if the auctioneer makes the goods reasonably available for inspection;
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 consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person ; and
4. All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

The preferred option is to maintain the status quo, so that goods sold at auctions are exempted from certain consumer guarantees in the ACL. Feedback revealed that the majority of auctions offer in person inspections.

The reform options, particularly Option 4, received support from consumer and community stakeholders who considered that the rationale for the exemptions was no longer appropriate. However, the cost of amending the law to provide the remainder of the consumer guarantees (that are available in the ACL for generic retail sales) exceeds the likely benefits.

Other issues raised through consultation

During the consultation process, several issues were raised that are not in the scope of the consumer guarantees proposals but are relevant to the operation of the consumer guarantees framework. Three key issues were:

* Regulatory guidance on non-major failures: The consultation revealed that businesses need greater information about what constitutes a major and a non-major consumer guarantee failure under the ACL.
* Supplier indemnification: Under section 247 of the ACL, when a supplier is liable to a consumer for a failure to comply with the consumer guarantees, and the manufacturer is or would be liable for the same failure, the manufacturer is liable to compensate the supplier. Consultation revealed that large and small retailers have significant difficulty obtaining recompense from manufacturers if they provide the consumer a remedy for a faulty good. This can result in retailers wearing the cost for selling a faulty good supplied by the manufacturer and being less willing to provide a refund.
* Consumer detriment in the caravan industry: Consultation revealed a high degree of consumer concern that caravan sellers are not complying with their obligations under the ACL, including in cases of repeated cycles of failed repairs.

Decision Regulation Impact Statement

Chapter one

Australian Consumer Law Review: Increasing the threshold in the definition of ‘consumer’ from $40,000 to $100,000

Consumer Affairs Australia and New Zealand

2018

Executive Summary – Chapter One

In 2017, the ACL Review Final Report (the Review) found that the extent of consumer and small business protection provided by the ACL had eroded over time, as the real value of the monetary threshold of $40,000 in the Australian Consumer Law’s (ACL) definition of ‘consumer’ declined. As a result, the scope of purchases protected by the ACL has diminished, and the definition is no longer fit for purpose. The Review proposed that the $40,000 threshold be increased to $100,000 to broadly account for inflation since the threshold was set in 1986.

The purpose of this Regulation Impact Statement (RIS) is to recommend a preferred policy option to address this problem, and ensure that the monetary threshold remains fit for purpose so that eligible consumers, including small businesses, remain protected by the ACL regime. This RIS follows stakeholder comment on the Consultation RIS.

This Decision RIS identifies the nature of the problem to be solved, outlines the alternative policy options considered and explains the rationale for selecting the preferred option. It also assesses the costs and benefits of the preferred option compared with the other options identified.

This chapter explores three options:

* Option 1 – Maintain the status quo. No action is taken.
* Option 2 – Increase the threshold in the definition of consumer from $40,000 to $100,000.
* Option 3 – Increase the threshold in the definition of consumer from $40,000 to $100,000 and apply indexation.

The status quo does not address the problem, with the majority of stakeholder feedback agreeing with the problem description in the Consultation RIS, and supporting the threshold being increased to $100,000. While a majority of stakeholders supported the increase of the threshold with indexation applied (option 3), it could result in high compliance costs for businesses and uncertainty for consumers.

An analysis of the costs and benefits of the proposals, informed by consultation feedback, demonstrates that option 2, increasing the threshold with no indexation, is the preferred option. The benefits of this approach exceed the costs and will ensure that the definition of ‘consumer’ in the ACL remains fit for purpose.

Introduction

The existing legislative framework

1. Section 3(1) of the ACL defines a consumer as someone who acquires goods in any of the three circumstances set out below.
2. The first situation, which is the focus of this RIS chapter, involves a person acquiring goods or services that do not exceed the monetary threshold of $40,000. For goods, this is set out in section 3(1)(a) of the ACL, while section 3(3)(a) adopts a similar definition for a consumer acquiring services. The inclusion of the monetary threshold, acting as a bright-line standard, was intended to broaden the group of consumers who were protected under the regime, with specific emphasis on protecting small businesses. This situation also covers purchases of commercial products not exceeding $40,000 for personal use by a consumer.
3. The second situation involves a person acquiring goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. There is no monetary threshold set for this situation.
4. The third situation involves a person acquiring a vehicle or trailer for transporting goods on public roads.
5. Under subsection 3(2), in order to fall within the definition of ‘consumer’, the goods or services acquired must not be used for any of the following purposes:
	1. Resupply; or

Using them up or transforming them, in trade or commerce: in the course of production or manufacture, or in the course of repairing or treating other goods or fixtures on land.

1. For example, a small business acquires an excavator for $30,000 for the purpose of on-sale (as opposed to using in the course of its business). Although the purchase is under the $40,000 threshold and so appears to fall within the definition of ‘consumer’, because the excavator was purchased for the purpose of re-supply, the transaction is excluded from the definition of ‘consumer’.
2. As the consumer guarantees are key and commonly used rights, it is important that the definition of ‘consumer’ continues to be fit for purpose so individual and small business consumers continue to receive the protection that they are entitled to.

The Australian Consumer Law Review

1. The Review noted that the monetary threshold of $40,000 in the definition of ‘consumer’ has not changed since the threshold was increased from $15,000 in 1986. The decline in the real value of the threshold means that certain purchases not ordinarily made for personal, domestic or household use that were once covered by the ACL, are no longer protected. The Review proposed that the $40,000 threshold be increased to $100,000 to broadly account for inflation of the cost of goods and services since 1986.
2. The Review involved two stages of public consultation. In both stages, the majority of responses that referenced the $40,000 threshold in the definition of ‘consumer’ supported increasing the monetary amount.

The Problem

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| --- |
| OVERVIEWThe level of protection provided by the $40,000 threshold in the definition of ‘consumer’ has eroded since it was set in 1986. The decline in the real value of the threshold means that certain purchases not ordinarily made for personal, domestic or household use that were once covered by the ACL, are no longer covered. The existing threshold is no longer fit for purpose. |

The development of the monetary threshold: protecting small businesses

1. The history and development of the monetary threshold in this definition of ‘consumer’ demonstrates that lawmakers were conscious of the need to extend protection to small business consumers.[[2]](#footnote-3)
2. The 1976 Trade Practices Act Review Committee Report (the *Swanson Report*) was ‘strongly of the view’ that consumer protections should extend to ‘a range of business transactions, particularly purchases by small businesses.’[[3]](#footnote-4) In its view, this would address one of the functions of consumer protection laws, being ‘to redress, between supplier and customer, inequalities in the technical expertise required to recognise, and the bargaining power to negotiate, a fair bargain.’[[4]](#footnote-5)
3. The *Trade Practices Amendment Act 1977* first introduced a monetary threshold of $15,000. According to the explanatory memorandum, the introduction of this threshold was to ‘permit parties to contract for a minimum limitation on liability…in relation to goods or services not ordinarily acquired for personal, domestic or household use or consumption.’ The Bill Digest noted that the definition was broadened for the benefit of ‘small businessmen’.
4. In 1986, the *Trade Practices Revision Act 1986* (Cth) increased this threshold amount to the current value of $40,000. The Explanatory Memorandum to the Bill explained that:
5. As a result of inflation over the past 8 years, the real value of the $15,000 monetary limit … has been significant eroded, and an adjustment to the monetary limit is needed to restore the protection given by the Act to consumers and small businesses.[[5]](#footnote-6)
6. In 2010, when the ACL was being developed, the removal of the monetary threshold part of the definition of ‘consumer’ was considered, so that only goods and services ordinarily acquired for personal, domestic or household use would be covered. However, the threshold amount of $40,000 was retained in the final version of the ACL as a bright-line standard. The Second Reading speech for the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) justified retaining the threshold on the basis of ensuring that ‘small businesses continue to be protected’ under the new regime.
7. From this history, it appears that a key rationale behind the 1977 introduction of the monetary threshold, the 1986 increased threshold amount and the 2010 retention of this bright-line standard was to ensure that small business consumers were afforded legal protections that were similar to those afforded to individual consumers under the then *Trade Practices Act* 1974 (Cth) and State and Territory consumer law regimes. However, while the threshold was developed with small businesses in mind, there was no intention to exclude larger businesses from the protections in the ACL.
8. There were mixed views on whether big businesses should receive the benefit of the threshold, as they do not face the same resource restraints that small businesses do. One stakeholder described this effect as ‘illogical’. While the threshold was introduced primarily for the benefit of small businesses, it was not intended that larger businesses be excluded from the operation of the threshold or the ACL.

Small businesses require the same protection as consumers

1. Small businesses play a key role in driving growth and creating jobs in the Australian economy. In 2017, the Australian Bureau of Statistics announced an annual 2.4 percent increase in business numbers (in the 2015-16 financial year), primarily driven by growth in small businesses.[[6]](#footnote-7)
2. In the *Review of Australia’s Consumer Policy Framework: Inquiry Report*, the Productivity Commission acknowledged the unique dual role of small businesses: ‘as well as being suppliers of goods and services, they are consumers in their own right.’[[7]](#footnote-8) The Productivity Commission continued:
3. Indeed, in their dealings with larger businesses, small businesses can face many of the same issues as individual consumers, particularly relating to unequal bargaining power and the lack of resources to effectively negotiate contracts.
4. Freilich and Webb highlight that the general presumptions about businesses being on equal footing and not requiring protection does not reflect the reality of small businesses.[[8]](#footnote-9)

Small-business persons come from a variety of backgrounds, levels of business and personal experience, financial liquidity, education and literacy. Moreover, small businesses feature a significant proportion of persons who are, in many circumstances, marginalised from the wider workforce, such as women and migrants. Also, being a good business person with regard to one’s own trade or profession does not automatically mean that a person is well versed in business and the law. In most cases, the future of a small business rests on the managerial expertise of an individual or small group of owners. … [M]any small businesses simply cannot afford the accounting, financial and legal advice which larger concerns take for granted.[[9]](#footnote-10)

1. The stakeholder consultation process found strong support from small business representatives from a variety of sectors on the proposition that small businesses are often in a similar (if not weaker) position compared to individual consumers, and deserving of comparable legal protection. For example, the Western Australia Small Business Development Corporation noted that

[T]he small business consumer can be more vulnerable than an individual consumer in terms of access to money and time to resolve disputes arising from goods or services they have purchased.[[10]](#footnote-11)

1. In their submission, the Australian Industry Group (AiG) expressed concerns that the proposed changes were likely to harm small businesses in their capacity as suppliers.[[11]](#footnote-12) However, the ACL simultaneously confers both protections and obligations on businesses of all sizes.
2. AiG also expressed concerns about the implications of the threshold’s increase on the freedom of businesses to enter into legitimate commercial contractual relationships.[[12]](#footnote-13) This freedom is acknowledged and should not be affected by the increase to the threshold to the extent that the ACL currently applies.

Many small business consumers are denied access to the ACL solely due to the decline in the real value of the monetary threshold

1. With the decline in the real value of the threshold which has occurred since 1986, certain small business purchases that were once protected by the ACL regime are no longer so protected. The Review cited client record systems, certain farm and agricultural equipment, air-conditioning units for industrial buildings, water tanks and some vehicle purchases as examples.
2. The majority of stakeholder submissions agreed with this assessment and the Review’s findings, noting that as the value of goods increase, an increasing number of goods would be excluded from the consumer guarantees regime coverage. A number of submissions outlined concerns specific to small business consumers, noting that small businesses were increasingly making ‘major and necessary purchases of goods and services’ which exceeded $40,000 (Legal Aid Queensland).[[13]](#footnote-14) From consultation submissions, an assumption was made that for the period 2018-19, there would be almost 250 disputes involving small businesses who had made purchases over $40,000.
3. Stakeholders also provided specific examples about machinery purchases from certain sectors.

The current threshold value of $40,000 excludes a significant amount of farm equipment and machinery. Retail prices of different types of agricultural machines vary considerably, but overall trends show prices have increased significantly over time. … An increase in the threshold from $40,000 to $100,000 will see more farm equipment and machinery covered under the threshold. For example, a smaller tractor, a brand new 2017 New Holland TD 5.95 95 HP is currently listed for sale by a dealer online for $55,000. A farm business purchasing this tractor would not presently be classified as a consumer based on the current value threshold. However, if the value threshold is raised to $100,000 then consumer protection would cover this purchase.[[14]](#footnote-15)

- Grain Growers Ltd

The SBDC receives numerous complaints about faults with vehicles and machinery that are not used to transport goods on a public road. The value of these vehicles often exceeds $40,000 and therefore the small business owner is exempt from the consumer guarantee provisions.[[15]](#footnote-16)

- WA Small Business Development Corporation

1. Using producer price index (PPI) analysis, the NSW Department of Finance, Services and Innovation (NSW DFSI) provided a case study (see **Case study 1**) of a particular small business purchase that would have satisfied the definition of ‘consumer’ in 1986, but no longer did in 2011, solely due to the decline in the real value of the monetary threshold.

Case study 1 – Complaint about an agricultural excavator

1. An agricultural business owner lodged a complaint about his agricultural excavator, which he purchased in 2011 for $54,000. The agricultural business owner needed to repair the excavator after it broke down. However, neither the manufacturer nor the dealer were able to provide the spare part. As an excavator is not likely to be considered something that is normally used for domestic or household use and costs more than $40,000, the agricultural business owner was advised that he was not able to seek a remedy under the ACL.
2. According to the producer price index, the prices of agricultural machinery and equipment in 2011 were 33 index points or 41 percentage points higher than the prices in 1986. This means the price paid for the excavator in 2011 ($54,000) would have been $38,297 if purchased in 1986 and therefore would have been covered by the ACL’s $40,000 threshold.
3. NSW DFSI also provided examples of other types of machinery that would be covered by the ACL if the threshold was raised to $100,000:
* Trucks ranging from $40,000 to $100,000
* Portable compressors – average price $45,000
* Forklifts – average price $40,000 to $55,000
* Diesel powered pumps – average price $85,000
* Tanks for trucks – average price $90,000
* Excavators – average price $85,000
1. There was also a *decline* in the relative prices of some goods and services as a result of significant technological advancement and improvements, for example, computer equipment. A number of stakeholder submissions confirmed this, citing motor vehicles, consumer electronics, whitegoods and telecommunication purchases as other common examples. No evidence was provided about the scope or extent to which the value of goods has decreased; however such an effect would be expected in light of technological advancements and economies of scale. The decline in the relative price of such goods and services offsets the impact of the decline in the real value of the monetary threshold, so that these goods and services continue to be covered by the ACL.

Small businesses suffer a commercial impact

1. All consumers are, to varying degrees, adversely affected by the purchase of a good or service which fails to comply with a particular standard or guarantee. Particularly from a small business perspective, faulty or defective goods or services could result in lost productivity or profits. The increase of the threshold will provide the necessary protections for small businesses in their capacity as a consumer, which enables them to carry out their obligations as a supplier. An example of this was provided by the Western Australia Small Business Development Corporation and is outlined below (see **Case study 2**).

Case study 2 – A small business dispute about a water tank

1. A small business owner paid $70,000 for a water tank to be installed on his truck by the supplier. After installation, the water tank began to crack. The small business owner believed that the manufacturer had used inferior plastic to construct the tank. The small business owner lost four jobs as a result of the faulty water tank, causing financial loss. The manufacturer of the water tank declared bankruptcy and the supplier refused to provide a refund. The supplier refused to participate in mediation to resolve the dispute, forcing the small business owner to take the matter to Court.

Consumer purchases of commercial products should be entitled to protection

1. The Review observed that a flow-on benefit of increasing the threshold was that consumer purchases of commercial products which are above the current $40,000 threshold would also be protected.**[[16]](#footnote-17)**
2. Case studies provided demonstrate that individual consumers commonly purchase products which could be, and are, utilised for both personal and commercial purchases. Where the purchase price is over the $40,000 threshold, it results in a grey area as it is unclear whether such purchases are ‘of a kind ordinarily acquired for personal, domestic and household use’. In these cases, individual consumers would also be afforded protection through an increased threshold amount. The amount acts as the bright-line rule clarifying the operation of the law.

The client purchased a dual cab chassis ute for $46,000 from a motor vehicle dealer. The vehicle was for personal and business use. About 6 months after purchase, due to a head gasket fault, the engine overheated causing significant mechanical damage. The dealer eventually fixed the engine but the client wanted to claim consequential losses under the ACL. Given the price of the ute was above the $40,000 threshold, the issue was: were the goods “of a kind ordinarily acquired for personal, domestic household use”? As a dual cab chassis ute is commonly used for both recreational and business purposes, there was uncertainty as to whether the client had ACL rights.[[17]](#footnote-18)

- Consumer Law Centre of the ACT

Assume an individual acquires an elevator for $50,000 for use in their home following an accident. The elevator is ordinarily acquired for commercial use. As the elevator is not of a kind ordinarily acquired for personal, domestic or household use or consumption, the purchaser would not fall within the definition of ‘consumer’ in section 3 and not be afforded the protections of the ACL.[[18]](#footnote-19)

- Law Council of Australia, Business Law Section

Where goods could be used for commercial purposes, for example cars and vans having seating capacity of more than five people the supplier may argue that the goods were not regulated by the ACL. This is particularly so where the goods were used for a mixed purpose, transporting children as a home daycare provider and for the transportation of family. In our experience consumers buying these vehicles are often from non-English speaking backgrounds or from migrant communities with limited income. A similar problem exists with respect to vans purchased by people with a disability that need to be wheelchair accessible because these could be used for commercial purposes as well.[[19]](#footnote-20)

- Legal Aid Queensland

1. Stakeholder submissions also highlighted the broader benefits for the market, including ‘encouraging consumer confidence and helping promote a robust and competitive market’[[20]](#footnote-21) (CALC joint submission).

Exclusion from the ACL: limited alternative recourse

1. The ACL was never intended to offer blanket protection coverage for all business purchases. However, the failure to recognise inflation means individual and small business consumers have been unjustifiably and increasingly excluded from the regime over time.
2. Under the current law, where the cost of a good or service exceeds the monetary threshold of $40,000 (and the nature of the transaction does not satisfy other definitions of ‘consumer’), the purchaser would not be able to take advantage of certain protections offered by ACL provisions, including the consumer guarantees. The effect of such exclusion is that they would be required to rely upon alternative legal avenues, such as claims based on contract law or negligence.
3. However, many individual consumers and small businesses may not be able to negotiate contract terms or establish that a duty of care is owed by their supplier to support a claim under negligence. In contrast, the consumer guarantees cannot be excluded by contract, nor is it necessary to establish any duty of care.
4. In the absence of ACL protections, in particular the consumer guarantee provisions, consumers and small businesses will need to pursue non-ACL based options, if they are to obtain recourse where a good or service they have purchased is faulty. As the nature and extent of contractual warranties outside of the ACL’s consumer guarantees vary between suppliers and manufacturers, consumers may need to invest in locating a supplier who is able to provide adequate voluntary warranties. However, individual and small business consumers may lack the necessary bargaining power as well as the time, skill and expertise to assess the quality of products and the adequacy of any warranties provided. The process for resolution of a dispute for claims under contract and negligence can be complex, slow and resource-consuming, and may require professional legal advice. Based on consultation submissions, the cost-benefit analysis suggested an assumed cost for businesses dealing with a faulty good outside of the ACL regime amounted to 30% of the value of a product (including business time and legal fees).
5. Evidence provided during consultations from various sectors confirmed these difficulties and affirmed that the benefits of increasing the threshold would assist in alleviating such difficulties.

There is increasing concern by our members that farmers as small businesses are unable to secure appropriate and timely remedies and that consumer protection laws are inadequate in terms of both threshold and scope. … Farm businesses may lack the time, skill and/or expertise to assess the quality of products and the adequacy of provided warranties. And while other remedies and alternative legal avenues are available in the absence of protections by the ACL, these are often complex, slow, costly and resource-consuming. GrainGrowers therefore seeks the extension of the ACL consumer guarantees and remedies to cover goods (agricultural machinery and equipment)…[[21]](#footnote-22)

- GrainGrowers Ltd

The increased threshold would reduce the cost for small businesses seeking redress through common law or tort law for what would otherwise be ACL breaches. Increased ACL protection and simplified disputation costs are likely to lead to increased small business confidence in purchasing decisions and assist in stimulating investment in the form of refurbished facilities and new equipment.[[22]](#footnote-23)

- Motor Trade Association of South Australia

Policy objective

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| --- |
| OVERVIEWThe policy objective behind the proposal to increase the monetary threshold in the definition of ‘consumer’ is to ensure that the ACL continues to be fit for purpose in protecting individual and small business consumers when purchasing goods or services not ordinarily acquired for personal, domestic or household use or consumption. |

1. The policy objective acknowledges that small businesses, like individual consumers, often face information asymmetries and are time and resource poor. It remains unchanged from when it was first introduced in 1977. In light of the changes in prices since 1986, the increase to $100,000 would broadly reinstate the original purchasing power of the $40,000 threshold, ensuring the ACL remains fit for purpose in this context.

Options and impact analysis

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| OVERVIEWIn achieving the policy objective, it is important that the benefit should exceed the costs. The options addressing the problem should provide certainty to manufacturers and suppliers, and not increase their regulatory burden or compliance costs unnecessarily.To address the defined problem, this RIS chapter explores three options:* **Option 1**: maintain the status quo.
* **Option 2**: increase the threshold from $40,000 to $100,000 in the definition of ‘consumer’.
* **Option 3**: increase the threshold from $40,000 to $100,000 in the definition of ‘consumer’ and apply indexation.

The following costs and benefits have been quantified to support the evaluation of each Option: * Business compliance costs (transition);
* Business compliance costs (ongoing); and
* Small business consumer benefits.
 |

1. Undertaking a quantitative analysis of the costs and benefits of the three options, beyond specific and identifiable compliance costs, presents a number of challenges. The analysis of the impact of each option is supported by a quantitative and qualitative analysis and focuses on reflecting the anticipated costs and benefits of each option. The stakeholder consultation process affirmed these anticipated impacts, as well as revealing new impacts. However the anticipated impacts cannot be quantified with any certainty. The cost-benefit analysis for options 2 and 3 are outlined below.

Option 1: Maintain the Status quo

1. If the status quo is maintained, current laws would continue to operate. All purchases of goods or services ordinarily acquired for domestic, personal or household use will remain covered. A purchase will be outside the definition of ‘consumer’ when that purchase is ‘not ordinarily for domestic, personal or household use’ and in excess of the monetary threshold amount of $40,000, and will not be covered by the ACL consumer guarantee protections. Stakeholders who supported this option pointed to the decline in the real value of certain goods or the decline in cost of purchasing as their main reason.

Impact analysis

1. A benefit to both businesses and consumers if the status quo is maintained is that it offers legal certainty as there is no change to the existing law, contractual arrangements or warranties. Businesses would not have to take any action to reflect an increased monetary threshold amount in their transactions.
2. As outlined in the ‘Problem’ section, consumers would continue to be excluded from the ACL protections which rely on the definition of ‘consumer’ where their purchase of commercial products exceeds the $40,000 monetary threshold amount. These consumers would need to consider alternative, non-ACL legal redress or compensation in the event they encounter problems with a good or service they have purchased.
3. There may also be issues about whether the threshold remains fit for purpose into the future as the price of goods and services continues to change over time. Overall, this option does not address the problem, and is not preferred.

|  |  |
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| BENEFITS | COSTS |
| * Certainty for businesses and consumers as the law maintains the status quo.
 | * Consumers are not able to access the ACL’s protective regime if their purchase of a commercial product exceeds the $40,000 monetary threshold.
 |
| * Businesses do not need to adjust compliance mechanisms.
 | * Consumers would need to consider protection or legal redress outside the ACL’s consumer guarantee regime.
 |

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

1. This option would increase the monetary threshold in the definition of ‘consumer’ from $40,000 to $100,000, thus restoring the real value of the threshold and achieving parity in the protection available when the current threshold was established in 1986. An amendment would be made to the ACL to increase the threshold, reinforcing its bright-line standard status.
2. While supportive of increasing the threshold and ensuring small business access to redress, NSW Business Chamber queried the proposed threshold amount being $100,000 where the $40,000 was retained as the threshold amount when the ACL was introduced in 2011. They submitted that a more appropriate threshold amount was $60,000, which would maintain the real value of the threshold of $40,000 when it was re-introduced in 2011.[[23]](#footnote-24)
3. A key rationale behind the ACL was converting the implied warranties regime into the existing consumer guarantees framework to ensure better consumer protection. It is not necessarily the case that the amount of $40,000 was considered acceptable in 2011; it is likely that this amount was automatically carried across into the consumer guarantees framework. Viewed from this perspective, the better approach would be to maintain the real value of the threshold when it was first introduced in 1986.

Impact analysis

1. This option ensures that the definition of ‘consumer’ is fit for purpose and consistent with the original policy intent for ACL protections to extend to consumers, including small businesses. The real value of commercial purchases would be more accurately reflected, providing individual and small business consumers with the confidence that their purchases will be protected under the ACL regime so long as they fall under the $100,000 threshold amount and are not otherwise excluded (for example, by being for the purpose of resupply). Search costs would be reduced as consumers will not need to expend further cost and effort in seeking non-ACL forms of protection or redress, including reliance upon common law actions grounded in contracts or tort law, which are unclear in operation and uncertain in outcome.
2. The majority of stakeholder submissions supported this option for the above benefits. The evidence suggests that this option would result in minimal increase in compliance or training costs. These benefits were especially important as the value of goods continue to increase, with the risk that an increasing number of goods will be excluded from the operation of the ACL regime if the threshold is not increased (Legal Aid Queensland submission).[[24]](#footnote-25)
3. This option is not without potential one-off compliance costs to suppliers of such goods. Such suppliers may need to invest in updating record keeping mechanisms to ensure that future sales of goods or services reflect the new threshold amount, and ensure they meet any consequential obligations. Further training of staff to assist them in understanding updated legal obligations may also be necessary. On the other hand, the ACL regime has been in operation for almost seven years. If only the threshold *amount* is increased, but the law is otherwise unaffected, the costs associated with compliance and education initiatives may be minimal.
4. Businesses may also face increased ongoing costs when selling goods due to the wider range of purchases eligible for protection under the ACL, and the need to provide remedies for which they are not currently liable. Such costs could result from increased claims, compensation and other forms of redress and insurance premiums. These costs are to be reasonably expected as a consequence of increasing the threshold and restoring its real value. These additional costs to business also offer benefits to small business consumers in the form of increased coverage under the ACL. These benefits are also on an ongoing basis.
5. It is also acknowledged that the real value of the threshold will decrease in value as the costs of certain goods increase over time and may need to be updated again. This would be undertaken as part of the monitoring and evaluation process (discussed in the Implementation section of this RIS).

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| BENEFITS | COSTS |
| * The real value of the threshold is maintained.
 | * Compliance costs to ensure and maintain updated record keeping.
 |
| * The original policy intent of the monetary threshold within the definition of consumer is maintained in protecting small business consumers, and reducing search costs for businesses of all sizes.
 | * For businesses: training costs to understand and comply with legal obligations under the increased monetary threshold.
 |
| * Small businesses receive maintained protection under the ACL.
 | * Potential for increased financial loss due to the wider range of products covered by the ACL.
 |
| * ACL protection may lead to increased small business demand because of increased purchasing confidence (unquantified)
 |  |

1. Based on the costs and benefits that can be quantified, it is estimated that the total cost over ten years for this option are $70.6 million, while the benefits are $102.4 million. This option is expected to bring the greatest net benefit over ten years of $31.8 million.

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

1. This option builds upon Option 2 by initially increasing the threshold in the definition of ‘consumer’ from $40,000 to $100,000, with a provision in the law to allow for indexation or other adjustments to this figure at regular intervals. Access to remedies would be based on the threshold amount at the time of purchase. The amount could be automatically indexed by using the Producer Price Indexes (PPIs), which measure changes in the prices received by businesses for categories of goods and services they produce. This option would only apply to goods and services not ordinarily purchased for personal, domestic or household use.

Impact analysis

1. The benefits and costs are the same as those identified in Option 2. An additional benefit under this option is that the threshold will be automatically indexed so that it reflects the real value of goods more accurately. It ensures that the law does not become significantly out of alignment with the original policy intent.
2. An additional cost to this proposal is the potential increase in uncertainty, due to the threshold being regularly reviewed and amended. Purchasers may also find it more difficult to recall and assert their consumer guarantee rights if the threshold changes regularly. Suppliers may have difficulty in complying with regular amendments, potentially resulting in an increase in compliance and administrative costs as they will be required to update their records on a regular basis.
3. A high amount of support was received for this option, with its in-built indexation feature being particularly attractive as it ensured that the real and current value of the threshold amount would *continue* to be maintained with automatic adjustments. Stakeholders suggested that indexation should occur on either a three-yearly or five-yearly interval. Supporters also pointed out that it was the more cost-effective option (compared to option 2), as it did not require further resources or legislative amendments to allow for a review and increase of the threshold in the future. They acknowledged that there would be some negative impacts on consumers and businesses (such as uncertainty and increased compliance and education burdens), but these would be outweighed by the benefits and alleviated by effective communication of changes to the threshold, such as publication of the threshold amounts on the ACL regulator websites.
4. On the other hand, stakeholders (including the Australian Small Business and Family Enterprise Ombudsman, Kate Carnell) who did not support option 3 expressed concerns that the costs would outweigh the benefits, noting that it would result in increased compliance and education costs. These costs would be repeated every time indexation occurs. Compliance costs may be passed on to the consumer.The ongoing indexation feature would also result in additional costs for both consumers and businesses, associated with the uncertainty as to what the value of the threshold will be in the future.
5. As with option 2, businesses of all sizes would benefit from increased coverage as consumers, but also face increased ongoing costs as suppliers due to the wider range of purchases eligible for protection under the ACL, and the need to provide remedies for which they are not currently liable. The costs of this will be higher compared to option 2 following indexation and an increase of the threshold amount.
6. There was also some uncertainty as to what series the threshold amount would be indexed to. Consumer groups supported the application of CPI while industry groups noted that CPI was a ‘wholly incorrect metric’ as it measured the change in the price of *consumer* goods and services, as opposed to *commercial* goods and services (National Retail Association).[[25]](#footnote-26) As for applying the Producer Price Index (PPI), GrainGrowers noted the negative impacts impact from the agricultural sector perspective:

GrainGrowers does not see benefit in the introduction of indexation, such as Producer Price Indexes (PPI), to automatically adjust the threshold as it is likely to cause confusion rather than clarity. This is because the PPI for agricultural equipment can fluctuate from year to year making it difficult for a consumer to quickly identify the threshold value at time of purchase.[[26]](#footnote-27)

1. The choice of series would have an impact on the threshold chosen, potentially increasing or decreasing the scope of goods covered by the ACL, and further increasing uncertainty and costs to consumers. The choice of series may not be appropriate for all types of goods as prices across different categories of goods have generally grown at different rates over time.
2. Instead of automatic indexation, stakeholders suggested that a mechanism or delegation to regular *review* of the threshold be introduced, again on a three or five yearly interval, to determine ‘relevance, cost to businesses and unintended consequences’ (Australian Automotive Dealer Association).[[27]](#footnote-28)
3. Given that the inflation rate in Australia is sufficiently low ‘that it does not materially distort economic decisions in the community’**[[28]](#footnote-29)**, there is a possibility that the costs of this option may significantly outweigh associated benefits. If this option was preferred, it is suggested that indexation be applied on a five yearly interval, reflecting low inflation rates and to minimise compliance costs and uncertainty.

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| BENEFITS | COSTS |
| * The real value of the threshold is maintained.
 | * Increased uncertainty as the threshold amount will regularly change (unquantified)
 |
| * The original policy intent of the ACL regime is maintained in protecting small businesses in particular, and reducing search costs for businesses of all sizes.
 | * Compliance costs to ensure and maintain updated record keeping on a more regular basis.
 |
| * The threshold continues to increase in line with appropriate indexation, maintaining the real value of the goods entitled to protection under the ACL (unquantified)
 | * For businesses: training costs to understand and comply with legal obligations under the increased monetary threshold.
 |
|  | * Potential for increased financial loss due to the wider range of products covered by the ACL.
 |
|  | * Potential for greater confusion among consumers about their rights under the ACL, and whether their purchase is covered (unquantified).
 |

1. Based on the costs and benefits that can be quantified, it is estimated that the total cost over ten years for this option are $78.5 million, while the benefits are $108.3 million. This option is expected to bring a net benefit over ten years of $29.7 million. As noted above, indexation of the threshold would likely result in increased costs associated with uncertainty, and thus further contribute to the costs of option 3.

Implementation

1. Under the Intergovernmental Agreement for the Australian Consumer Law, the proposed amendments will require the agreement of the Legislative and Governance Forum on Consumer Affairs (CAF).[[29]](#footnote-30) CAF is scheduled to consider the proposed amendments on 31 August 2018.
2. If the proposed amendments are agreed by CAF, the implementation of the amendments is expected to require legislative amendments to the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
3. An Exposure Draft of the proposed amendments will be prepared and circulated for public consultation. Following this, a Bill will be introduced into Parliament.

Transition period

1. To help businesses comply with the new laws, a 12 month transition period is expected to be provided; beginning the day after the law receives Royal Assent.

Monitoring

1. Regular monitoring and evaluation of the new laws will be undertaken by CAANZ.

DECISION Regulation Impact Statement

Chapter Two

Australian Consumer Law Review: Clarifying the consumer guarantees remedies

Consumer Affairs Australia and New Zealand

2018

Executive Summary – Chapter Two

Background

The consumer guarantees in the Australian Consumer Law (ACL) set out standards for goods and services supplied to consumers, remedies available to consumers when goods and services do not meet those standards and the rights and obligations of both consumers and traders.

When a good or service fails to meet the consumer guarantees, the consumer’s rights are impacted by whether a failure is defined as major. Consumers can choose a refund or replacement if there is a major failure to comply with the guarantees. If a failure is non-major, traders can choose the remedy, including repair. The 2017 ACL Review (the Review) final report found that consumers and businesses sometimes have difficulty determining what constitutes a major failure, that is, practically, when the consumer has the right to choose a refund or replacement for a faulty good. Specifically, the Review identified uncertainty about:

* whether a failure to meet the consumer guarantees within a short period of time after purchase is considered a major failure; and
* whether multiple non-major failures can collectively amount to a major failure.

The consultation Regulation Impact Statement (RIS) sought views on options to improve the framework for consumer guarantees remedies, their effectiveness and impacts, including:

* giving consumers the right to choose a refund or replacement where a good fails to meet the consumer guarantees within 30 days of purchase without needing to prove a major failure; and
* clarifying that multiple non-major failures can amount to a major failure.

Failure within a short period of time

This decision RIS identifies the status quo as the preferred option to address a single consumer guarantee failure arising within a short period of time after purchase.

While the potential legislative options in the RIS (Options 2 and 3) would produce benefits associated with consumers having the right to choose their preferred remedy in a greater number of cases, this is outweighed by the significant costs that would be imposed on businesses. For example, the estimated cost of Option 2 is $1,204 million, compared to estimated benefits of $843.3 million.[[30]](#footnote-31)

It is important to note that Options 2 and 3 would result in a *non-major failure* in that period triggering a refund or replacement right. This could produce unreasonable outcomes where very minor faults in high-value goods trigger refund rights (even if easily repairable).

Consultation conveyed that consumers are facing problems getting remedies for major failures and for repeated or multiple non-major failures. Consultation did not establish that consumers are experiencing significant issues from retailers choosing to repair a good in the event of a one-off
non-major failure.

By lowering the test for a refund or replacement, Options 2 and 3 would make it easier for consumers to obtain their preferred remedy for a *major* failure. However, the consequence of lowering the test is to create a refund or replacement right for any *non-major* failure. In doing so, Option 2 and Approach 3A in particular would entail significant costs because a new category of faults would now attract a refund or replacement right. For this reason, the status quo is the most appropriate option among those considered.

Non-major failurescan normally be fixed or resolved in a reasonable period of time. In comparison, major failuresnormally cannot be fixed or are too difficult to fix. Consultation revealed the costs would exceed the benefits of a framework where consumers would have a right to a refund or replacement when there is a non-major consumer guarantee failure in a short period of time after purchase.

Under Options 2 and 3, consultation indicated suppliers would share a disproportionate burden of the costs, in the context of persistent challenges getting indemnification from manufacturers. Consultation also revealed widespread concerns about the limited understanding or guidance on the concept of ‘non-major failure’; a concept that would become more important if the other options presented were pursued.

Multiple non-major failures

To address the problem about multiple non-major failures and consumers becoming trapped in cycles of failed repairs, this decision RIS identifies clarifying that multiple non-major failures can amount to a major failure as the preferred option.

This option is estimated to have the greatest net benefit and represents an appropriate response to some of the most significant problems identified, including in relation to ‘cycles of failed repairs’.

Introduction

1. The consumer guarantees provide consumers with a set of statutory protections when buying goods. For example, goods must be of acceptable quality and fit for purpose.[[31]](#footnote-32) If goods fail to meet the standards required by the consumer guarantees, consumers are entitled to a remedy. The remedy may be a repair, refund or replacement.
2. The consultation RIS discussed how consumers and traders face uncertainty about when consumers are entitled to reject goods and choose a remedy.
3. The right to reject goods and choose a remedy depends on the severity of the failure to meet a consumer guarantee.[[32]](#footnote-33) Consumers have the right to reject goods that are subject to a major failure. If goods are rejected, the consumer has the choice of a refund or replacement. If a failure is non-major, the trader is still obliged to provide a remedy but may choose their preferred remedy. The trader’s preferred remedy may be a repair, rather than a refund or replacement.
4. A failure to meet the consumer guarantees is deemed major when:
* a reasonable consumer would not have bought the goods if they had known about the nature and extent of the failure;
* the goods are significantly different from the description, sample or demonstration model shown to the consumer;
* the goods are substantially unfit for their normal purpose or unfit for a disclosed purpose and cannot easily and within a reasonable time be made fit; or
* the goods are not of acceptable quality because they are unsafe.[[33]](#footnote-34)
1. The application of the legal test for a major failure, as outlined above, is highly dependent on the particular facts of each situation. Although the generic, principles-based approach allows flexibility to deal with different situations, consumers can sometimes face difficulties when interpreting and applying the provisions to establish whether a failure is major.

The Problem

1. In some situations when consumers would ordinarily expect a refund, it can be unclear whether a major failure has occurred. The consultation RIS examined two situations: when there is a failure to meet the consumer guarantees within a short period of time after purchase; and when there have been multiple failures in the same good.
2. The consultation RIS discussed how consumers in these situations can spend a disproportionate amount of time and resources proving whether a major failure has occurred and negotiating with the trader to obtain a remedy which may not be their preference or may leave them unsatisfied.
3. Available data indicates that consumers rarely go to court to enforce their rights under the consumer guarantees and in many cases, the costs of legal action are likely to exceed the value to the consumer of having an issue remedied. As a result, the consumer guarantee remedies provisions should be spelled out clearly, on the face of the legislation, so that the mechanisms for obtaining redress are so unambiguous that court action is unnecessary, or so that matters are consistently remedied if disputes do escalate.[[34]](#footnote-35)
4. The Consumer Action Law Centre’s joint submission noted generally that:

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.[[35]](#footnote-36)

1. The Australian Automobile Association (AAA) conducted an online survey of consumers affected by problems with their motor vehicle, with results indicating persistent difficulties for consumers in accessing remedies:

Responses to the AAA survey provide evidence that a consumer’s chance of receiving a refund or replacement can largely depend on how determined they are in pursuing their rights under the ACL. The AAA’s member motoring clubs often cite examples where manufacturers or dealers have provided favourable outcomes only where a third party, such as the consumer’s motoring club, has advocated on their behalf. Often by this stage, significant resources have already been expended by the consumer and a resolution has still not been forthcoming.[[36]](#footnote-37)

1. This online survey attracted 306 responses. Key findings included that:
* Respondents incurred $1,970, on average, in associated costs while seeking a remedy for their faulty car;
* Respondents lost 45 hours on average trying to resolve the issues; and
* Eighty-eight per cent of respondents stated their fault was not satisfactorily resolved.[[37]](#footnote-38)
1. Consultation revealed that difficulties asserting a right to a refund or replacement are significantly more prevalent for high-value or complex goods. Suppliers typically show a greater willingness to provide a refund or replacement for low-value goods.[[38]](#footnote-39)

Traders are more likely to agree to a refund for small value goods such as small appliances (toasters, microwaves) and other small consumer goods (phones, small value tools). However, with higher value goods such as cars and major appliances, traders will almost never agree to a refund and will insist on trying to repair the goods even when the failure is a significant one.

- Legal Aid Queensland submission[[39]](#footnote-40)

Consumer Action receives 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.

- Consumer Action Law Centre joint submission[[40]](#footnote-41)

1. Importantly, many larger retailers of low-value goods already offer a company policy of a 30 day return or similar that goes beyond the consumer law rights, sometimes even for change of mind.[[41]](#footnote-42) This makes access to remedies substantially more robust for low-value goods.

Problem 1: Failure within a short period of time

1. Problem 1 was identified as a lack of clarity about consumers’ entitlement to remedies where a good fails in a short period of time after purchase.
2. The consultation RIS explained that it is arguable that a failure occurring within a short period of time after purchase could be considered a major failure under the current law, on the basis that a reasonable consumer would not have purchased the good had they known it would fail so quickly. However, in determining whether there has been a major failure, the current provisions require consideration of the hypothetical action of a ‘reasonable consumer’. The consultation RIS discussed how this principles-based approach can cause practical problems if the trader disputes the consumer’s right to choose the remedy, such that the consumer would need to establish what the hypothetical reasonable consumer would have done.
3. The consultation RIS discussed that in circumstances where major failures are generally likely to have occurred, but are not necessarily clear or easy for parties to determine or assert, particularly for high-value and complex goods, there are costs to parties, regulators and the legal system in determining whether each failure within a short period of time is a major failure.
4. Consultation indicated the extent of the problems consumers experience getting a refund or replacement is more pronounced for *high-value or complex* goods that fail in a short period of time than for *low-value* goods that fail in a short period of time. This is reflected in the economics of refunding versus repairing low-value goods and in the prevalence of voluntary store policies among larger retailers of low-value goods.[[42]](#footnote-43)
5. However, consultation strongly conveyed that the more significant problems consumers face in terms of access to consumer guarantee remedies relate to enforcing their existing entitlements in the event of a *major* failure (even for very obvious major failures), or relate to repeated failures. This is discussed further under ‘Additional Problems Identified through Consultation’ below.

Problem 2: Multiple Failures

1. The current law is also unclear in relation to whether multiple non-major failures can collectively be considered a major failure. For example, a product may have many minor issues that may or may not be related, but collectively could have the effect of a major failure.
2. The current legal test for a major failure does not specifically consider whether the totality of these discrete issues can give rise to a major failure and the right for the consumer to choose a refund.
3. The principles-based nature of the consumer guarantee provisions is intended to allow consideration of all relevant circumstances. Accordingly, one of the grounds for a major failure is whether a reasonable consumer would have bought the good if they had known the nature and *extent* of the failure at the outset. This would suggest that multiple
non-major failures *can* be considered collectively.[[43]](#footnote-44)
4. However, as indicated in the consultation RIS discussion of the status quo, the existing language of the ACL may not be sufficiently clear and courts and tribunals have taken different approaches to the issue. This has resulted in uncertainty and inconsistent outcomes for both consumers and businesses.[[44]](#footnote-45)
5. In consultation, consumer groups highlighted the impact of the uncertainty about the treatment of multiple failures.

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 courts and tribunals confirms our view.

- Consumer Action Law Centre joint submission[[45]](#footnote-46)

1. In the Australian Automobile Association’s online survey of motorists who experienced problems with their vehicle (see paragraph 2.10 above), 24 per cent of respondents reported experiencing a series of non-major failures. Only two survey respondents reported that they received a replacement vehicle (out of a total 306 respondents).[[46]](#footnote-47)
2. Another persistent problem that consumer groups highlighted in consultation is that of consumers being trapped in cycles of failed repairs, particularly in the case of high-value and complex goods. The Consumer Action Law Centre’s joint submission explained that:

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.[[47]](#footnote-48)

1. Similarly, the Legal Services Commission of South Australia reported its experience that ‘consumers seek legal advice after a number of attempts have been made by the supplier to repair the goods and self-help no longer is an option’.[[48]](#footnote-49)
2. Consumer groups provided several illustrative case studies of consumers with motor vehicles that, for this reason, had spent more time at a mechanic than on the road. Notable case studies included:
* A caravan that experienced 19 faults and six returns to the supplier for rectification within a 12-month period, with time out of service of about two months;[[49]](#footnote-50)
* A car that the consumer had to take to the mechanic six times, leaving her with use of the car for 5 days in about 3 months;[[50]](#footnote-51)
* A new car that required multiple repairs, leaving the consumer with use of the car for 6 days in a 5-week period;[[51]](#footnote-52)
* A new car that spent 3 months in the first year after purchase being fixed for minor problems, including computer issues, rattling of the car, and door liners and seals falling off; and[[52]](#footnote-53)
* A caravan sent for repairs ten times in 12 months, requiring the consumer to travel a total of 4000 kilometres just to have repairs carried out.[[53]](#footnote-54)
1. It is difficult to quantify the extent of the consumer detriment caused by the identified uncertainty. Regulators generally do not record complaints data in a way that would enable the isolation of those disputes where this uncertainty is a material factor. However, as the above summary indicates, consumer groups provided compelling evidence of consumer detriment in this context.
2. Options for how to best simplify and clarify the consumer guarantees remedies and who chooses them when goods have multiple non-major failures will be considered in this RIS chapter.

Additional problems identified through consultation

1. During consultation, many consumers and consumer groups highlighted significant problems in terms of securing remedies for *major failures* generally, even where the entitlement to a remedy is very clear.
2. Broader issues were raised about access to justice and supplier indemnification in the consumer guarantees context that go beyond the treatment of non-major failures within a short period after purchase.

CHOICE has been alarmed at the enormous lengths some consumers are forced to go to in their attempts to access refunds for clearly faulty goods that failed quickly. Many of these consumers even seek expert assessments at their own cost in order to support their attempts to assert their rights under the ACL

- CHOICE submission[[54]](#footnote-55)

1. Many suppliers report being constrained in their ability to provide refunds or replacements because of manufacturer reluctance to reimburse suppliers after they have provided a remedy to the consumer, even under the current law.

Despite retailers currently having the legal right to claim failed goods back from a supplier or manufacturer, there seems to be continual issues with suppliers and manufacturers refusing to compensate a retailer when a good had clearly failed. In fact, when the issues was raised with our members as part of this submission it became clear that this overlooked provision is easily the single biggest issue for retailers under the ACL when it comes to financial compensation.

- Australian Retailers Association submission[[55]](#footnote-56)

Often times, even with assistance from third parties, small businesses are unable to get a manufacturer or supplier of a product to comply with their obligation to compensate the small business for their loss incurred as a result of purchasing a faulty good to on-sell to consumers … The SBDC [Small Business Development Corporation] has heard numerous examples where a manufacturer or supplier refuses to communicate with the small business consumer. …

The SBDC is aware of many examples where the small business retailer/ supplier has worn the cost of providing a remedy to its customer for selling them a faulty good. In these cases, the small business will compensate their customer but will not be compensated by the manufacturer for the cost of the product or the labour and ancillary costs borne during the repair/ replacement process.

- Western Australian Small Business Development Corporation submission[[56]](#footnote-57)

1. Other factors impeding consumers’ access to remedies identified by stakeholders include:
* State and territory tribunal (or court) monetary limits on consumer guarantee claims often being significantly lower than some claims, requiring the consumer to seek a resolution elsewhere or pursue a partial claim only;[[57]](#footnote-58)
* Practical barriers for consumers going to tribunals or courts for a consumer guarantee matter (tribunal fees, cost of obtaining technical reports, cost of legal advice and representation, etc.);[[58]](#footnote-59) and
* The fact that a breach of the remedy provisions in Part 5-4 of the ACL is not a contravention (limiting how regulators can respond).[[59]](#footnote-60)
1. Many stakeholders also characterised the lack of clarity about the meaning of ‘non-major failure’ as a core problem in this area.[[60]](#footnote-61) For example, the Australian Industry Group submitted that there were problems arising from the lack of clarity in the definition of a number of terms relating to consumer guarantees – ‘major failure’, ‘failure’, ‘acceptable quality’, ‘durable’, ‘reasonable time’ and ‘reasonable costs’.[[61]](#footnote-62)
2. Overall, consultation revealed that businesses need greater information about what constitutes a major and a non-major consumer guarantee failure under the ACL.
3. Consultation revealed a high degree of consumer concern that caravan sellers are not complying with their obligations under the ACL, including in cases of repeated cycles of failed repairs.[[62]](#footnote-63)

Policy Objective

1. The policy objective is to simplify and clarify what remedies are available to consumers when goods do not meet the consumer guarantees.
2. The options proposed seek to address concerns about the accessibility of remedies and better align these remedies with consumer expectations where necessary.
3. There are concerns that uncertainty in the application of the law has created issues resolving disputes early, quickly and economically in some instances. The Review and subsequent consultation found that consumers may be having difficulty asserting their right to refunds and replacements in some situations. The examination of the proposed options are aimed at providing clarity about when consumers are entitled to reject goods and receive a refund or replacement.
4. Greater clarity about the application of the law may help to reduce the number and duration of disputes and lower training costs for suppliers. It may also encourage better quality assurance practices and repair processes to prevent failures from arising, avoid repeat failures and improve consumer satisfaction with repairs.
5. Clarity in the law would allow consumers to participate in the market with greater confidence. Effective and efficient markets rely on confident and empowered consumers. Consumer decisions send signals to suppliers, driving innovation, productivity and competition among firms.[[63]](#footnote-64) A clearer legal framework would also create time and cost savings for consumers, businesses, regulators, consumer advocates and tribunals.

Options and Impact Analysis

Problem 1: Failure within a short period of time

|  |
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| OverviewThe 2017 Australian Consumer Law Review (the Review) found that consumers and traders may be uncertain about how the right to reject goods for a refund or replacement under the consumer guarantees regime applies when goods have a failure within a short period of time after purchase. If a good purchased by a consumer fails to meet one of the consumer guarantees in the ACL, a consumer’s right to reject the good is dependent on whether the failure to meet the consumer guarantees is ’major’ as defined by the ACL. If the failure is a major failure, consumers have the right to reject the goods within a reasonable period of time and choose a remedy, including a refund. If the failure is non-major, the supplier chooses the remedy, which can be a repair, replacement or refund.Under the current law, it is arguable that a failure occurring within a short period of time after purchase would be considered a major failure, on the basis that a reasonable consumer would not have purchased the good had they known it would fail within a short period. In determining whether a major failure has occurred, the current provisions require consideration of a number of factors on a case-by-case basis, including the action of a hypothetical ‘reasonable consumer’, which can make the resolution of disputes time consuming and difficult if the trader challenges the consumer’s right to choose the remedy. Although this case-by-case application of the law provides flexibility, it provides little guidance on how the timing of a failure is considered as part of the legal test for a major failure. In response to these concerns, the Review proposed that the law be amended to specify that where a good fails to meet the consumer guarantees within a short specified period of time, consumers can choose a refund or replacement regardless of whether the failure is major.To address the problem, three options were proposed:* **Option 1**: Status quo.
* **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.
* **Option 3**: Within Option 3, two approaches were considered:
* **3A**: Option 2, but specify a longer time period for high-value goods (such as motor vehicles and white goods) based on a monetary threshold; or
* **3B**: Option 2, but with an exemption (status quo) for high-value goods.

The following costs and benefits have been quantified to support the evaluation of each Option:* Costs to the supplier of the goods if consumer’s chosen remedy is the more expensive option;
* Lost retail margin (earned on a product which a consumer gets a refund on and does not go on to purchase elsewhere);
* Transition costs for businesses;
* Consumer benefit from avoided out-of-pocket costs; and
* Consumer benefit from avoided repair costs.
 |

Option 1: Status quo (Preferred)

1. In summary, Option 1 would maintain the existing legal test for a major failure. If a good fails quickly, consumers would still need to prove that there has been a major failure to meet the consumer guarantees to be able to choose their preferred remedy.
2. Option 1 is the preferred option. Taking into account costs to businesses and benefits to consumers, it represents the greatest net benefit among the options presented.
3. While Options 2 and 3 would produce benefits associated with consumers having the right to choose their preferred remedy in a greater number of cases, this is outweighed by the significant costs that would be imposed on businesses. For example, the estimated cost of Option 2 is $1,204 million, compared to estimated benefits of $843.3 million.[[64]](#footnote-65) The costs on businesses, and the complexity about how suppliers and manufacturers bear them, are detailed further in the discussion on Option 2.
4. It is important to consider the effect of Options 2 and 3 – that is, a single *non-major failure* within a short specified period triggers a refund or replacement right. This could produce unreasonable outcomes where very minor faults in high-value goods trigger refund rights (even if easily repairable). For example, a malfunction of the Bluetooth feature in a car could entitle the consumer to a refund or a new car.
5. Options 2 and 3 would effectively work to encompass all consumer guarantee failures, regardless of the value of the good and regardless of the seriousness of the failure. By expanding in this way the number of cases where a refund or replacement right is triggered, Option 2 and Approach 3A in particular entail very high costs for businesses. The impact of Approach 3B is of course lower, in part for the reasons identified in paragraph 2.69 below, but it does nevertheless entail an estimated negative net benefit.
6. Consultation conveyed that consumers are experiencing widespread problems enforcing their existing entitlement to a refund or replacement in the event of a *major* failure, even when the major failure is very obvious. The discussion in the problem section at the beginning of this chapter highlights issues such as access to justice and supplier indemnification. Addressing these issues directly would likely be of greater benefit to consumers.
7. The existing remedy settings for a non-major failure in the ACL recognise the economies of having a good repaired where it is possible to do so within a reasonable time, rather than providing a refund right for each and every consumer guarantee failure.
8. As discussed further below, identifying Option 1 as the preferred option also recognises widespread concerns about the limited understanding or guidance on the concept of ‘non-major failure’. Proceeding with a change to the law that creates a refund or replacement right for a non-major failure within a short specified period would create unnecessary complexity, contrary to the stated objectives of the ACL Review.

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| Box 1: Defining major and non-major failuresSection 260 of the Australian Consumer Law outlines the test for a major failure. This test considers the severity of a failure by the supplier to comply with the consumer guarantees.[[65]](#footnote-66)A **major failure** is when the goods:* would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
* are significantly different from the description, sample or demonstration model shown to the consumer;
* are substantially unfit for their normal purpose and cannot easily and within a reasonable time be made fit;
* are unfit for a disclosed purpose, and cannot easily and within a reasonable time be made fit; or
* are not of acceptable quality because they are unsafe.

A **non-major failure** is any failure to comply with the consumer guarantees that does not meet the test of severity outlined above. For example, the goods may be substantially unfit for normal purpose but can be remedied to be made fit for purpose easily and within a reasonable time. |

1. The broadly-framed, principles-based provisions of the status quo provide scope for redress in most of the circumstances a consumer would expect. The law allows for consideration of all relevant factors to determine whether a reasonable consumer would have purchased the good had they known about the nature and extent of the failure at the time of purchase. Accordingly, a failure that occurs within a short period of time may be sufficient to demonstrate that the consumer would not have purchased the good. It is possible that suppliers may acknowledge this and offer a refund in this situation. This is evidenced in many store policies for returns of low-value goods.[[66]](#footnote-67)
2. Some industry groups considered the case for change had not been made. For example, the Australian Industry Group submitted there is a lack of sufficient evidence to support
Options 2 or 3.[[67]](#footnote-68)
3. Some stakeholders expressed a view that changing the treatment of non-major failures within a short period is not a compelling proposition in the context of the legal threshold for ‘major failure’ already being relatively low.
4. By contrast, many consumer groups considered the status quo is not working for consumers and supported Options 2 or 3 on that basis.[[68]](#footnote-69)

**Impact Analysis**

1. The status quo would continue to provide a mechanism for consumers to seek a refund or replacement within a reasonable time, if there has been a major failure. However, the uncertainty identified in the consultation RIS about whether a major failure has occurred, allowing the consumer to choose a remedy, when goods fail within a short period of time would remain. Low-value goods are less affected by such uncertainty, in the context of voluntary refund policies that exceed consumer guarantee rights.
2. As outlined in Box 1, determining whether there has been a major failure requires consideration of several factors, including ambiguous concepts such as ‘reasonable time’ and a ‘reasonable consumer’. This can be complex in some circumstances and difficult for consumers and businesses to understand and apply in practice, primarily with regards to high-value or complex goods. It can also be resource intensive to apply as it requires the individual circumstances of each dispute to be assessed. This can lead to issues where the supplier does not agree with the consumer’s assertion that a major failure has occurred and therefore offers a repair rather than the refund or replacement to which the consumer is entitled.
3. On the other hand, the status quo would maintain the balance between the interests of consumers and suppliers that the current distinction between major and non-major failures strikes. The right of a trader to choose whether a good is repaired or replaced when there is a non-major failure gives suppliers flexibility and is often more economical.
4. Non-regulatory options, such as regulator guidance and education, could be pursued and improved under the status quo. ACL regulators already prepare guidance for consumers and businesses on the consumer guarantees,[[69]](#footnote-70) and this RIS proposes that ACL regulators will produce updated guidance, bringing clarity on non-major consumer guarantee failures (see paragraph 2.172 below). While the proposed updated guidance is intended to complement the preferred option in this RIS responding to the multiple failures problem, this could assist more broadly in limiting disputation about consumer guarantee remedies.
5. As discussed in the problem section at the beginning of this Chapter, manufacturer indemnification of suppliers is also a key issue for the effective application of consumer guarantee remedies. Consultation highlighted that suppliers often feel constrained in providing remedies to consumers because of the obstacles they then face in securing reimbursement from the manufacturer. Under any of the options presented, including Option 1, this indemnification problem remains.

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| --- | --- |
| BENEFITS | COSTS |
| * Consumers and businesses would not have to familiarise themselves with a change to the law.
 | * Costs associated with unnecessary disputes and litigation.
 |
| * Traders have greater flexibility to negotiate and offer a repair, rather than a refund or replacement.
 | * Consumers would continue to have difficulty when asserting their right to reject goods for a refund or replacement.
 |

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

1. This option would involve a legislative amendment to specify that where a good fails to meet the consumer guarantees within a short specified period of time, consumers can reject the good and choose the remedies of a refund or replacement regardless of whether the failure is major. The consultation RIS sought views on specifying a 30-day period.
2. Option 2 would expand on the existing law to include consideration of timing. As outlined in Figure 2, the type of consumer guarantee failure would not be relevant if the failure occurs within the specified short period of time after purchase.
3. The consultation RIS discussed that although the case-by-case application of the current law allows for flexibility, as consumers’ rights are framed broadly, it can create uncertainty and undermine consumers’ confidence when asserting their rights.
4. Consumer and legal aid groups expressed support for Option 2 on the basis that it would avoid argument about whether a failure in a short period of time amounts to a major failure in the circumstances.[[70]](#footnote-71)
5. In contrast, many stakeholders did not accept characterisations of the proposal as a mere clarification to the law, considering it to be a clear and substantial change from the current law. For example, Lighting Council Australia submitted that, in relation to the balancing of suppliers’ and consumers’ interests, the proposal ‘may dramatically change the calculus between contracting parties’.[[71]](#footnote-72)
6. The consultation RIS drew parallels with the UK’s framework of ‘statutory rights under a goods contract’ and its 30-day ‘short-term right to reject’.[[72]](#footnote-73) However, this model is not directly transferable to the Australian context. The UK framework does not contain the concepts of ‘major’ and ‘non-major’ failures, and applies a ‘deduction for use’ to refund claims for motor vehicles after any period and for other goods after six months.[[73]](#footnote-74) There has also been limited opportunity to analyse the impact of the UK’s 30-day short-term right to reject, with this provision having only been introduced in 2015.
7. The consultation RIS also noted that the UK approach applies a reverse onus of proof during the first six months – meaning that the onus is on the retailer to prove that the fault was not present at the time of purchase, rather than the consumer having to prove that it was present – except where the consumer exercises the short-term right to reject.[[74]](#footnote-75)

Longer specified periods

1. A longer specified period, such as 60 days or six months, was proposed by some stakeholders during consultation for the Review and on the consultation RIS. For example, the Consumer Credit Legal Service of Western Australia’s submission on the consultation RIS proposed a three to six month period for low-value goods (and 12 months for high-value goods).[[75]](#footnote-76) The Consumer Action Law Centre joint submission proposed a six-month period ideally applying to all goods.[[76]](#footnote-77)
2. The Australian Automobile Association cited the recent enforceable undertaking by Holden, which specifies a 60-day time period for a consumer to claim a refund or replacement without having to prove a major failure, as a suitable model. In the Association’s online survey (see paragraph 2.10 above), 56% of respondents reported experiencing a problem less than 60 days after purchasing their vehicle.[[77]](#footnote-78)
3. Under this approach, the existing major failure test would become relevant in relation to failures to meet the guarantees which emerge well after purchase. This may go beyond the scope of the Review proposal, which suggested a short time for the specified period.

Impact Analysis

##### Smaller impact on low-value goods

1. Consultation reflected that suppliers have an incentive to provide a refund or replacement for a low-value good where it is more economical to do so, compared to a repair. Relatedly, the consultation RIS discussed the voluntary store refund policies over and above the consumer guarantee rights typically offered by large retailers of low-value goods. The economics of repairing low-value goods, combined with the prevalence of voluntary policies, implies that Option 2 would have a much smaller impact (in terms of both costs and benefits) on low-value goods, simply because many transactions in this category are already being captured.
2. Lighting Council Australia submitted that:

The existence of voluntary consumer returns policies – above those required by law – does not mean that this is [a] legitimate area for legislative expansion. Rather it demonstrates the precise opposite – that there is an existing, well-functioning market for the provision of these additional services.[[78]](#footnote-79)

1. Even if Option 2 were supported on the basis that formalising these existing practices is a worthwhile exercise, as an economy-wide change it would have cost impacts in every other context, particularly for high-value and complex goods.

##### Significant costs on suppliers and manufacturers of high-value goods

1. Option 2 would benefit consumers by providing a refund or replacement right in a new category of transaction (namely, non-major failures within 30 days), likely making refunds and replacements substantially more common, for high-value goods in particular. Other related benefits are discussed further below under ‘Other impacts’. However, correlative with an increased volume of refunds and replacements, the option would impose very significant costs on businesses.
2. Suppliers (or manufacturers) would incur costs in relation to providing a refund or replacement for higher value goods, rather than a repair, in circumstances where a repair would be a more economical remedy for the trader and would have otherwise been provided.
3. This cost would be the difference in value between the cost of providing a repair and the cost of the remedy actually provided. These costs are difficult to accurately quantify, as they would vary dramatically depending on variables such as the type and value of the goods, when the dispute arises, and the preferences or likely behaviour of each party.
4. Industry groups expressed concern that easily repairable minor faults would entitle consumers to a refund or replacement, at significant cost to the supplier. This concern was particularly strong from the automotive sector.[[79]](#footnote-80)

The proposed … amendment … overlooks the significant cost this would impose on businesses and consumers. … More often than not, a repair is sufficient to rectify a failure identified by a consumer. A repair is also often the most cost effective approach in rectifying non-major failures. Implementing a blanket rule to require businesses to replace or refund essentially new goods will significantly increase the cost of providing these goods to consumers. These increased costs will, in turn, increase the price of these goods for consumers.

- Australian Chamber of Commerce and Industry submission[[80]](#footnote-81)

1. The Australian Small Business and Family Enterprise Ombudsman expressed concerns about the capacity of small businesses in particular to provide a refund or replacement without the consumer having to prove a major failure, given their position as the ‘underdog’ in the marketplace.[[81]](#footnote-82)
2. Other costs on businesses would include those associated with learning the new law,
re-training staff, updating internal policies and processes, educating consumers, and updating commercial arrangements with third parties.[[82]](#footnote-83)
3. While suppliers could of course mitigate costs under Option 2 by repairing and reselling goods returned by consumers for a refund or replacement, the impact of this would vary considerably by product type. The most notable example is the depreciation in value of a new motor vehicle immediately after delivery, meaning the supplier could only expect to recover a portion of the costs.[[83]](#footnote-84)
4. Being required to provide a refund for these high-value goods may leave businesses with goods that are worth less than their wholesale value and difficult to re-sell. Accordingly, the ability to offer a repair rather than a refund is important to the sustainability of some business models. This situation is reflected by the well-developed aftermarket repair industries for many high-value goods.
5. Several stakeholders emphasised that repair is an efficient remedy for minor faults.[[84]](#footnote-85) The existing law reflects this proposition.

A repair that can restore a product in a timely manner ought not be regarded as inferior from a consumer’s perspective. The consumer guarantee framework currently recognises this with the ability to repair a product itself a trigger for whether a failure is major. …

Consumers’ predisposition to favour exchanges or refunds will, however, mean if such a change is made to the framework, repairs will seldom occur even where they are by far the most cost-effective and practical solution. Allowing consumers to choose the remedy would bias against repairing relatively small and easily fixed defects and would needlessly create significant inefficiencies and additional cost.

- NSW Business Chamber submission[[85]](#footnote-86)

1. Stakeholders report that modernisation and technological advances have made the diagnosis of faults in some goods a complicated and difficult process. It has also made replacement of components a more viable and cost effective alternative to traditional repairs. The complexity of many high-value goods means that problems can be difficult to quickly diagnose and the delineation between major and non-major failure can be blurred. Accordingly, the inconvenience experienced by consumers must be balanced with the practical constraints of providing an effective repair.
2. In consultation, the automotive sector emphasised the complexity of modern motor vehicles and the implication of this for the probability of a vehicle having some non-major faults:

It is important to understand that a modern motor vehicle is a complex piece of machinery consisting of around 60,000 parts and containing in excess of 10 million lines of computer code. Given the complexity and growing sophistication of each new model a reasonable consumer would expect minor or unfamiliar matters to be rectified during the manufacturer’s warranty period which can be up to seven years in the case of some brands.

- Australian Automotive Dealer Association submission[[86]](#footnote-87)

1. Additionally, often these are goods which can be modified by consumers or serviced and repaired by a third party. In these circumstances, it can be difficult to ascertain whether a problem has arisen from an inherent defect that was present at the time of purchase or whether it was the result of an intervening modification.
2. Option 2 also presents particular difficulties for digital goods, where traditional conceptions of ‘product failure’ are difficult to consistently and objectively apply.[[87]](#footnote-88)

##### Manufacturer indemnification of suppliers

1. Section 274 of the ACL provides that a manufacturer of goods is liable to indemnify a supplier in the event of a supplier incurring the relevant consumer guarantee remedy liabilities.
2. The consultation RIS canvassed how a clearer law could also give suppliers a clearer legal basis on which to claim indemnification from manufacturers who have supplied faulty goods. However, several supplier and retailer groups raised concerns that Option 2 could in fact aggravate the existing difficulties that suppliers face claiming indemnification from manufacturers. This is based on the proposition that there would be a greater volume of refund or replacement claims under a law more favourable to consumers, to which the same challenges securing indemnification would apply, leaving suppliers to alone absorb that burden of increased refunds or replacements.[[88]](#footnote-89)
3. The Australian Automotive Dealer Association submitted that the existing statutory indemnity against manufacturers under section 274 of the ACL ‘is of very limited value as it can only be exercised if there is an actual finding of liability against a manufacturer’.[[89]](#footnote-90) Similarly, the Western Australian Small Business Development Corporation emphasised that the costs for a small business to take legal action to enforce section 274 often outweigh the benefits.[[90]](#footnote-91)
4. The Australian Automotive Dealer Association also emphasised the imbalance of power between automotive dealers and manufacturers, and the commercial pressures to comply with manufacturers’ instructions relating to consumer guarantee failures, given that dealers rely on security of tenure of franchise agreements*.*[[91]](#footnote-92)
5. There is evidence of this being an economy-wide problem. The Australian Retailers Association submitted that:

Very few small retailers know their rights to claim costs under the ACL and some who do gave examples where they were told if they took the matter further the supplier/manufacturer would cease to supply. We thought this was a small business issue until some larger retailers informed the ARA they build in costs to the business because there are major technology companies who were extremely difficult to deal with on replacing clearly failed products.[[92]](#footnote-93)

- Australian Retailers Association submission

1. The above has a significant influence on who bears the costs generated by Option 2. If indemnification arrangements were operating as intended, manufacturers who produced faulty goods, rather than retailers, would ultimately bear the costs of this proposal. The problems emerging from consultation weaken the case for Option 2 because it is evident that suppliers, who are often small businesses, would be left in the unfair position of frequently having to bear the cost of the enhanced consumer rights.

##### Uncertainty generated by elevating ‘non-major failure’ to the determinant criterion

1. One key risk presented by Option 2 is that it would elevate the concept of non-major failure to the most important marker of what happens in the first 30 days after purchase. Instead of the difference between ‘major’ and ‘non-major’ failure, the concept that would determine the outcome would be the difference between ‘non-major’ and a failure that does not amount to a failure to comply with the consumer guarantees.
2. As indicated in the problem section at the beginning of this Chapter, there are concerns about the limited guidance presently available on what amounts to a non-major failure. Option 2 could cause significant uncertainty for consumers and suppliers in the absence of further regulator, tribunal or court guidance on non-major failures.

##### Other impacts

1. The Australian Industry Group raised concerns the proposal could ‘open the floodgates to unreasonable and vexatious claims’, and submitted that small suppliers would be more likely than larger suppliers to be put in an untenable situation as a result.[[93]](#footnote-94) Direct Selling Australia similarly raised concern about allowing a consumer to recast a change of mind or ‘buyer’s remorse’ as a product fault issue, ‘even if there is in fact no fault with the product or the fault can be easily and economically repaired’.[[94]](#footnote-95)
2. The prevalence of voluntary refund policies, which often allow refunds for change of mind, may also result in consumers conflating these policies with the short specified period. As a result, the short specified period might encourage consumers to overestimate their rights and assume that they have an extended ‘trial’ period.
3. In terms of benefits to consumers, Option 2 could give suppliers an incentive to ensure their repairs are effective and completed quickly, so that repairs are an attractive remedy for consumers to choose. A specified period may also improve the quality of goods and encourage better quality assurance and pre-sale checks.[[95]](#footnote-96)
4. Option 2 could reduce the time spent determining whether the consumer is entitled to a refund and avoid some unnecessary disputes.
5. The Communications Alliance disagreed with the assertion in the consultation RIS about time saving benefits, submitting that returned goods would still need to go through the same process including possibly being sent for off-site assessment of whether there is a fault.[[96]](#footnote-97)
6. In any event, the identified benefits to consumers from Option 2 are outweighed by the costs businesses would incur, as discussed in detail above. Several industry groups submitted that the costs generated by the proposal would be passed on to consumers.[[97]](#footnote-98) While supporting the principle that the uncertainty about the right to reject goods should be resolved in favour of consumers, the Legal Services Commission of South Australia also acknowledged in its submission that, in the event consumers seek refunds or replacements for easily reparable faults, suppliers and manufacturers could pass on their increased costs in the form of higher prices for consumers.[[98]](#footnote-99)

##### Net benefits

1. Cost benefit analysis indicates that Option 2 has estimated costs of $1,204 million and benefits of $843.3 million, producing estimated net benefits of -$360.6 million over ten years.[[99]](#footnote-100)
2. The majority of the ongoing costs to business are due to the higher cost of the remedy to the supplier, while a small amount is due to the lost margin from a reduction in sales. Businesses also face costs in transitioning to the new regime. The majority of the benefits to consumers are due to the avoided financial cost of repair. There are also some benefits from avoided cycles of repeated repairs, although this factor is significantly less than for the options in this RIS relating to multiple failures.

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| BENEFITS | COSTS |
| * More efficient resolution of consumer guarantees disputes.
 | * Costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy for the supplier, particularly for higher value goods.
 |
| * Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.
 | * Costs for businesses of learning the short specified period and adjusting customer service practices and training staff.
 |
| * Potential improvements in customer service and repair policies and procedures (unquantified).
 | * Costs associated with the increased potential for consumers to overestimate their rights (unquantified).
 |
|  | * Risk of contributing to burden on businesses in circumstances where they are unsuccessful in securing indemnification from manufacturers (unquantified).
 |

Option 3: Variations of Option 2

1. Within Option 3, two approaches are considered. Approach 3A is Option 2, but with a longer time period for high-value goods (such as motor vehicles and white goods) based on a monetary threshold. Approach 3B is Option 2, but with an exemption (status quo) for high-value goods.
2. Many of the concerns about Option 2 are equally or more applicable to Option 3. Importantly, either approach under Option 3 would introduce the complexity associated with monetary thresholds and risk undermining the objective of a simple and accessible consumer guarantee framework.

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

1. This approach would build on the short specified period, under Option 2, to specify which goods would be subject to a longer period. This could be achieved by setting a monetary value threshold. If goods are above this value, consumers purchasing those goods will be eligible for a longer period during which they can more easily access a refund or replacement. This approach reflects a general consumer expectation that more expensive goods should be less prone to a failure within a short time period.
2. The high instances of unresolved problems with motor vehicles found by the 2016 Australian Consumer Survey, for example, and the number of complaints received by the Australian Competition and Consumer Commission (ACCC) indicate that there may be systemic issues in the motor vehicle industry which make it difficult for consumers to enforce their consumer guarantees rights. The consultation RIS discussed how a period longer than 30 days might give consumers sufficient time to test high-value goods, diagnose problems and seek redress more easily.[[100]](#footnote-101)
3. Views were sought on the appropriate level for a high-value monetary threshold which could apply to give consumers a greater period of time to choose a refund or replacement in the event of a failure to meet the guarantees.
4. The Consumer Action Law Centre’s joint submission proposed that the monetary threshold take account of the value of second-hand whitegoods and cars ‘to ensure that low-income consumers are not unfairly excluded from additional protections’.[[101]](#footnote-102)
5. Grain Growers Limited submitted the extended period for high-value goods should be ‘at least 90 days and/or a set number of operating hours given that some equipment is often purchased in the off-season and may not be tested under normal operating conditions within 90 days’.[[102]](#footnote-103) Grain Growers Limited’s submission highlighted the special considerations that apply to agricultural machinery and equipment, and raised that ‘there is merit in the time period being replaced by a set number of “hours of use” within which a consumer is entitled to a refund or replacement if a major failure occurs’.[[103]](#footnote-104)
6. The National Retail Association’s submission proposed the threshold be set at no more than $2,500 on the basis that this represents, in the Association’s view, the maximum price of an ‘impulse buy’ by the average consumer.[[104]](#footnote-105)

##### Impact Analysis

1. Consultation found consumers had particular difficulty asserting a right to refunds for higher-cost goods such as motor vehicles and white goods where refunds are potentially more costly than repairs.[[105]](#footnote-106)
2. Consumers who have purchased high-value goods are also more likely, in general, to take their claim to a court or tribunal if they are refused a refund following a failure to meet the guarantees.
3. The Western Australian Small Business Development Corporation submitted that Approach 3A would provide benefits to small businesses as purchasers, outweighing in its view the cost implications for small businesses as suppliers.[[106]](#footnote-107)
4. However, as with Option 2, these identified benefits are significantly outweighed for the costs that would be imposed on businesses and other negative impacts.
5. As with Option 2, this approach may impose costs where a refund or replacement is chosen, rather than a repair, in circumstances where a repair is the more economical remedy for the trader and would have otherwise been provided (particularly for high-value goods). This cost would be the difference in value between the cost of providing a repair and the cost of the remedy actually provided. The longer period proposed by Approach 3A would mean that these circumstances would occur more commonly and, as a result, these costs would be greater than under Option 2.
6. Approach 3A would also result in costs for businesses to learn the new law and adjust practices to ensure the implications of the specified period are understood and that it is applied correctly when resolving consumer guarantee issues.
7. Among other cost impacts presented by Approach 3A, the creation of a monetary threshold demarcating low-value and high-value goods, and the application of differential periods of time, would add to the complexity of the consumer guarantee framework in a way that undermines the stated objectives of the ACL Review and this RIS. Additionally, the monetary threshold would have the unintended consequence that a consumer buying a good on sale that would normally be over the threshold (but is now under) would get fewer consumer guarantee rights during the extended period – an effective ‘penalty for buying goods on sale’.
8. Cost benefit analysis indicates that Option 3, Approach 3A has estimated costs of $1,972.7 million and benefits of $807.8 million, producing estimated net benefits of -$1,164.9 million over ten years.[[107]](#footnote-108) The larger net costs relative to Option 2 reflect that high-value goods are generally cheaper to repair than replace in comparison to low-value goods; so providing the choice of remedy to consumers places a higher cost on suppliers than it does for low-value items.

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| BENEFITS | COSTS |
| * More efficient resolution of consumer guarantees disputes.
 | * Greater costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy for the business.
 |
| * Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.
 | * Costs for businesses of learning the new law and adjusting customer service practices and training staff.
 |
| * Potential improvements in customer service and repair policies and procedures (unquantified).
 | * Cost for government and ACL regulators of regular review of the law to ensure value thresholds stay current, as well as additional education and enforcement (unquantified).
 |
|  | * Greater likelihood of costs associated with consumers overestimating their rights (unquantified).
 |
|  | * Increased complexity in the consumer guarantees framework (unquantified).
 |
|  | * Risk of contributing to burden on businesses in circumstances where they are unsuccessful in securing indemnification from manufacturers (unquantified).
 |
|  | * A ‘penalty for buying goods on sale’ associated with a monetary threshold demarcating low-value and high-value goods (unquantified).
 |

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

1. Approach 3B would provide an exemption for high-value goods from the Option 2, 30 day short specified period. That is, for low-value goods, any consumer guarantee failure would trigger a right to a refund or replacement in the first 30 days, but for high-value goods, there would still need to be a major failure to trigger a right to a refund or replacement. This approach reflects concerns from suppliers and manufacturers that a short specified period would be overly burdensome if applied to high-value goods.

##### Impact Analysis

1. An industry or goods specific approach to Option 3 would be inconsistent with the
economy-wide application of the ACL and raises a number of definitional issues which would add complexity to the law. Value thresholds would have to be defined to qualify for an extended period (Approach 3A) or exemption (Approach 3B).
2. Many businesses and consumers supported maintaining the generic, economy wide nature of the consumer guarantees during consultation for the Review. There are benefits to maintaining a generic approach to consumer guarantees. The guarantees currently apply generically across the economy, allowing for flexibility in individual circumstances. Product specific treatment may make the application of the law more rigid and inflexible to changes in the market.
3. The Australian Chamber of Commerce and Industry’s submission on the consultation RIS expressed a similar perspective about the benefits of the ACL’s flexibility, arguing that ‘ACL amendments that fail to accommodate market nuances in the provision of goods and services will negatively impact both consumers and businesses’.[[108]](#footnote-109)
4. Implementation of Option 3 would introduce inconsistencies and undermine the effort and resources that have gone into educating consumers and businesses about their rights and responsibilities, resulting in confusion and non-compliance.
5. Direct Selling Australia’s submission identified the risk that the monetary threshold set under Approach 3B could lead businesses to raise prices at the margin of the thresholds with a view to business obtaining the benefit of the exemption of ‘high-value’ goods from the enhanced consumer guarantee rights.[[109]](#footnote-110)
6. Cost benefit analysis indicates that Option 3, Approach 3B has estimated costs of $807 million and benefits of $106.9 million, producing estimated net benefits of
-$700.1 million over ten years.[[110]](#footnote-111) The significantly lower scale of costs and benefits for Approach 3B (compared to Option 2 and Approach 3A) in part reflects the impact analysis in paragraph 2.69 above.

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| BENEFITS | COSTS |
| * More efficient resolution of consumer guarantee disputes.
 | * Costs for businesses of learning the new law and adjusting customer service practices and training staff (as being an exemption from an Option 2 approach for other goods).
 |
| * Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.
 | * Cost for government and ACL regulators of regular review of the law to ensure value thresholds stay current, as well as additional education and enforcement (unquantified).
 |
| * Potential improvements in customer service and repair policies and procedures (unquantified).
 | * Inconsistency with the current economy wide approach of the law (unquantified).
 |
| * For high-value goods, businesses would still be able to choose a repair in circumstances where there has been a non-major failure and a repair is the most economical remedy.
 | * Potential confusion for consumers and businesses resulting from different periods (unquantified).
 |

Problem 2: Multiple failures

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| SUMMARYThe consumer guarantees provisions are currently unclear about whether multiple non-major failures can collectively be considered a major failure. Courts and tribunals have given conflicting interpretations of the law. This has resulted in uncertainty for both consumers and businesses.[[111]](#footnote-112)The basic threshold test for a major failure is whether a reasonable consumer would not have purchased the good had they known the nature and extent of the failure at the outset. It is arguable that this test is likely to be met when there have been multiple non-major failures. However, the language of the ACL is currently unclear about whether this situation can give rise to a major failure and the right for the consumer to choose a refund. In response, the ACL Review Final Report 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. The clarification would reflect the reality that multiple issues can be sufficient to deter a reasonable consumer from buying a good.To address the problem, three options are proposed:* **Option 1**: Status quo.
* **Option 2**: Clarify that multiple non-major failures can amount to a major failure.
* **Option 3**: Specify the number of non-major failures that can amount to a major failure.

The following costs and benefits have been quantified to support the evaluation of each Option:* Costs to the supplier of the goods if consumer’s chosen remedy is the more expensive option;
* Lost retail margin (earned on a product which a consumer gets a refund on and does not go on to purchase elsewhere);
* Transition costs for businesses; and
* Consumer benefit from avoided out-of-pocket costs.
 |

Option 1: Status quo

1. Option 1 would maintain the existing distinction between major and non-major failures to meet the consumer guarantees. Although the existing law allows for courts and tribunals to consider all relevant factors and determine whether a reasonable consumer would have bought the good if they had known about the nature and extent of the failure at the outset, courts and tribunals have applied varying approaches to whether multiple non-major failures can collectively amount to a major failure (see the consultation RIS discussion of the status quo).
2. For instance, the consultation RIS compared *Prestige Auto v Bonnefin* [2017] NSWSC 149 and *Marwood v Agrison Pty Ltd* [2013] VCAT 1549. The former decision indicated that multiple non-major failures can amount to a major failure. In the latter case, the Tribunal considered several failures in turn, concluding that each was not a major failure, without addressing the status of the failures taken together.
3. The status quo would continue to provide a path for consumers to seek a refund. The principles-based nature of the consumer guarantees provisions is intended to take into account “all of” the relevant circumstances. One of the grounds for a major failure is whether a reasonable consumer would have bought the good if they had known the nature *and extent* of the failure at the outset. This would suggest that multiple non-major failures *can* be considered collectively, and this is the existing approach of ACL regulators.
4. A ‘failure’ in the text of the ACL does not actually refer to a failure of the good as such, but to whether the supplier has failed to comply with a consumer guarantee. As a supplier either has, or has not, complied with a consumer guarantee, a plural form of ‘failure’ is not strictly necessary. Accordingly, the singular form of that word does not necessarily support the interpretation that non-major failures cannot be considered collectively.[[112]](#footnote-113)
5. Accordingly, consumers may already have a legal basis to argue that multiple non-major failures can collectively be considered a major failure under the existing law.
6. Some industry groups considered the case for change had not been made out. For example, the Australian Industry Group submitted there is a lack of sufficient evidence to support the proposals,[[113]](#footnote-114) and the Australian Chamber of Commerce and Industry submitted that:

As the ACL currently stands, which the RIS confirms, multiple non-major failures can be considered collectively as a major failure. As such, the Australian Chamber questions whether any legislative change is required to confirm what the ACL already prescribes.[[114]](#footnote-115)

Impact Analysis

1. Under the status quo, the law would remain as it is, with the existing lack of clarity about whether multiple non-major failures can amount to a major failure and the associated barriers to parties resolving disputes early, quickly and economically.
2. It would be left to courts and tribunals to continue to develop the application of the law. However, judicial consideration is rare because of the high cost of litigation relative to the value of most goods. This means that further clarity may take a long time and unnecessary disputes will continue to be likely in the interim.
3. The current law would be left open to further interpretation, which may allow it to retain the flexibility to develop and adapt to consumer expectations. This view was reflected in the Australian Automotive Dealer Association’s submission that:

… the ACL is only 7 years old and if allowed time to mature, a body of case law would emerge across a range of industries, which would provide more certainty and clarification for the benefit of stakeholders. It took considerable time for a body of case law to emerge in relation to concepts such as misleading and deceptive conduct, but eventually significant case law emerged which provided considerable clarity on these legal concepts.[[115]](#footnote-116)

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| BENEFITS | COSTS |
| * Further judicial interpretation would allow the law to continue to develop and adapt to consumer expectations.
 | * Costs associated with unnecessary disputes and litigation.
 |
|  | * Costs associated with continuing uncertainty about the status of multiple non-major failures.
 |

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

1. Option 2 would involve a legislative amendment to clarify that multiple non-major failures can amount to a major failure. The drafting would not prescribe a specific number and may simply involve a legislative note to clarify the existing law. It would be left to courts and tribunals to determine the amount of non-major failures required, on a case by case basis. The failures would not need to have the same nature or source.
2. Option 2 is the preferred option as it is estimated to have the greatest net benefit. It represents an appropriate response to some of the most significant problems identified at the beginning of this Chapter.
3. Courts and tribunals would retain their ability to consider all factors and whether a reasonable consumer would have bought the good if they were fully aware of the nature and extent of the failures at the outset. Accordingly, the unique facts of each case would be considered individually. This approach would go some way to addressing concerns about ‘lemon’ goods without being overly prescriptive or setting a numerical threshold. It would also preserve the role of repairs where non-major failures are not sufficient to amount to a major failure. This is important because a repair is often the more practical and economical solution.
4. Option 2 may also help to prevent consumers becoming trapped in cycles of repeated repairs.[[116]](#footnote-117) The existing law requires suppliers to repair goods within a reasonable time. This option would provide further clarity that there is recourse where there have been multiple failed repairs, even if these repairs have been provided within a reasonable time.
5. This option would not change the distinction between a major and non-major failure. Legislation would simply clarify that courts may consider multiple non-major failures collectively, where appropriate, in deciding whether there has been a major failure.
6. Option 2 attracted broad support through consultation, although some industry stakeholders expressed reservations.
7. The automotive industry expressed concerns that the presence of multiple minor, unrelated and easily repairable faults in a motor vehicle could trigger a refund or replacement right in circumstances where the situation would currently be treated as a non-major failure. Some stakeholders considered that Option 2 could be appropriate in cases of persistent faults of the same character or from the same source.
8. Further regulator guidance and education could play a valuable role in complementing any amendment to the ACL regarding the treatment of multiple non-major failures. As set out in the problem section at the beginning of this Chapter, a key theme from consultation was that businesses have limited guidance on what amounts to a non-major failure in particular.

Impact Analysis

1. As indicated in the problem section at the beginning of this Chapter, consultation found consumer detriment from circumstances where suppliers respond to multiple non-major failures with repeated cycles of failed repairs. This option would produce substantial benefits for consumers in such situations.
2. Clarification would reduce the time and money spent by consumers and suppliers in unnecessary disputes and litigation.[[117]](#footnote-118) This option provides greater clarity on traders’ existing obligations and does not replace or expand on them. Court action would be less likely, as the law would be clearer and remedies would be better understood.
3. With a clarification, consumers would be less likely to feel compelled to accept a supplier’s assertion that a refund cannot be provided (with the underlying reason being that multiple non-major failures cannot be collectively considered to be a major failure).
4. The Western Australian Small Business Development Corporation’s submission identified benefits from Option 2 for small businesses as acquirers:

The SBDC supports Option 2 … because doing so would provide small business consumers with a more efficient and effective remedy. It is important to give small business consumers this extra protection because small businesses rely on the goods purchased for use in their business. When these goods fail and the small business enters into a cycle of repairs, they lose income and can suffer reputational damage.[[118]](#footnote-119)

1. Compliance costs are likely to be minor because Option 2 reflects the legislative intent of the ACL and existing regulator interpretations. However, the actual cost impact will depend on what common practice is and how much of an impact Option 2 would have on this behaviour.
2. In the New South Wales Supreme Court case *Prestige Auto v Bonnefin* [2017] NSWSC 149, cited in the consultation RIS, the coolant in the consumer’s car failed twice in a month. The judge held that the combination of the two failures was a major failure, entitling the consumer to a refund.[[119]](#footnote-120)
3. Option 2 would reduce the chances of a consumer having to go all the way to the Supreme Court to secure such an outcome; an outcome that the law already intends. The greater clarity would improve the chances of a quick resolution for the consumer at a tribunal. That is, this option would produce substantial benefits at the point where a dispute has escalated to a tribunal application.
4. Before that stage, explicit clarification in the ACL could also give consumers supporting material to point to when approaching or negotiating with a supplier for a refund or replacement.
5. Option 2 may also ease the evidentiary difficulties consumers face (for example, in a tribunal) proving a major failure when there has been a pattern of failures or defects after a repair or replacement. As set out in the problem section at the beginning of this Chapter, such situations featured extensively in consultation. These issues relating to ‘failed repairs’ are particularly problematic when there has been a time lag between the last repair and the problem re-emerging. Accordingly, Option 2 would not include a time limitation on what can be considered.
6. The consultation RIS canvassed this option providing suppliers a stronger basis on which to claim indemnification from manufacturers. The proposition was that suppliers could more confidently facilitate a refund if the consumer chooses it as a remedy, rather than pushing back against a claim of major failure due to difficulties in seeking reimbursement from the manufacturer for payment of a refund. However, consultation indicated strongly that this benefit is unlikely to materialise without further change to indemnification arrangements.
7. There may be minor costs for businesses to familiarise themselves with the clarified law and adjust their customer service practices and training, however, these would primarily be business-as-usual costs.
8. Cost benefit analysis indicates that Option 2 has estimated costs of $2,937.2 million and benefits of $6,250.5 million, producing estimated net benefits of $3,313.3 million over ten years.[[120]](#footnote-121)
9. The majority of the ongoing costs to business are the increased costs for product suppliers, with a small amount due to reduced profit margin for retailers. Businesses also face costs in transitioning to the new regime.
10. The benefits to consumers from the avoided cost of financial repair are larger than in the impact analysis of the options in this RIS relating to failure in a short period of time. This reflects a greater number of goods affected by the change and the number of repeated repair cycles avoided, which provides an additional benefit to the consumer at each avoided occurrence. The analysis undertaken is based on 2016 Australian Consumer Survey data showing the number of multiple non-major failures in the first two years of owning a good. This is a larger pool of goods than those that form the basis of the analysis for a single
non-major failure in the first 30 days under Option 2 (or 60 days in the case of high-value goods under Approach 3A) in the earlier part of this RIS addressing failure in a short period of time.

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| BENEFITS | COSTS |
| * More efficient resolution of consumer guarantees disputes.
 | * Minor costs for businesses to familiarise themselves with the clarified law.
 |
| * Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.
 | * Risk of contributing to burden on businesses in circumstances where they are unsuccessful in securing indemnification from manufacturers (unquantified).
 |
| * Easier for ACL regulators and consumer advocates to provide advice on the application of the law (unquantified).
 |  |

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

1. Option 3 would involve a legislative amendment to prescribe that a specific number of
non-major failures amount to a major failure, rather than leaving it to courts and tribunals to determine on a case by case basis.
2. Such a legislative change would effectively set a numerical threshold requirement for
non-major failures which, once met, would trigger a major failure and the associated refund or replacement right.
3. This threshold test would apply across all industries, product types and monetary values. It would not be feasible to construct differential treatment, in the form of a different specified number, depending on product type or some other distinction.
4. The aim of increased clarity may be partly achieved through regulator actions such as guidance, education and compliance and enforcement activities in conjunction with clarification.

Impact Analysis

1. While Option 3 may give some consumers more confidence to raise the issue of multiple non-major failures amounting to a major failure with suppliers, it may create definitional issues and the need for exemptions.[[121]](#footnote-122)
2. The Legal Services Commission of South Australia’s submission explained that Option 2 has the advantage of flexibility and cautioned in relation to Option 3 that:
3. Setting a number of non-major failures to meet the guarantees creates a cycle of repairs that may not be tolerable for consumers. A supplier may use the set number of attempts at repair to avoid offering the consumer a refund or replacement until it is absolutely necessary.[[122]](#footnote-123)
4. Option 3 also creates a new need for Government to continuously review and update the threshold to keep it current as new products and technologies emerge. This may result in a fragmented law which is not easily or flexibly applied. The problem defined indicates a need for clarification, rather an overhaul of how the consumer guarantees operate. Option 3 would go beyond clarification and alter the existing law to effectively add a new means of establishing a major failure.
5. The ACL provides broad and general protections. The setting of thresholds would likely be an impractical and arbitrary process which may have the unintended consequence of reducing consumer protection in individual circumstances if it has the effect of putting remedies that would have previously been available out of reach. To take the example from *Prestige Auto v Bonnefin*,[[123]](#footnote-124) where the coolant in a car failing twice in a month constituted a major failure, this outcome would not be available if the number under Option 3 were set at ‘five failures’.
6. The potential multitude of thresholds and exemptions could be confusing for consumers and businesses. Option 3 would result in substantial costs for businesses to learn the new law and adjust customer service practices to ensure the new threshold is understood and applied correctly. Record keeping costs may also increase, as businesses may be required to track and verify failures in more detail.
7. The new law would likely require ACL regulators to increase education and guidance activities to ensure that consumers and traders are aware of the threshold and can apply it. The complexity of the new law may also necessitate additional regulator enforcement to ensure compliance.
8. Submissions indicated concern at the proposition that a single number of failures would be fixed in respect of all product types across the economy.[[124]](#footnote-125) This could produce unreasonable and disproportionate outcomes. For example, setting the number at two could be quite reasonable in the case of a power tool with two minor faults; but it would also entitle a consumer to a refund for a vehicle where, for example, the Bluetooth function and windscreen wipers experienced separate failures.

Legislating for a specific number of non-major failures which can amount to a major failure could have the unintended consequence of creating a ‘legal’ major failure in the absence of a ‘practical’ major failure. For example, if the law were to specify that five non-major failures constituted a major failure, the consumer would be entitled to a remedy even if the collective assessment of those non-major failures would not, but for the operation of law, constitute a major failure.

- National Retail Association submission[[125]](#footnote-126)

1. Cost benefit analysis indicates that Option 3 has estimated costs of $2,307.3 million and benefits of $3,829.1 million, producing estimated net benefits of $1,521.8 million over ten years.[[126]](#footnote-127) This analysis assumes the specified number of non-major consumer guarantee failures would be set at three.
2. The present value cost of transitioning to the new regime is estimated at $3.2 million. The ongoing costs to business in present value terms over 10 years of the new proposed law are estimated at $10.4 million in reduced profit margin for retailers and $2.3 billion in increased costs for product suppliers. The benefits to consumers from the avoided cost of financial repair are estimated at $3.8 billion in present value terms over 10 years.
3. The difference in costs and benefits between Options 2 and 3 is due to the difference in specifying a principle (Option 2) and a rule (Option 3). Option 2 is more inclusive as it can include goods that have experienced two or more non-major failures. This increases the cost of the remedy if retailers treat two non-major failures as a major failure. This is in comparison to Option 3 where retailers will only treat three minor failures as a major failure, which places fewer costs on retailers.

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| BENEFITS | COSTS |
| * More efficient resolution of consumer guarantees disputes.
 | * Costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy.
 |
| * Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.
 | * Costs for businesses of learning the new law and adjusting customer service practices and training staff.
 |
|  | * Cost for government and ACL regulators of regular review of the law to ensure thresholds stay current, as well as additional education and enforcement.
 |
|  | * Costs of record keeping, to track and verify failures in more detail.
 |
|  | * Risk of contributing to burden on businesses in circumstances where they are unsuccessful in securing indemnification from manufacturers.
 |

Implementation

1. The preferred option in response to Problem 2: Multiple Failures is expected to require a legislative amendment to the ACL (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)).
2. Under the Intergovernmental Agreement for the ACL, this proposed amendment will require the agreement of the Legislative and Governance Forum on Consumer Affairs (CAF).[[127]](#footnote-128) CAF is scheduled to consider the proposed amendment on 31 August 2018.
3. If the proposed amendment proceeds, an Exposure Draft will be prepared and released for public consultation. Following this, a Bill will be introduced into Parliament.
4. ACL regulators will also produce updated guidance on consumer guarantee failures, bringing clarity on non-major consumer guarantee failures. This will respond to concerns about limited understanding by businesses of non-major failures while assisting businesses and consumers to understand and apply the proposed clarification to the law.

Monitoring

1. CAANZ will monitor and evaluate the implementation of this proposed amendment. CAANZ will also continue to monitor the issues about access to consumer guarantee remedies identified in this RIS and related matters.

dECISION Regulation Impact Statement

Chapter three

Australian Consumer Law Review: Enhanced disclosure for extended warranties

Consumer Affairs Australia and New Zealand

2018

Executive Summary – Chapter Three

Extended warranties are optional products that consumers typically purchase for an additional amount around the time of purchasing the primary product to which the extended warranty applies. The warranty provider generally agrees to repair or replace, or cover the cost of repairing or replacing goods (or parts of components), if a defect occurs within a specified time period. Extended warranties are separate to a consumer’s statutory rights and any manufacturer’s warranty provided. Although consumers may perceive extended warranties to be a ‘feature’ of the primary product to which the extended warranty applies, extended warranties are themselves a separate product.

Extended warranties are available for a wide range of goods and are frequently offered to consumers when they purchase expensive or complex consumer goods, such as white goods and electrical products. Extended warranties can be attractive to consumers because they offer consumers the ‘peace of mind’ that they do not have to worry about paying for the unexpected costs of repairing or replacing a product. They can also make the process of obtaining a refund, repair or replacement easier for consumers because the consumer does not have to establish a breach of the Australian Consumer Law (ACL).[[128]](#footnote-129)

However, in some cases it can be difficult for consumers to determine if an extended warranty offers value for money and provides the additional protection they seek. Extended warranties may not always offer significant benefits over and above a consumer’s statutory rights or manufacturer warranty rights. The consumer guarantees in the ACL provide consumers with an automatic set of rights for new and used goods sold in trade or commerce. These guarantees include that goods must be of acceptable quality, which means goods must be free from defects and durable.[[129]](#footnote-130)

Consumers can have difficulties making informed decisions about buying an extended warranty if they:

* are not aware of their existing rights under the ACL or any applicable manufacturer’s warranty;
* have trouble understanding the terms and conditions of an extended warranty;
* are not able to compare an extended warranty with their rights under the ACL and under any manufacturer warranty;
* are influenced by behavioural biases such as loss aversion and decision fatigue;
* are under time pressure; and/or
* have trouble comparing different extended warranties (or don’t compare them).

This decision Regulation Impact Statement (RIS) provides options that would assist consumers to make more informed purchasing decisions with regard to extended warranties.

In 2017, the ACL Review Final Report (the Review) recommended enhancing disclosure in relation to extended warranties by requiring:

* agreements for extended warranties to be clear and in writing;
* additional information about what the ACL offers in comparison; and
* a cooling-off period of ten business days (or an unlimited time if the trader has not met their disclosure obligations) that must be disclosed orally and in writing.

The policy options analysed in this RIS are:

* Option 1: status quo;
* Option 2: Enhanced disclosure and a cooling-off right;
* Sub-option 2a: Enhanced disclosure only;
* Sub-option 2b: Cooling-off right only;
* Option 3: Enhanced disclosure and an opt-in process.

A consultation RIS was released for public consultation on 9 March 2018. Consultation closed on 23 April 2018. The consultation RIS identified problems that consumers experience when making decisions about whether to purchase an extended warranty and presented options to address these problems.

Feedback on the consultation RIS indicated a range of different views on the regulation of extended warranties. Approximately one quarter of stakeholders that indicated their position in submissions supported maintaining the status quo. Option 2 (disclosure and a cooling-off right) received the strongest support. Drawing on stakeholder consultations, an assessment of the costs and benefits, including compliance costs, this RIS concludes that Option 2 is likely to have the greatest net benefit and is therefore the preferred option. It is expected to help consumers make more informed purchasing decisions about extended warranties by providing consumers with:

* better information through oral and written disclosure; and
* a ten day cooling-off right so that consumers have the opportunity to opt-out of extended warranties.

Improved information disclosure will help address the information asymmetries that have been identified in the extended warranties market and ensure that consumers have access to the information they require to make more informed choices. The written disclosure information helps consumers to understand their existing rights under the ACL and under any manufacturer’s warranty, and understand what a particular extended warranty offers in comparison.

In addition to providing written information, traders would have to inform consumers verbally that they have a cooling-off right (unless this oral disclosure would be impractical, for example, where the transaction happens online). The cooling-off right gives consumers the opportunity to assess the value of an extended warranty away from the pressure of a sales environment, and cancel the extended warranty without financial penalty. Option 2 will also introduce more consistent regulation of all types of extended warranties that are offered to consumers.

There was minimal interest from stakeholders in sub-options 2a (disclosure only) and 2b (cooling-off right only). The cost benefit analysis showed that disclosure and a cooling-off right produce additional net benefits when combined (as in Option 2).

Option 3 (disclosure and an opt-in process) received strong support from consumer and community stakeholders. However the costs on businesses and burden on consumers to opt-in are considerably higher than Option 2, without commensurate benefits. A consequence of Option 3 is that extended warranties currently subject to the incidental product exemption from the *Corporations Act 2001* (Cth) would likely lose that characterisation, which would have substantial costs for businesses.

Introduction

Extended warranties

1. Extended warranties are optional contracts that consumers typically purchase for an additional amount around the time of purchasing the product to which the extended warranty applies (the primary product). The warranty provider generally agrees to repair or replace, or cover the cost of repairing or replacing the primary product (or parts of components), if a defect occurs within a specified time period. They are separate to a consumer’s statutory rights and any protections provided in any manufacturer’s warranty. In addition to offering repair or replacement, extended warranties also frequently advertise added benefits or remedies, such as priority customer treatment and technical support. Protection for accidental damage is generally offered as a separate product, but may be bundled with some types of extended warranties.
2. Usually an extended warranty commences on the expiry of the manufacturer’s warranty, however some extended warranties provide features such as technical assistance during and after the period of the manufacturer’s warranty. The duration of protection offered by traders varies, but is generally between one and five years.[[130]](#footnote-131)
3. Extended warranties are available for a broad range of products and are offered by many retailers of expensive consumer goods (such as cars, whitegoods, televisions and appliances). They are also available from manufacturers and insurance companies.
4. Generally, retailers have one extended warranty product for a consumer good.[[131]](#footnote-132) Additionally, the terms and conditions for an extended warranty tend to be consistent for any specific product type offered by a retailer.[[132]](#footnote-133) This may reflect that having a variety of offerings would overburden the decision-making process for consumers.
5. Although extended warranties may appear to ‘extend’ a manufacturer’s warranty, extended warranties are a separate product and in some cases, may be an insurance product. In addition to being a separate product, extended warranties are often provided under a separate contract.
6. Consumers typically purchase extended warranties to minimise any costs associated with a product breaking down or having faults during the warranty period. The main perceived benefit of an extended warranty is that they provide consumers with ‘peace of mind’ that they do not have to worry about the unexpected costs of repairing or replacing a product (for a particular period). Consumers who buy extended warranties can also benefit from not having to invest time to search for a company to repair a product and from not having to invest time to understand how their ACL rights would apply.
7. Extended warranties can also make the process of gaining a refund, repair or replacement easier, compared to relying on statutory rights or the manufacturer’s warranty. Retailers may be more willing to provide refunds and replacements and may have more convenient or straightforward processes where a consumer is able to rely on an extended warranty.
8. Another benefit that may be provided by an extended warranty is a repair time guarantee.[[133]](#footnote-134) An extended warranty can also increase the resale value of a good, where the warranty can be transferred to the new owner.
9. For a detailed description of the laws applying to extended warranties, see *Attachment A.*

Other types of warranties

1. Consumer products normally come with other types of warranties, called express warranties and warranties against defects. These are different to extended warranties. Express warranties and warranties against defects are provided to consumers for no additional cost. In contrast, extended warranties are warranties offered to consumers that the consumer pays for, separately to payment for the primary product.

Express warranties

1. An express warranty relates to the quality or standard of a product. It is a promise about what a product can do, in terms of its characteristics, performance, quality and/or the action that will be taken if the product is faulty. Under the consumer guarantees, suppliers and manufacturers are required to comply with the terms of any express warranty.[[134]](#footnote-135) For example, if a supplier sells a book shelf that is advertised as holding up to 80 kilograms this is a statement about what the product can do and the shelf must meet this standard.
2. Suppliers who do not honour express warranties can also be liable under other provisions of the ACL, such as for making a false or misleading representation about the effect of any warranty.

Warranties against defects

1. Suppliers and manufacturers often provide an express ‘warranty against defects’ for a specified period of time. The time period is often one to three years. Warranties against defects are also known as manufacturer’s warranties. Warranties against defects are representations that a supplier or manufacturer will (unconditionally or on specified conditions): repair or replace products (or part of them), resupply or fix a problem with services (or part of them), or provide compensation to the consumer.[[135]](#footnote-136)
2. If a supplier or manufacturer chooses to provide a warranty against defects then the warranty document must comply with specific information requirements, including mandatory text.[[136]](#footnote-137)

The Problem

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| OVERVIEWA lack of clear and accessible information, behavioural biases and time constraints can make it difficult for consumers to make informed decisions about whether to purchase an extended warranty. Consumers are not always aware of their existing rights and can experience difficulty comparing the protections offered under an extended warranty with their existing rights. This can make it difficult for consumers to determine if an extended warranty provides value for money and the additional protection they seek. Additionally, consumers are unlikely to compare extended warranties offered by a retailer with extended warranties available elsewhere. |

Scope and significance of the problem

1. Extended warranties do not always provide consumers with significant benefits over and above a consumer’s existing rights. It can be difficult for consumers to make informed decisions about extended warranties, due to a lack of information, time constraints and behavioural biases.
2. This RIS chapter is not directed at issues of unconscionable or misleading conduct by traders in relation to the sale of extended warranties. Unconscionable conduct and misleading or deceptive conduct is already prohibited under the consumer law.
3. The incidence of consumer harm varies between industries. Submissions from some stakeholders suggested that there are more problems with extended warranties in particular industries, such as the motor vehicle industry.[[137]](#footnote-138) Concerns were also raised about the quality of extended warranty products offered for agricultural machinery and equipment.[[138]](#footnote-139) Nonetheless, consumers can experience difficulties with making an informed decision about an extended warranty in any sector of the economy.
4. The Review reported that many consumer stakeholders suggest that a lack of clear information can prevent consumers from comparing an extended warranty with the consumer guarantees in the ACL to determine if the extended warranty provides value for money.[[139]](#footnote-140) The Review found that legislative change is needed to ensure consumers receive adequate disclosure and can make informed purchasing decisions about extended warranties.[[140]](#footnote-141) This conclusion is supported by the submissions to the consultation RIS, the findings from the Australian Competition and Consumer Commission’s (ACCC’s) study into the new car retailing industry and the Australian Securities and Investments Commission’s (ASIC’s) paper on the sale of add-on insurance and warranties through caryard intermediaries (both outlined below).
5. There were different views on the significance of the problem identified, with industry stakeholders submitting that more data was needed on consumer detriment prior to regulatory action.[[141]](#footnote-142) There is indeed a lack of comprehensive data on the full scope of consumer detriment related to extended warranties. However, consumer advocates submitted that considerable consumer detriment is evident in existing data and research, including the ACCC’s new car retailing study, ASIC’s report into caryard add-on insurance, the ACCC’s own complaint data and other consumer research.[[142]](#footnote-143) On balance, there is sufficient evidence that it can be difficult for consumers to make informed decisions about whether to purchase an extended warranty.

Consumer awareness of the ACL

1. Consumers should be aware of their existing rights under the ACL when purchasing an extended warranty. The guarantees in the ACL provide consumers with an automatic set of rights for new and used goods sold in trade or commerce. These guarantees include that goods must be of acceptable quality, which means goods must be free from defects and durable.[[143]](#footnote-144)
2. The 2016 Australian Consumer Survey found that 90 per cent of consumers are aware that laws exist to protect consumer rights when purchasing products or services.[[144]](#footnote-145) However, consumers may have a general awareness of consumer protection laws but not have specific knowledge about the consumer guarantees. Additionally, some consumer groups have lower reported awareness of consumer laws, including females, younger respondents, those living outside of a capital city and those who speak a language other than English at home.[[145]](#footnote-146)
3. As previously noted, extended warranties can provide consumers with ‘peace of mind’. However, this ‘peace of mind’ may be driven by a lack of awareness of the ACL:

While consumers may currently be satisfied with extended warranties and the ‘peace of mind’ they bring, the question arises: would they have the same level of satisfaction with extended warranties if they were fully aware of their existing statutory rights?[[146]](#footnote-147)

1. A study of the former *Trade Practices Act 1974* found that a lack of awareness of statutory rights was driving the demand for extended warranties.[[147]](#footnote-148) Where consumers are not aware of their statutory rights under the ACL, including the consumer guarantees, they may be more inclined to consider that they should purchase an extended warranty, and may be more susceptible to purchasing an extended warranty that offers no real benefit above the ACL. In contrast, when consumers are more informed of their rights they perceive extended warranties differently: ‘they feel they are being asked to pay for something that they already have a right to expect’.[[148]](#footnote-149)
2. However, an insurance provider submitted that the recent changes to the ACL and the activities of the ACCC have been well publicised and are likely to have increased consumer awareness of the ACL. They consider that in recent years there has been an improvement in the extended warranties on offer and the disclosure of the benefits of such products.[[149]](#footnote-150) Although the introduction of the ACL has improved awareness of consumer rights,[[150]](#footnote-151) some consumers remain unaware of their rights under the ACL.
3. Submissions from a number of stakeholders indicated that consumers are often not aware of their rights under the ACL. The Legal Services Commission of South Australia submitted that in their experience, consumers who purchase an extended warranty ‘are often surprised that they have existing rights under the ACL or other legislation’.[[151]](#footnote-152) They provided the following case study:

Mr A is a disability support pensioner and went to a large electrical retailer to buy a laptop. He had a limited amount of money to spend but was offered credit in the form of a consumer lease so that he could add a number of ‘extras’ to his purchase. He did not fully understand the nature of the ‘extras’ but the salesperson convinced him that he was getting good value and he could pay it off over a period of time. When Mr A sought advice, it turned out that the base price of the laptop doubled with a ‘care package’ for 3 years. He was provided with a brochure that emphasised peace of mind and immediate delivery of a replacement laptop if there was an eligible fault with the original laptop. He was unaware of his rights under the Australian Consumer Law if there was a major failure. He said he felt overwhelmed and confused by the information he was given about the contract and simply focussed on how much he was going to pay per month rather than exactly what he was buying.[[152]](#footnote-153)

1. In the context of motor vehicles, the Australian Automotive Aftermarket Association submitted that consumers are not often aware of their statutory rights when they purchase a motor vehicle.[[153]](#footnote-154) Likewise, the Seniors Rights Service submitted that they have been contacted by older people who had extended warranties but were not aware of their rights under the ACL.[[154]](#footnote-155) Even where consumers have a broad awareness of the ACL, it can be difficult for consumers to understand exactly how their ACL rights would apply in a particular case (see *Lack of Clarity in the Law*).
2. Consumer awareness of the ACL is impacted by the absence of any obligation on traders to disclose ACL rights. Of course, it is generally not the responsibility of a trader to help consumers to understand their rights under the ACL. Furthermore, the ACL is unlikely to attach liability to a trader that makes a true statement about the benefits of, or need for, an extended warranty and omits to mention the consumer’s ACL rights.
3. Submissions from insurance providers noted that enforcing ACL rights can be a complicated process, involving delays, prescriptive remedies and costs.[[155]](#footnote-156) In this regard, Brightside Cover suggested that consumers should be given information about the process for the enforcement of ACL rights.[[156]](#footnote-157) Similarly, the Victorian Chamber of Commerce suggested that disclosure of the processes and costs associating with enforcing ACL rights is critical to consumers making an informed decision about whether to purchase an extended warranty.[[157]](#footnote-158) The Victorian Chamber of Commerce submitted:

It is quite probable that once armed with this added information, consumers may decide that even though an extended warranty offers little in value above their existing ACL rights, they may still prefer to purchase an extended warranty, based on the costs and rigmarole of seeking redress under the law.

1. In summary, there is evidence that some consumers are not aware of their ACL rights. Additionally, it can be difficult for all consumers to determine how the ACL applies in practice. As pointed out by insurance providers, extended warranties can make the process of gaining a remedy easier, compared to relying on statutory rights. It is open to traders of extended warranties to provide information to consumers about the procedural benefits of an extended warranty in comparison to relying on the ACL.

Consumer understanding of extended warranties

1. Consumers purchasing an extended warranty should understand what they are buying. However, consumers can experience difficulties reading and understanding the terms and conditions of extended warranty contracts and may not always have an adequate opportunity to read the contractual terms before purchasing the warranty. The Legal Services Commission of South Australia submitted that in their experience, ‘consumers who purchase an extended warranty do not understand the terms and conditions of the warranty’.[[158]](#footnote-159)
2. Extended warranty contracts can be lengthy and difficult to understand. For example, Consumer advocates noted that a particular retailer’s disclosure document is 20 pages long.[[159]](#footnote-160) A comparison of the features of the extended warranty with the ACL is contained in an annexure to the document.[[160]](#footnote-161) Consumers are also unlikely to read in full an extended warranty contract, especially for lower cost extended warranties. In this regard, simple comparison information may help consumers.
3. There was limited evidence in submissions from businesses about how they ensure that they provide adequate disclosure to consumers. An insurance provider supported the need for appropriate disclosure which they considered was achieved through their current comparative table of extended warranty features and benefits and ACL rights in their Terms and Conditions booklet.[[161]](#footnote-162)
4. Consumer advocates including the Consumer Action Law Centre submitted that a problem with existing laws is that traders do not have a requirement to provide full disclosure and this is mirrored by trader behaviour.[[162]](#footnote-163) In the context of motor vehicles, the ACCC has noted that some dealers and suppliers of extended warranties do not disclose important details that would allow the consumer to assess the value of the extended warranty, including the full costs and any exclusions.[[163]](#footnote-164)
5. Legal Aid Queensland advised it has given advice and assistance to a large number of consumers who had been offered and then purchased an extended warranty. They submitted that typically for these interactions, the business did not explain what if any additional coverage the extended warranty provides and consumers did not have a good understanding of the extended warranty they purchased. Some consumers were not even aware they had purchased an extended warranty.[[164]](#footnote-165)
6. Similarly, the Australian Automotive Aftermarket Association submitted that extended warranties offered by new car dealers at the point of sale do not clearly specify the benefits of the extended warranty over and above consumer guarantee rights.[[165]](#footnote-166)
7. Submissions from industry indicated that training is provided to salespersons to assist them to explain the benefits of an extended warranty. Retailers are responsible for training staff about the consumer guarantees under the ACL.[[166]](#footnote-167) However, insurance providers noted that they provide training in relation to the extended warranty product, including how the product compares to rights under the ACL.[[167]](#footnote-168) Insurance providers noted that a comparison table approved by the ACCC and provided to consumers at the point of sale forms part of this training.[[168]](#footnote-169)
8. Some insurance providers that underwrite extended warranties are currently subject to enforceable undertakings accepted by the ACCC that require the insurance providers to develop and implement annual compliance training.[[169]](#footnote-170) An insurance provider currently subject to an undertaking considered that the undertaking provided an example of ‘how some of the measures identified in the [consultation RIS] can improve consumer outcomes’.[[170]](#footnote-171) However it was noted that these enforceable undertakings do not cover all market participants.[[171]](#footnote-172)
9. In circumstances where extended warranties are provided by third parties (not the retailer or manufacturer of the primary product), consumers may not always be aware that the retailer is not the provider of the extended warranty.
10. A lack of clear information can make it difficult for consumers to compare the protections offered by an extended warranty with their existing consumer rights.[[172]](#footnote-173) While statements to encourage consumers to take up an extended warranty must not be misleading, there is no positive obligation upon traders to provide information comparing rights under an extended warranty with a consumer’s existing rights under the ACL or under any manufacturer warranty. There may also be no strong market incentive for provision of this information, because a trader is unlikely to obtain any additional benefit from providing consumers with comparison information, unless the extended warranty offers clearly superior protections or features compared to a consumer’s existing rights. In some cases this can mean there is an information asymmetry between consumers and traders which can result in consumers purchasing extended warranties on an uninformed basis that are not right for them.

Situational monopolies

1. Consumers are unlikely to compare different extended warranties to find the best deal before choosing to purchase one. Retailers can benefit from situational monopolies at the point of sale, meaning a consumer may purchase an extended warranty on the spot without conducting further research into other extended warranties that may be available elsewhere.
2. Market research from the United Kingdom indicates that consumers typically do not shop around for an extended warranty for electrical products, despite a range of providers offering extended warranties.[[173]](#footnote-174) Consumers can perceive extended warranties to be a ‘feature’ of the product for which the warranty is bought, rather than a separate product that they can potentially purchase elsewhere. It is also generally more convenient for a consumer to purchase an extended warranty at the same time that they purchase the primary product.
3. Consumers are not likely to have considered or researched purchasing an extended warranty prior to being offered one.[[174]](#footnote-175) Consumers generally don’t go shopping intending to purchase an extended warranty. This was confirmed in a number of submissions.[[175]](#footnote-176) Additionally, CHOICE submitted that in their shadow shopping exercises they found that ‘nearly all salespeople offer extended warranties to consumers, unprompted’.[[176]](#footnote-177) CHOICE submitted this was likely due to sales incentives or key performance indicators being linked to sales quotas.[[177]](#footnote-178) Consumer advocates have suggested that despite sales of extended warranties occurring in retail stores, they share many of the characteristics of unsolicited door-to-door sales:

In the add-add 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.

1. It was suggested that these high-pressure sales are inherently uncompetitive and work against consumers making informed decisions in an open market.[[178]](#footnote-179) Additionally, extended warranties can be beneficial for retailers in their negotiations with manufacturers to refund consumer goods. The Australian Retailers Association noted that ‘this is due to perceived and actual issues regarding indemnification between suppliers and manufacturers’.[[179]](#footnote-180) This gives retailers an added incentive to sell extended warranties.

Poor value extended warranties

1. Some submissions received support the view that extended warranties do not always offer significant benefits to consumers. This was overwhelmingly the view of consumer advocate groups, who reported that according to their research, some add-on warranty products offer ‘very little real value.’[[180]](#footnote-181) Similarly, Legal Aid NSW submitted that extended warranties typically represent little, if any, value to consumers because cover often commences only after the manufacturer’s warranty ends.[[181]](#footnote-182) They provided the following example from their casework experience:

Daniel purchased a second hand vehicle from a car dealership. At the point of sale, Daniel was told that he should purchase an extended warranty to protect him in case the car breaks down. Daniel initially said that he did not want the warranty, but the sales person told him that he would regret it if his car broke down, so he agreed to purchase the insurance at a significant cost. Daniel was not told that the warranty that he purchased would not come into effect for seven years. Three years later, Daniel sold the car, at which point the car was still under the manufacturer’s warranty. Daniel lost money paying the premium for this product before he was even entitled to make a claim under it.[[182]](#footnote-183)

1. Consumers may purchase an extended warranty with the perception that it will provide ‘peace of mind’, only to discover that the warranty does not cover a problem that has occurred. CHOICE reported:

We receive many complaints through our CHOICE Help consumer advice service from consumers who have purchased an extended warranty and experienced a product failure that is likely to be covered by the consumer guarantees. Subsequently, they have approached the retailer to request a remedy only to be told that the extended warranty does not apply in this particular case due to exclusions in the terms and conditions.[[183]](#footnote-184)

1. CHOICE also reported they are aware of cases where when a consumer complained about the inadequacy of an extended warranty, they were offered a refund for the price of the extended warranty, not the faulty product.[[184]](#footnote-185) Based on these and other cases, CHOICE submitted that ‘the quality of extended warranties offered in Australia is often very low. In many instances, consumers would be better off not buying extended warranties but instead relying solely on their consumer guarantee rights’.[[185]](#footnote-186) CHOICE advises the consumers it assists to determine what an extended warranty will provide, over and above their rights under the ACL.[[186]](#footnote-187)
2. In the context of motor vehicles, the Australian Automotive Aftermarket Association submitted that extended warranties can place additional burdens on the consumer that can restrict their choice of repairer. They submitted that it is a condition of some extended warranties that the contract is no longer valid if the consumer does not use one specific dealership or brand of dealerships.[[187]](#footnote-188)
3. Some stakeholders considered that extended warranties should be banned, or that there should be consideration of this.[[188]](#footnote-189) For example, the Motor Trades Association of Queensland submitted that the consumer product recourse mechanism should simply consist of two components, the manufacturer’s warranty and the statutory guarantee.[[189]](#footnote-190)

Behavioural biases

1. Behavioural biases can affect the purchasing decisions of consumers. Retailers typically offer extended warranties to consumers when the consumer has already decided to purchase the primary product to which the extended warranty would apply.[[190]](#footnote-191) In this sales environment, consumers may feel pressured to make a quick decision. This point was contested by Communications Alliance who submitted that the speed of transactions was due to ‘consumers preferring to transact in a fast and simple way’.[[191]](#footnote-192)
2. As extended warranties tend to be sold for expensive products, the high cost of the primary product can create a reference point for a consumer. At the time, the cost of the extended warranty may seem small in comparison. Where consumers have purchased an expensive primary product, they may be more inclined to purchase an extended warranty due to the fear of losing time and money if the primary product breaks down (loss aversion). Consumers that attach a higher value to the primary product may be more inclined to purchase an extended warranty to protect the perceived value of the primary product. Similarly, consumers who are risk adverse may also be more inclined to consider the purchase of an extended warranty for ‘peace of mind’.
3. In some cases, consumers may have also spent significant time and cognitive resources on the primary purchase, and may experience decision fatigue at the point when they are offered the extended warranty. Decision fatigue can mean that a consumer is unable to properly assess whether they should purchase an extended warranty, even when they have been provided clear information at the point of sale.[[192]](#footnote-193) Consumers who have limited English language skills can be particularly susceptible to decision fatigue, which can make them more vulnerable to high-pressure sales.[[193]](#footnote-194) Legal Aid Queensland submitted that in their experience, extended warranties were often offered to consumers at the end of the purchase process when all the consumer wants to do is complete the purchase.[[194]](#footnote-195)
4. Together, these behavioural biases can affect the ability of a consumer to make an informed decision about purchasing an extended warranty. Behavioural biases can result in consumers purchasing an extended warranty that is not appropriate for them or that does not provide significant additional benefits beyond existing rights.

Making an informed purchasing decision

1. It can be difficult for consumers to determine if an extended warranty offers value for money and the additional protection that the consumer seeks due to the difficulties outlined above with understanding the terms and conditions of an extended warranty, comparing rights under an extended warranty with existing rights, behavioural biases, poor value extended warranties and situational monopolies. These factors can prevent consumers from making informed decisions about extended warranties.
2. This conclusion is supported by the ACCC’s New Car Retailing market study, which found that inadequate information makes it difficult for consumers to accurately evaluate the value of an extended warranty (see box below). Indeed it is largely self-evident that if a consumer does not have sufficient information about how an extended warranty compares to their existing rights, they will not be able to make an informed purchasing decision.

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| Australian Competition and Consumer Commission’s *New Car Retailing Industry* market study, December 2017:The Final Report of the ACCC study into the new car retailing industry found that:* Consumers are not being provided adequate information about the consumer guarantees at the point of sale of a new car and many consumers face difficulties understanding how the consumer guarantees apply and the distinction between consumer guarantees and warranties.
* These difficulties affect the ability of consumers to accurately evaluate the value of extended warranties compared to the rights consumers already have under the consumer guarantees or the manufacturer’s warranty.
* Where dealers are remunerated on a commission basis, they have a commercial incentive to maximise their sales of extended warranties.
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1. To help consumers make informed decisions, Legal Aid Queensland considered that information should be provided both in writing and orally, because different consumers take in information in different ways. They submitted that providing information in writing and orally means the consumer can take away and consider the product and also has the opportunity to ask questions about the product in person.[[195]](#footnote-196)
2. Legal Aid Queensland submitted that in their experience, improved written and oral disclosure and a cooling-off period would allow consumers to reconsider the extended warranty away from the high pressure nature of the sales environment. They submitted that the factors that can prevent consumers making informed decisions are: lack of knowledge about the product, the high pressure nature of the retail sales environment, and that extended warranties are presented as part of a standard package that consumers purchase.[[196]](#footnote-197)
3. In their submission, an insurance provider agreed that to make an informed decision, consumers need to be aware of their existing rights. However they considered that the decision-making process for consumers was more complex, taking into account the ‘value and practical benefits’ of an extended warranty compared to any risks and effort required to enforce consumer guarantee or manufacturer warranty rights.[[197]](#footnote-198) They suggested that the decision-making process ‘will also take into account the efficiency of the remedy – how fast can the item be repaired/replaced and returned to me versus how long it will take to exercise my rights’.[[198]](#footnote-199)

Regulatory gaps

1. As noted in ASIC’s paper on the sale of add on insurance and warranties in caryards (see box below), extended warranties can be structured in such a way that they are exempt from the requirements of the *Corporations Act 2001* (Cth) (Corporations Act). Extended warranties sold in-store with other consumer goods would normally fall within the incidental product exemption from the Corporation Act’s requirements.[[199]](#footnote-200) This means that many extended warranties are not currently subject to any particular disclosure requirements. Some consumer advocates considered that the complicated legislative framework for extended warranties is itself an important issue that also makes compliance and enforcement more difficult for regulators.[[200]](#footnote-201)
2. There is support for more consistent regulation of extended warranties, with the Insurance Council of Australia noting that the ‘rationale for robust consumer protection is the same for all extended warranties, regardless of their character at law’.[[201]](#footnote-202) For a detailed description of the laws applying to extended warranties, see *Attachment A.*

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| Australian Securities and Investments Commission’s Consultation Paper 294: *The Sale of add-on insurance and warranties through caryard intermediaries*, August 2017:ASIC examined the sale of extended warranties in caryards and reported that:* Extended warranties for cars can be structured to avoid being classified as insurance, meaning providers do not need to comply with the requirements of the Insurance Contracts Act 1984.
* In relation to dealer warranties, the risk of poor sales practices is increased as providers do not comply with the licensing or conduct obligations of the Corporations Act, while consumers cannot take action against misconduct at the point of sale by complaining to an external dispute resolution scheme.
* There are some systemic unfair practices in the warranty add-on market, including: sales of warranties that provide unnecessary cover, the absence of any contractual right to a rebate if the warranty is cancelled before the end of its term, and unfair arrangements that increase the price of warranties for financially vulnerable consumers.
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Lack of clarity in the law

1. A related problem for consumers making informed decisions about extended warranties is that in some circumstances there can be a lack of clarity as to the meaning and scope of the existing law, particularly around the triggers for when they have a right to a refund, replacement or repair.
2. Where there are grey areas in the law it can be difficult for consumers to determine how their statutory rights apply to a particular product. Consumers may also be hesitant to rely on statutory rights where there is any real or perceived lack of clarity or difficulty in enforcing their rights. For example, a consumer may decide to purchase an extended warranty because they believe the warranty provides certainty that a defect in a product will be remedied.
3. This issue was noted in a number of submissions as a deterrent to consumers relying on the ACL,[[202]](#footnote-203) with stakeholders also noting that there is no prescriptive guidance on the definition of major and minor faults.[[203]](#footnote-204) An insurance provider considered that ‘it is often unclear (not only to consumers) whether or not the ACL provides a remedy for a particular defect or breakdown’.[[204]](#footnote-205) In this regard, they considered that extended warranty documentation ‘cannot be any more specific than the legislation itself’.[[205]](#footnote-206)

Policy Objective

1. The policy objective is to ensure that consumers are able to make more informed decisions about whether to purchase an extended warranty. To make informed decisions about an extended warranty, consumers need to be aware of their existing rights under the ACL and under any manufacturer warranty and understand what a particular extended warranty offers in comparison. This information helps consumers to determine if the extended warranty offers value for money and provides the additional protection they seek.
2. Solutions to address the identified problem should improve incentives for traders to provide clear information about extended warranties and thereby assist consumers to make more informed purchasing decisions.
3. In achieving this objective, it is important that benefits should exceed costs.
4. In addition, any solution for addressing the problem identified should provide certainty for traders as to the application of any laws applying to extended warranty contracts.

Options and Impact Analysis

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| OVERVIEWThrough the policy development and consultation processes of the Review, Consumer Affairs Australia and New Zealand (CAANZ) assessed a range of options to help consumers make informed decisions about whether to purchase an extended warranty. This RIS explores three options. **Option 1**: Maintain the status quo.**Option 2** (preferred option): A legislative amendment comprising the following three elements.*Cooling-Off Right*: a requirement for traders to provide a cooling-off period of ten business days from the time the consumer receives the written agreement. Where a trader does not meet disclosure requirements (set out below) the cooling-off period would be unlimited.*Oral Disclosure*: a requirement for traders to provide oral advice, where reasonably practicable, about the consumer’s cancellation rights before entering into a contract.*Written Disclosure*: a requirement for traders to provide a written agreement containing:* all the terms and conditions, including:
	+ the rights and obligations of the warrantor and consumer (including the cooling-off right);
	+ the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made);
	+ the total price payable under the agreement;
	+ the date of the agreement;
* information on the front page of the agreement, including:
	+ a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by any extended warranty agreement (this may be in the form of a table or diagram);
	+ a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects;
	+ the warrantor’s name, street address, telephone number and email address.

Sub-options under Option 2 are to have a disclosure regime only, or a cooling-off right only.**Option 3**: Oral and written disclosure with an opt-in process. That is, a requirement for consumers to confirm the extended warranty after a specified period.The following costs and benefits have been quantified to support the evaluation of each Option: * time and material cost of developing side-by-side comparison document (transition costs);
* staff training costs (transition costs);
* cost from reduction in sales of warranties (margin component);
* cost from reduction in sales of warranties (time and materials component); and
* net consumer savings.
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Option 1: Status quo

1. Option 1 would maintain the existing regulatory regime for extended warranties.
2. The existing safeguards for consumers would remain in force, including the generic protection against misleading and deceptive conduct. Further, regulators would continue to promote awareness of rights and obligations and take enforcement activity where appropriate.
3. Currently, the overwhelming majority of extended warranty agreements are recorded in writing. Furthermore, many extended warranties in the marketplace include an explanation of the consumer’s ACL rights, with some contracts offering cooling-off periods.[[206]](#footnote-207) This would continue to be the case under the status quo.
4. As Option 1 maintains the status quo, it would not address any of the concerns outlined in the *Problem* section. As a result, some consumers would continue to have difficulties making informed decisions about extended warranties and some may be induced to purchase extended warranties that they would not otherwise have bought.
5. Some insurance providers are currently subject to enforceable undertakings with the ACCC.[[207]](#footnote-208) These undertakings require the insurer to:
* provide information to consumers about their ACL rights and a comparison of those rights against the extended warranty product;
* develop and implement annual compliance training (in relation to the false or misleading conduct provisions);
* have in place a compliance monitoring program to ensure compliance with the ACL; and
* report annually to the ACCC on training and compliance monitoring.[[208]](#footnote-209)
1. For some time, these enforceable undertakings have covered many major Australian retailers who offer extended warranties for electronics, domestic appliances and white goods.[[209]](#footnote-210) However, one of the undertakings has expired, another will expire in November 2018 and the others will expire in May 2019. Other market participants (smaller traders) are not subject to these enforceable undertakings.

Impact Analysis

1. As Option 1 does not change the current regulatory environment, it would not result in new benefits or costs for consumers, traders or other stakeholders. Traders would not have to make any changes to practices for the sale of extended warranties or amend standard extended warranty contracts.
2. As discussed in the *Problem* section, some consumers experience difficulties making informed purchasing decisions about extended warranties, and would continue to do so under this option. Submissions from consumer advocates suggested that consumers experience substantial detriment under the status quo.[[210]](#footnote-211)
3. A number of stakeholders considered that the benefits of any of the proposed regulatory changes were outweighed by the costs. Accordingly they considered the status quo should be maintained.[[211]](#footnote-212) Some stakeholders also supported an education campaign to increase awareness of consumer rights.[[212]](#footnote-213) Other proposals included further research[[213]](#footnote-214) and increased regulator guidance.[[214]](#footnote-215)
4. Non-regulatory options, such as regulator guidance and education, could be pursued and improved under the status quo. However, regulators already prepare guidance and educational material for consumers and traders on the interaction between the consumer guarantees and extended warranties. [[215]](#footnote-216) Inevitably, guidance and educational material has limited effectiveness in addressing the identified problem because not all consumers are aware of the material, some consumers may not read the material and some consumers may not understand the material. Furthermore, guidance and educational material on the consumer guarantees does not provide consumers with information about the terms of a particular extended warranty.
5. Education campaigns typically work more effectively in confined markets for a target group of consumers, rather than as a broad campaign attempting to educate consumers generally. Accordingly, this RIS did not propose an education campaign as an option. Regulators would update existing guidance material if the preferred option was implemented, which would assist consumers and traders to understand the new law.
6. While Option 1 itself has no additional benefits or costs, it provides a basis for illustrating and comparing the costs and benefits of the other options. Given the problems identified and the net benefits of regulatory reform, maintaining the status quo is not the preferred option.

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| BENEFITS | COSTS |
| * No additional compliance costs are incurred by traders or consumers.
 | * Some consumers continue to have difficulties with making informed decisions about extended warranties.
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Option 2: Cooling-off right with oral and written disclosure (preferred)

1. Option 2 is the preferred option as it is likely to have the greatest net benefit.
2. Under Option 2, transparency around extended warranties would be enhanced through a disclosure regime and a cooling-off right. Option 2 reflects the proposed reform in the Review Final Report (proposal 3) to address concerns regarding extended warranties. This proposal was subject to broad stakeholder consultation as part of the Review.
3. Traders would be required to provide a cooling-off period of ten business days from the time the consumer receives the written agreement. The cooling-off right means that a warranty would have effect from the time the agreement is made. Within ten business days, a consumer could cancel the agreement and receive a refund. However, where a trader did not meet their disclosure obligations (for example, they do not provide any information or only provide a generic brochure about the ACL), the cooling-off period would apply for an unlimited period of time, meaning the consumer could cancel the extended warranty and receive a refund at any time. The ten day period is consistent with the existing ten day period for unsolicited consumer agreements under the ACL. The cooling-off period allows a consumer to cancel the extended warranty, but would not allow the consumer to cancel the purchase of the primary product.
4. A cooling-off period may be particularly beneficial where a consumer has received contrary information or needs time to read and understand the information they have been provided. The cooling-off period gives consumers time to distinguish the purchase of the warranty from the purchase of the primary product and assess the purchase of the warranty on its own merits, away from the pressure of a sales negotiation.
5. Traders would be required to provide oral disclosure about a consumer’s cancellation rights before entering into the contract. This means traders would have to verbally inform consumers that they can choose to cancel the purchase of the extended warranty within ten business days of purchase, without incurring a financial penalty. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online. It is not intended that this oral disclosure would constitute the provision of financial advice.
6. Traders would also be required to provide a written agreement. The agreement would have to include the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer (including the cooling-off right), the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.
7. Traders would also have to include the following information on the front page of the agreement:
* a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by the agreement (this may be in the form of a table or diagram);
* a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects; and
* the warrantor’s name, street address, telephone number and email address.
1. The intention of Option 2 is that the consumer should not be financially penalised for exercising the cooling-off right. As extended warranties are often financed as part of a loan contract for a purchase of a car or other major good, if the extended warranty is cancelled during the cooling-off period, the cost of the warranty will need to be removed from the consumer’s tied credit contract.[[216]](#footnote-217) The consumer should be repaid the consideration for the extended warranty in a timely period.
2. The proposed obligations are broadly modelled on the approach taken in New Zealand, which was discussed in the Review Interim Report and which received general support from stakeholders. The New Zealand regime was introduced in June 2014 and requires disclosure of a number of matters, including a comparison of the consumer’s rights under New Zealand law and the protections offered by the warranty. It also creates a five-day cooling-off period.[[217]](#footnote-218) CHOICE submitted that New Zealand’s model is a useful solution,[[218]](#footnote-219) and would make it ‘more difficult for businesses to sell, low-value, potentially harmful, products to consumers’.[[219]](#footnote-220) Otherwise, there is limited data on the impact of New Zealand’s regime.
3. There is currently no legislative definition of ‘extended warranty’. Accordingly, Option 2 would require a definition of ‘extended warranty’ to be developed. There was support for New Zealand’s definition in submissions to the consultation RIS.[[220]](#footnote-221)

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| Regulation of extended warranties in New ZealandThe *Fair Trading Act 1986* (NZ) contains rules for traders that offer extended warranties to consumers. In New Zealand, traders are required to:* explain the protections that consumers are provided under the Consumer Guarantee Act 1993 (CGA),
* compare the CGA protections with the protections offered by the extended warranty, and
* explain that if consumers buy an extended warranty, they can change their minds within five days and cancel the warranty and obtain a full refund of the price paid for the extended warranty.

Businesses that breach these requirements can be liable to an infringement notice and a fine of $1,000 for each breach, or to prosecution and a fine of up to $30,000. Individuals may also be liable to an infringement notice and a fine or to prosecution and a fine of up to $10,000.In New Zealand, an extended warranty is defined as an agreement that:* is between a consumer and a ‘warrantor’ in relation to the purchase of goods or services,
* is entered into around the same time as the goods or services are purchased,
* provides specific warranties, guarantees or undertakings (either directly or through a third person) relating to those goods or services, and
* is purchased at a cost additional to the price paid for the goods or services.
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Impact Analysis

1. This option has the greatest net benefit, with estimated costs being $28.9 million and benefits being $39.8 million, producing a net benefit of $10.8 million over ten years. These costs are due to the lost margin from not selling extended warranty products as well as the non-productive use of staff time from arranging the sale of an extended warranty product to have it cancelled during the cooling-off period. The reduction in sales is based on the assumption that the propensity for consumers to purchase an extended warranty product would be lower under Option 2.
2. Consumers would benefit from Option 2’s enhanced disclosure and cooling-off right. The additional information would help consumers make more informed purchasing decisions. The cooling-off right would give consumers time to reconsider a decision to purchase an extended warranty. The cooling-off right may help mitigate the effects of high-pressure sales techniques and psychological factors that influence decision-making in a sales environment.
3. Option 2 would mean consumers would be less likely to purchase extended warranties that do not offer significant benefits over their existing rights or do not offer value for money, potentially saving them money. Option 2 is expected to be of particular benefit to vulnerable consumers who may be more susceptible to high pressure sales and more likely to purchase extended warranties that they do not need or that represent poor value for money.[[221]](#footnote-222)
4. Submissions indicated that better disclosure would deliver better outcomes for consumers.[[222]](#footnote-223) The Australian Communications Consumer Action Network (ACAN) submitted that enhanced disclosure would mean businesses would be competing on actual benefits rather than relying on customer confusion.[[223]](#footnote-224) ACAN further submitted that any disclosure information should be accessible for people with a disability and people from culturally and linguistically diverse backgrounds.[[224]](#footnote-225)
5. However, there are some limitations to the effectiveness of enhanced disclosure. As previously noted, behavioural biases such as loss aversion and decision fatigue can make consumers more inclined to consider that they should purchase an extended warranty (see ‘*Problem’* section above). The same behavioural biases can also limit the effectiveness of disclosure information. For example, submissions from insurance providers noted that disclosure should be simple or there is a risk of information overload.[[225]](#footnote-226) Another limitation is that some consumers may simply not read or understand the information.[[226]](#footnote-227) The NSW Business Chamber noted that:

Current requirements to include mandatory text when informing consumers about any warranties against defects illustrate the challenges associated with prescribing the provision of succinct, clear and useful advice to consumers. While it is relatively easy for suppliers to provide this text in print form, it becomes more complicated when considering how to deliver oral disclosures.[[227]](#footnote-228)

1. One further limitation on the benefits of comparison information is the generic nature of the ACL, which provides protection for ‘a reasonable period of time’.[[228]](#footnote-229)
2. Behavioural biases such as loss aversion and decision fatigue can make consumers more inclined to consider that they should purchase an extended warranty (see ‘*Problem’* section above). The same behavioural biases can also limit the effectiveness of disclosure information.
3. In addition to helping consumers directly, Option 2 is likely to benefit lawyers and community workers that assist consumers. Legal Aid Queensland considered that Option 2 would provide ‘lawyers and community workers with a clear and simple process that will allow consumers in vulnerable circumstances to get out of inappropriate extended warranties’.[[229]](#footnote-230)
4. The preferred period for the cooling-off right is ten days. A ten day period received the greatest support from stakeholders that provided a submission, compared to shorter periods. A shorter period may not provide sufficient time for consumers to opt-out if they so choose. There are also no significant differences in costs for a ten day period, compared to a shorter period. A benefit of a ten day period is that it aligns with the existing ten day period in the ACL for unsolicited sales. In this regard, Legal Aid Queensland submitted that the regime for unsolicited sales has improved consumer awareness of ACL rights and enabled Legal Aid Queensland to assist to number of clients to get out of unsolicited sales contracts.[[230]](#footnote-231) Legal Aid Queensland considered that Option 2 would provide similar benefits for consumers.[[231]](#footnote-232)
5. The cooling-off right itself is expected to have moderate benefits for consumers. There is research to indicate that cooling-off periods don’t overcome many human biases.[[232]](#footnote-233) This was noted by some stakeholders, who considered that cooling-off periods are generally not useful for consumers.[[233]](#footnote-234) For this reason, these stakeholders tended to prefer Option 3’s
opt-in process. For example, CHOICE submitted that consumers usually find problems with extended warranties after they try to use them, which is invariably much later than ten days after purchase.[[234]](#footnote-235) However, there are a number of issues and costs associated with an opt-in process (discussed below) that make a cooling-off right the preferable option.
6. Option 2 imposes compliance costs (mostly transitional) on traders that supply extended warranties, in developing and providing the additional information. Traders would need to assess and modify documentation for extended warranties to identify the benefits above the consumer law that the extended warranty provides. Traders would need to ensure that comparisons do not mislead consumers, which may require legal advice. There was support for the use of a prescribed form or guidance to assist traders to provide the comparison information.[[235]](#footnote-236)
7. Traders would also face costs associated with administering the cooling-off period, for example, amending accounting practices to enable the provision of refunds.[[236]](#footnote-237) Traders would also have costs for notifying consumers about the cooling-off right.
8. It is expected that Option 2 will result in a reduction in sales of extended warranties. However, in the Review, retail stakeholders indicated that many extended warranties offer real and legitimate benefits over ACL rights, including greater coverage of protections, certainty of remedies and streamlined processes. Accordingly, the Review found that clearer explanations of these benefits would be unlikely to diminish the availability or desirability of legitimate extended warranties in the market. Accordingly, the reduction in sales is likely to relate to extended warranties that do not offer significant benefits over ACL rights.
9. Some stakeholders submitted that Option 2 would impose a substantial cost on businesses.[[237]](#footnote-238) Concerns were raised that oral disclosure could pose a significant compliance cost for traders,[[238]](#footnote-239) particularly for retailers that have high staff turnover.[[239]](#footnote-240) Communications Alliance noted that for telecommunications providers, a large proportion of the workforce are younger and work part-time, and ‘already have an overburdening amount of information to learn…’ to comply with existing regulations.[[240]](#footnote-241) Another concern was that there was a potential for misrepresentation or incorrect advice to be given, even where all reasonable steps are taken to mitigate risks.[[241]](#footnote-242) A further concern was the potential for disputes over whether oral advice had been provided.[[242]](#footnote-243)
10. Communications Alliance also raised the concern that introducing a cooling-off period could cause confusion for consumers and businesses, for example where staff do not understand which cooling-off period is relevant to a claim (such as unsolicited consumer agreements compared to extended warranties).[[243]](#footnote-244)
11. However there are some small benefits of Option 2 for traders. Option 2 would provide traders with increased clarity and certainty about their legal obligations regarding extended warranties. The Insurance Council of Australia submitted that Option 2 would provide a more consistent approach to the regulation of extended warranties, removing the existing regulatory gap for warranties that are not insurance products.[[244]](#footnote-245)
12. Compliance costs can also be mitigated by a transition period. Option 2 may also cause reduced compliance costs for other provisions of the ACL. For example, the Review found that ‘the regulator guidance and the new comparison in the warranty document can help traders educate staff on how to make correct representations that do not mislead consumers’.[[245]](#footnote-246)
13. Although Option 2 may impose some costs on government, it may assist regulators with investigating representations made about extended warranties because regulators could examine the disclosure information that traders would be required to provide.
14. Some insurance providers indicated that they have already substantially adopted the disclosure and cooling-off right proposed in Option 2.[[246]](#footnote-247) This has been done without any substantial or prohibitive costs involved.[[247]](#footnote-248) These providers considered that any additional costs of implementing Option 2 would be modest.[[248]](#footnote-249) It was also noted that a cooling-off period already applies for some extended warranties (that are subject to regulation under the Corporations Act as a financial product).[[249]](#footnote-250)
15. As noted above, most extended warranties in the marketplace include some documentation, including an explanation of the consumer’s ACL rights, with some contracts offering cooling-off periods.[[250]](#footnote-251) On this basis, the National Retail Association concluded that the disclosure obligations proposed by Option 2 are not significantly different to what is already commonly disclosed.[[251]](#footnote-252) The exception to this is the front page information sheet (see discussion above at page 3-86). Generating this comparison information for each extended warranty product can be expected to impose some costs. However, as most extended warranties are standard form contracts, it is not expected that this would be a substantial cost.
16. Accordingly, it is expected that the compliance costs of Option 2 would not be substantial or prohibitive, particularly for providers that already provide disclosure and a contractual cooling-off right.
17. The cost benefit analysis indicates that Option 2 has the greatest net benefit. It would help consumers to make more informed purchasing decisions without imposing prohibitive costs on businesses.

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| BENEFITS | COSTS |
| * Consumers gain additional information that enables them to make more informed purchasing decisions, potentially saving them money.
 | * Modest compliance costs (mostly transitional) for traders in developing and providing additional information. This includes the costs of orally disclosing the cooling-off right.
 |
| * Consumers gain additional time to consider their purchasing decision and a new right to cancel the purchase and obtain a refund.
 | * Ongoing costs for traders in administering cooling-off right.
 |
| * Regulators are assisted in investigating representations about extended warranties (unquantified).
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| * Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties (unquantified).
 |  |
| * The quality of extended warranty products and competition for them increases (unquantified).
 |  |
| * Sales of high-quality extended warranties may increase (unquantified).
 |  |
| * Potential reduced compliance costs for traders related to other ACL provisions (unquantified).
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Sub-option 2a: Disclosure regime only

1. This sub-option is the oral and written disclosure regime as set out in Option 2, without a cooling-off right.
2. This sub-option may address some of the concerns set out in the *Problem* section by providing consumers with additional information. However this sub-option does not give consumers extra time to process this information through a cooling-off period, which could mitigate any potential benefits of increased disclosure.

Impact Analysis

1. Cost benefit analysis indicates that this option has the second greatest net benefit, with estimated costs being $14.7 million and benefits being $23.5 million, producing a net benefit of $8.8 million over ten years. This cost is due to the lost margin from not selling extended warranty products.
2. The costs of Option 2a are less than for Option 2. This reflects that under Option 2a there would be no cooling-off right for traders to administer. A stakeholder in support of this option considered that any costs of Option 2a would be transitional.[[252]](#footnote-253)
3. However the benefits of Option 2a are considerably smaller than Option 2, reflecting the absence of a cooling-off right.
4. Option 2a does not provide the greatest net benefit compared to the other options.

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| BENEFITS | COSTS |
| * Consumers gain additional information that enables them to make more informed purchasing decisions, potentially saving them money.
 | * Modest compliance costs (mostly transitional) for traders in developing and providing additional information.
 |
| * Regulators are assisted in investigating representations about extended warranties (unquantified).
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| * Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties (unquantified).
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| * The quality of extended warranty products and competition for them increases (unquantified).
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| * Sales of high-quality extended warranties may increase (unquantified).
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| * Potential reduced compliance costs for traders related to other ACL provisions (unquantified).
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Sub-option 2b: Cooling-off right only

1. This sub-option is the cooling-off right in as set out in Option 2 without a disclosure regime. This cooling-off right would provide less protection compared to the Option 2 cooling-off right that applies for an unlimited period where a trader fails to comply with disclosure obligations.
2. This sub-option may help consumers to make better decisions by giving them more time to consider an extended warranty. However, without the disclosure regime, consumers may not have the necessary information to assess what an extended warranty offers in comparison to their existing rights.

Impact Analysis

1. Cost benefit analysis indicates that this option has estimated costs of $11.1 million and benefits of $10.8 million, producing a net outcome of -$0.3 million over ten years. These costs are due to the lost margin from not selling extended warranty products as well as the non-productive use of staff time from arranging the sale of an extended warranty product to have it cancelled during the cooling-off period.
2. Option 2b would impose less costs and benefits compared to Option 2. Option 2b would provide consumers with the benefit of a cooling-off right for extended warranties. Without enhanced disclosure, this additional right would be of less benefit to consumers and continues to rely on traders to voluntarily provide information.
3. Option 2b would impose costs on traders that sell extended warranties in providing the additional cooling-off right to consumers.
4. Option 2b does not provide the greatest net benefit compared to the other options.

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| BENEFITS | COSTS |
| * Consumers gain additional time to consider their purchasing decision and a new right to cancel the purchase and obtain a refund, which may save them money.
 | * Costs for traders in administering cooling-off right.
 |
| * Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties (unquantified).
 |  |
| * The quality of extended warranty products and competition for them increases (unquantified).
 |  |
| * Sales of high-quality extended warranties may increase (unquantified).
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Option 3: Disclosure and opt-in process

1. Option 3 is a disclosure regime and an opt-*in* process, rather than an ‘opt-out’ cooling-off period. This Option would include the disclosure regime as set out in Option 2. Traders would need to explain to customers the opt-in process, rather than disclosing a cooling-off period.
2. This Option would require a consumer to confirm an agreement for an extended warranty within a limited period, such as ten business days, before they were required to pay for the extended warranty. As a consequence, a consumer might not be entitled to immediate coverage under the extended warranty because the warranty would only apply once the consumer had opted-in.
3. Traders would be required to provide oral advice about the opt-in process before entering into the contract. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online. Nonetheless, consumers would need to opt-in to the extended warranty even if purchased online.
4. Traders would be required to provide a written agreement. The agreement would have to include the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer (including the opt-in process), the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.
5. Traders would also have to include the following information on the front page of the agreement:
* a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by the agreement (this may be in the form of a table or diagram);
* a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects; and
* the warrantor’s name, street address, telephone number and email address.

Impact Analysis

1. This option has estimated costs of $512.8 million and benefits of $161.8 million, producing a net outcome of -$351 million over ten years. The majority of these costs are from the additional ongoing compliance costs of purchasing and complying with an Australian Financial Services licence, as well as the costs due to the lost margin from the significant reduction in extended warranty products sold. The reduction in sales is based on the assumption that the propensity for consumers to purchase an extended warranty product would be lower under Option 3.
2. Consumers would benefit from increased disclosure and an opt-in process under Option 3. An opt-in process would benefit consumers by ensuring that consumers make an active decision to confirm the purchase of the extended warranty. Option 3 would mean consumers would be less likely to purchase extended warranties that do not offer significant benefits over their existing rights or do not offer value for money, potentially saving them money. This conclusion was supported by the Australian Automotive Aftermarket Association, [[253]](#footnote-254) who considered that an opt-in process would result in changes to market behaviour:

…if [consumers] are required to read material and express their take-up of extended warranties, that the market will soon deliver clear concise and compelling information on the value add for each extended warranty product.[[254]](#footnote-255)

1. Option 3 would benefit a broad range of consumers, including small businesses. For example, extended warranties are often offered for purchase with most new agricultural machinery and equipment.[[255]](#footnote-256) Consumer advocates submitted that because sales of extended warranties are often unsolicited, for a consumer to benefit from disclosure information, the timing of the provision of this information should be separated from the decision about the purchase of the good.[[256]](#footnote-257) In this regard, an opt-in process overcomes problems of decision fatigue at the point of sale.
2. The Australian Automotive Aftermarket Association submitted that an opt-in process would give consumers time to reflect on the value of an extended warranty.[[257]](#footnote-258) This may be particularly beneficial where consumers have received inaccurate oral information. Consumer advocates submitted that an opt-in process 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’.[[258]](#footnote-259) Consumer advocates also considered an opt-in process was preferable because some extended warranties offer ‘very little real value’.[[259]](#footnote-260) Some stakeholders submitted that Option 3 was preferable to Option 2 because cooling-off periods are not useful for consumers. [[260]](#footnote-261)
3. A ten day opt-in period received the greatest support, compared to shorter periods.[[261]](#footnote-262) Legal Aid NSW submitted that the opt-in process could be modelled on the approach taken for VET FEE-HELP loans, where students who have enrolled in a course are not able to apply for a loan for two days after enrolling.[[262]](#footnote-263)
4. There were different views on whether the trader should be permitted to contact the consumer to remind them to confirm the extended warranty during the opt-in period. Some stakeholders submitted that the consumer should be required to proactively opt-in to the purchase by contacting the salesperson.[[263]](#footnote-264) In contrast, ACAN submitted that businesses should be required to remind consumers of this process within ten days, to avoid consumers missing out on confirming an extended warranty purchase.[[264]](#footnote-265) Legal Aid NSW submitted that the trader should bear the costs of termination of the extended warranties contract if the consumer does not opt-in.[[265]](#footnote-266)
5. The extent of the benefit of Option 3 for vulnerable consumers is unclear. Legal Aid Queensland considered that an opt-in period may not benefit vulnerable consumers because of sales pressure through follow up emails, phone calls or incentives to opt in to an extended warranty, irrespective of any requirement not to contact the consumer.[[266]](#footnote-267) Similarly, the Queensland Law Society considered that an opt-in process may not benefit vulnerable consumers, although it may be more effective for more sophisticated consumers.[[267]](#footnote-268) Accordingly, it is possible that an opt-in period may not protect vulnerable consumers, even if traders were notionally prohibited from contacting the consumers.
6. Under Option 3 there would be a burden on consumers to opt-in to extended warranties. If a consumer wishes to purchase an extended warranty but forgets to confirm the purchase, they would not obtain the warranty. There may be consumer dissatisfaction where consumers intend but fail to call within the opt-in period.[[268]](#footnote-269) The risk of consumers forgetting to opt-in may be higher when the consumer does not receive oral disclosure about the requirement to opt-in, for example, because the transaction occurs online.
7. A consequence of Option 3 is that consumers would likely not be entitled to coverage under the extended warranty until they opted-in. However, this is not a significant issue as most extended warranties commence from the end of the manufacturer warranty period.[[269]](#footnote-270)
8. The impact of Option 3 on traders would be substantially higher than Option 2. Traders would face costs associated with administering the opt-in period and could lose revenue from consumers who forget to opt-in to an extended warranty. The expected costs to retailers and insurers of implementing an opt-in process would include system improvements, compliance costs and time and resource costs. Additionally, it is expected that Option 3 would result in a greater reduction in sales of extended warranties compared to Option 2.
9. Concerns were raised that an opt-in requirement after the ‘point of sale’ would likely change the legal characterisation of an extended warranty. Under Option 3, an extended warranty currently subject to the incidental product exemption in the Corporations Act would likely lose this exemption, and would become a financial product.[[270]](#footnote-271) This could impose additional costs on business in complying with the requirements under the Corporations Act for the provision of financial products (disclosure, licensing).[[271]](#footnote-272) For an explanation of the incidental product exemption, see paragraph 3.152 at *Attachment A.*
10. An insurance provider submitted that the increase in extended warranties captured by the Corporations Act:

…would result in increased administration, distribution, monitoring and training and these increased costs will ultimately be passed onto the consumer with little added benefit. [Extended warranties are] a value product to the consumer because of the low cost of entry and any additional costs would reduce this value.[[272]](#footnote-273)

1. The Insurance Council of Australia submitted that retailers currently operating under the incidental product exemption in the Corporations Act may consider that it is no longer feasible to offer extended warranties if they were to lose the benefit of the exemption.[[273]](#footnote-274)
2. Other concerns with an opt-in requirement included that it would increase the complexity of product design and make disclosure less effective. There was also a concern that Option 3 may have unintended indirect costs, such as the potential for reputation damage on retailers who may be perceived by consumers as extending the sales process beyond the shop floor.[[274]](#footnote-275)
3. Some stakeholders noted that ASIC is considering developing a deferred sales model for motor vehicle add-on insurance, which would likely capture motor vehicle extended warranty insurance. The Insurance Council of Australia submitted that whilst they support
in-principle a deferred sales model for motor vehicle extended warranties, ‘there is insufficient evidence to suggest that a similar model is warranted’ for all extended warranties.[[275]](#footnote-276) In contrast, Consumer Credit Legal Service WA submitted that a delayed sales model should be applied to the sale of all extended warranties, in line with ASIC proposal for a delayed sales model for motor vehicle add-on insurance.[[276]](#footnote-277)
4. Cost benefit analysis indicates that Option 3 does not provide the greatest net benefit compared to the other options. The costs on businesses and burden on consumers to opt-in are substantially higher than Option 2, without commensurate benefits.

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| BENEFITS | COSTS |
| * Consumers gain additional information that enables them to make more informed purchasing decisions, potentially saving them money.
 | * Modest compliance costs (mostly transitional) for traders in developing and providing additional information.
 |
| * Consumers have more time to consider and opt-in to an extended warranty.
 | * Ongoing costs for traders in disclosing and administering opt-in period and potential lost revenue if consumers forget to opt-in.
 |
| * Regulators are assisted in investigating representations about extended warranties (unquantified).
 | * Burden on consumers to opt-in to extended warranties (time costs).
 |
| * Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties (unquantified).
 | * If a consumer wishes to purchase an extended warranty but forgets to confirm the purchase, they would not obtain the extended warranty.
 |
| * The quality of extended warranty products and competition for them increases (unquantified).
 | * Consumers who do opt-in may not have immediate coverage from the point of sale of the primary product.
 |
| * Sales of high-quality extended warranties may increase (unquantified).
 | * Substantial costs for traders that lose the ability to rely on the incidental product exemption in the Corporations Act.
 |
| * Potential reduced compliance costs for traders related to other ACL provisions (unquantified).
 |  |

Implementation

1. Under the Intergovernmental Agreement for the Australian Consumer Law, the proposed amendments will require the agreement of the Legislative and Governance Forum on Consumer Affairs (CAF).[[277]](#footnote-278) CAF is scheduled to consider the proposed amendments on 31 August 2018.
2. If the proposed amendments are agreed by CAF, the implementation of the amendments is expected to require legislative amendments to the ACL and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).
3. An Exposure Draft of the proposed amendments will be prepared and circulated for public consultation. Following this, a Bill will be introduced into Parliament.

Transition period

1. During consultation, there was support for a 12 month transition period for industry to enable businesses to develop any necessary additional information.[[278]](#footnote-279) To help businesses comply with the new laws, a 12 month transition period is expected to be provided; beginning the day after the law receives Royal Assent.

Monitoring

1. Regular monitoring and evaluation of the new laws will be undertaken by CAANZ.

Attachment A: The existing legislative framework for extended warranties

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| OVERVIEWThe Australian consumer protection framework includes the ACL and the consumer protection provisions contained in the ASIC Act.[[279]](#footnote-280) The ACL applies to goods and services, whereas the ASIC Act applies to financial products and services. The consumer protection provisions in the ASIC Act largely mirror the provisions in the ACL. In most, if not all cases, extended warranties come within the definition of a ‘financial product’ in the ASIC Act because they are facilities through which a person manages a financial risk.[[280]](#footnote-281) This means that extended warranties are generally subject to the consumer protection provisions in the ASIC Act, rather than the ACL.[[281]](#footnote-282) However, the ACL applies to the primary product for which an extended warranty is bought. Furthermore, conduct that relates not only to the extended warranty, but also to some characteristic of the primary product to which the warranty applies, may be actionable under both the ASIC Act and the ACL.Currently, there are no targeted laws applying only to extended warranties. Instead, traders are subject to generic consumer protection requirements, reflecting the economy-wide application of the consumer law. The consumer protection provisions particularly relevant to the sale of extended warranties are:* misleading or deceptive conduct;[[282]](#footnote-283)
* unconscionable conduct;[[283]](#footnote-284) and
* false or misleading representations.[[284]](#footnote-285)

Importantly, extended warranties do not override a consumer’s statutory rights, including the consumer guarantees that apply to the primary product for which an extended warranty is purchased. In some circumstances, extended warranties are also subject to the Corporations Act, which imposes additional licencing and disclosure requirementson traders.  |

The regulation of extended warranties at state and federal level

1. Under Commonwealth legislation, extended warranties are subject to the ASIC Act rather than the ACL.[[285]](#footnote-286) However, extended warranties are subject to the ACL at a state level. Regardless, the same consumer protection requirements apply.

Extended warranties as financial products

1. There are different ways in which extended warranties can be provided to consumers, which can affect the regulatory requirements that apply. Extended warranties can be offered by a supplier, a manufacturer, or a third party. A table comparing the regulatory framework applying to different types of extended warranties is below (see **Table A**).
2. Extended warranties are generally regulated as financial products because they are facilities through which consumers manage financial risks.[[286]](#footnote-287) This means the consumer protection provisions in the ASIC Act apply.[[287]](#footnote-288) These consumer protection requirements are set out below at paragraph 3.156.
3. In some circumstances, an extended warranty can amount to a contract of insurance under the Corporations Act.[[288]](#footnote-289) An extended warranty is likely to be insurance if:
* it is provided by a third party to the sale of the goods, rather than a person who has an existing responsibility for the quality of the goods (such as the manufacturer, retailer or other distributor of the goods);
* the customer is entitled to the benefits described in the warranty if they have a valid claim, rather than only a right to have their claim considered;
* it covers additional costs or losses that do not result from defects in, or failure of, the goods and that are beyond the control, or not the responsibility, of the retailer or manufacturer (such as accidental damage or theft); and
* it covers normal wear and tear.[[289]](#footnote-290)
1. Warranties that are automatically provided to consumers by the supplier of goods as part of a sale of goods, such as manufacturer’s warranties, are generally not financial products. This is because the consumer does not take any active steps to acquire them, and so cannot be considered to be 'managing' their financial risks by acquiring the warranty. In contrast, extended warranties are generally acquired by payment of an additional amount to secure the promised cover for a specified period of time, and are acquired to manage the financial risks of a breakdown of the primary product.
2. Additional licensing and product disclosure requirements apply to extended warranties that come within the ‘financial product’ definition in the Corporations Act. However, some extended warranties that would otherwise be subject to these additional requirements fall within an incidental product exemption and will not be a financial product for the purposes of the Corporations Act.[[290]](#footnote-291) The incidental product exemption applies where an extended warranty is provided by a retailer at the point of sale, and the warranty only covers the repair or replacement of the purchased primary product in the event of defect or failure. There are no mandatory disclosure requirements for incidental products.
3. Importantly, where extended warranties come within the incidental product exemption from the Corporations Act, they will still be a financial product under the ASIC Act (and be subject to the ASIC Act’s consumer protection requirements).
4. There is a lack of data on the proportion of extended warranty providers that are subject to the additional licensing and product disclosure requirements under the Corporations Act. Additionally, it is unclear what proportion of consumers that purchase extended warranties already receive disclosure information as required under the Corporations Act.
5. Many retailers provide extended warranties to consumers at the point of sale, which means that the extended warranty is likely to fall within the incidental product exemption.[[291]](#footnote-292) These sales are not subject to the licensing and product disclosure requirements in the Corporations Act. It would appear that many extended warranties sold are not subject to Corporations Act disclosure requirements. However, one insurance provider noted they provide extended warranties directly to consumers and these are subject to requirements for disclosure, PDS, FSG, General Advice Warnings and External Dispute Resolution.[[292]](#footnote-293)

Table A: The regulatory framework for extended warranties

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Issuer  | When/how made available to consumers  | ASIC Act - financial product  | Corporations Act -financial product  | Corporations Act - licensing requirement | Corporations Act - PDS disclosure requirement  |
| Supplier of goods  | Available for purchase when goods supplied (for example, retailer issued extended warranties administered by a third party) | Yes  | No (if incidental exemption applies)  | No  | No  |
| Third party  | Available for purchase when goods supplied (for example, third party issued warranty distributed by retailer)  | Yes  | Yes  | Yes  | Yes  |
| Supplier of goods  | Available for purchase after goods supplied (for example, while still within a previous warranty period)  | Yes  | Yes (likely incidental product exemption will not apply)  | Yes - unless rely on another exemption, for example, intermediary authorisation exemption | Yes  |
| Third Party  | Available for purchase after goods supplied  | Yes  | Yes  | Yes  | Yes  |

The mirror consumer protection provisions in the ACL and ASIC Act

Consumer guarantees

Guarantees applying to the primary product

1. The consumer guarantees in the ACL provide consumers with a set of automatic rights for the goods and services they acquire. Under the consumer guarantees:
* Suppliers and manufacturers guarantee that goods are: acceptable quality, will match any description provided, and that any express warranties will be honoured.
* Suppliers guarantee that a consumer is buying goods that: have clear title (unless otherwise stated), do not have undisclosed securities, are fit for any disclosed purpose, have a right to undisturbed possession and match the sample or demonstration model provided.
* Manufacturers guarantee the availability of repairs and spare parts (other than for auctioned goods) for a reasonable period after the goods are supplied.
1. Importantly, consumers may be entitled to a repair, replacement or refund for a defective product under the consumer guarantees in the absence of an extended warranty or even after an extended warranty has expired.
2. The guarantee as to acceptable quality provides the consumer with a statutory right, which can mean that a consumer may decide that that they do not need to purchase an extended warranty. However, it can be difficult for consumers to determine the actual length of protection provided by this guarantee.
3. Extended warranties apply in parallel to a consumer’s statutory rights: they do not override or alter the consumer guarantees in the ACL, or affect a trader’s responsibility to meet these statutory requirements. This means that a consumer may be entitled to a remedy under the consumer guarantees even if they have no remedy under their extended warranty. Additionally, the consumer guarantees cannot be excluded by contract.[[293]](#footnote-294)
4. Extended warranties should provide additional rights over and above the consumer guarantees. A trader must not represent to a consumer that they are required to pay for any rights that are equivalent to a consumer guarantee (see *False or misleading representations* at paragraph 3.165).

Guarantees applying to extended warranties (except contracts of insurance)

1. Extended warranties that are not contracts of insurance are subject to guarantees relating to the supply of services.[[294]](#footnote-295) These are that services will be rendered with ‘due care and skill’[[295]](#footnote-296) and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.[[296]](#footnote-297) Traders providing extended warranties (except insurance contracts) to consumers must do so with ‘due care and skill’ and ensure the extended warranty service is fit for purpose.
2. Additionally, if a consumer makes known to the trader any particular purpose for which the services are required, or the result the consumer desires from the services, there is a guarantee that the services supplied and any materials supplied in connection with the services are reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result. The exception to this is if the consumer does not rely, or it is unreasonable for the consumer to rely, on the trader’s skill or judgement in providing the service.[[297]](#footnote-298)

Misleading or deceptive conduct

1. A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[[298]](#footnote-299) This means that traders must not mislead consumers about the need for an extended warranty or the benefits of an extended warranty. Similarly, traders must not mislead consumers about the scope of the rights automatically provided by the consumer guarantees in the course of selling an extended warranty.
2. For example, it would be misleading for a trader to suggest to a consumer that they can only have a faulty product repaired or replaced if they purchase an extended warranty.[[299]](#footnote-300) In *ACCC v Fisher & Paykel Customer Services,* an extended warranty letter prominently represented to consumers that they would not be protected against repairs after a period of two years from the date of purchase unless the consumer purchased an extended warranty. This was found to be misleading and deceptive conduct and a false or misleading representation, despite references to the ACL in the fine print.[[300]](#footnote-301)

False or misleading representations

1. Similarly, a person must not, in trade or commerce, make a false or misleading representation.[[301]](#footnote-302) This includes false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy,[[302]](#footnote-303) or about the need for any services.[[303]](#footnote-304)
2. This prohibition also includes false or misleading representations concerning a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person has under the law of the Commonwealth, a state or a territory.[[304]](#footnote-305) This clause is directed at traders of extended warranties.[[305]](#footnote-306)
3. Traders that sell extended warranties that offer anything less than or simply mirror a consumer’s existing entitlements risk misleading consumers into thinking they are receiving additional benefits when they are not. For example, if a telecommunications provider offered to consumers a mobile phone on a two year plan and offered an extended warranty to repair or replace the phone in the event of a defect in the first year, this would likely be a false or misleading representation as the extended warranty provides less than the protections already available to consumers.[[306]](#footnote-307)
4. Unlike misleading or deceptive conduct, these provisions only apply where there has been an express or implied ‘representation’. However, the same conduct may constitute misleading and deceptive conduct and also be a false or misleading representation.

Unconscionable conduct

1. A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.[[307]](#footnote-308) This is relevant where the consumer is at a ‘special disadvantage’.[[308]](#footnote-309)
2. Similarly, a person must not, in trade or commerce, engage in conduct that is, in all the circumstances, unconscionable.[[309]](#footnote-310) This statutory provision applies where conduct is more than simply unfair and goes against conscience as judged against the norms of society.
3. In sales of extended warranties without any unfair or high pressure sales tactics, these protections are less likely to be relevant. In any case, these protections do not directly assist consumers to understand the contract or their statutory rights before making a purchase.

Decision Regulation Impact Statement

Chapter Four

Australian Consumer Law Review: Access to consumer guarantees for goods sold at auctions

Consumer Affairs Australia and New Zealand

2018

Executive Summary - Chapter Four

Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the Australian Consumer Law (ACL)[[310]](#footnote-311) because, typically, consumers purchasing from traditional auctions have had the ability to inspect goods to identify any defects.

Consumers are less likely to have a practical opportunity to inspect goods in person for goods sold via an online auction. Accordingly, there is a concern that the rationale for exempting goods sold via auction is less applicable to online auctions. A further concern is that there can be uncertainty for consumers in understanding the exemption from the consumer guarantees and complexity for businesses in determining whether the exemption applies. The Australian Consumer Law Review (the Review) proposed modernising the “sale by auction” exemption to ensure that the consumer guarantees apply when goods are sold through an online auction.

This decision Regulation Impact Statement (RIS) provides options on access to consumer guarantees for goods sold at auctions.

The policy options analysed in this RIS are:

* Option 1: Status quo;
* Option 2: Goods purchased through online 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). The status quo remains if the auctioneer makes the goods reasonably available for inspection
* Option 3: Goods purchased through online auctions receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). This is regardless of the ability for a prior inspection (including traditional auctions that allow online bidding). The status quo will remain for consumers who purchase from auctions in person.
* Option 4: All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

A consultation RIS was released for public consultation on 9 March 2018. Consultation closed on 23 April 2018. The consultation RIS identified that there can be uncertainty for consumers in understanding the exemption from the consumer guarantees and complexity for businesses in determining whether the exemption applies.

Feedback on the consultation RIS indicated a range of different views on the existing exemption from the consumer guarantees for goods sold via auctions. A number of stakeholders raised concerns that the original rationale for the partial exemption from consumer guarantees for goods sold through auction, that the buyer has the capacity to inspect the goods in person, is no longer compelling. Many noted that consumers are not denied the full spectrum of consumer guarantee rights for new or used goods sold in a retail environment which they had inspected prior to purchase and questioned why this should be any different for goods sold by auction.

However, auctions play an important role in the market, acting as an intermediary for the sale of goods. The risk of applying all of the consumer guarantees to goods sold at auction is that those discounts currently available on auctioned goods may be eroded due to increased costs that would be borne by sellers.

Drawing on stakeholder consultations, an assessment of the costs and benefits, including compliance costs, this RIS concludes that Option 1 (the status quo) is likely to have the greatest net benefit compared to the other options and is therefore the preferred option.

The reform options, particularly Option 4, received support from consumer and community stakeholders who considered that the rationale for the exemptions was no longer appropriate. However cost benefit analysis indicates that removing these exemptions will have significant costs to businesses with only limited benefits to consumers.

Introduction

1. An auction in the ACL covers situations where goods are sold through an auction that is conducted by an agent of a person. This definition covers ‘traditional auctions’[[311]](#footnote-312) where an auctioneer is in a room taking bids on an item and some online auctions where the website operator is acting as an agent for the seller. Many online auction sites, such as eBay, do not fall within the ACL’s definition of auction as the website in that instance is not acting as an agent.
2. Currently, purchases made at auctions (in the scope of trade or commerce) are subject to some, but not all of, the consumer guarantees. The consumer guarantees set out certain standards for goods and services that apply automatically, and provide consumers with a basis for seeking redress where suppliers fail to comply with the guarantees. The guarantees apply automatically and cannot be excluded, modified or restricted by any contractual terms, these guarantees also apply to second hand goods.
3. The guarantees that currently apply to auctions are those that ensure that the person selling the goods has the right to sell those goods. They have been considered critical for goods purchased at auction as a physical inspection of the goods would not reveal the existence of undeclared securities, uninterrupted title or undisturbed possession (sections 51, 52 and 53).[[312]](#footnote-313) The application of these guarantees to purchases made at auction means consumers can make purchases at auction confidently, knowing that there will not be a subsequent attempt to reclaim the goods by another person.
4. Consumers are unable to rely on the consumer guarantees that relate to performance, quality and description for goods purchased at auction. The guarantees that *do not apply* to goods sold via auction are that:
* the goods are of acceptable quality;
* the goods are fit for any disclosed purpose;
* the goods correspond with any description, sample or demonstration model provided;
* spare parts and repairs will be available for a reasonable period after purchase;
* the manufacturer will comply with any express warranties provided.
1. Historically, consumer rights have been excluded in auction sales, for the following reasons:

The seller at auction is frequently unable to undertake that the goods will comply with the statutory implied terms, as where the transaction is a forced sale by a sheriff or bailiff. It also may be difficult for the auctioneer to know whether the buyer is a business buyer or a private purchaser; and auction sales usually involve an element of speculation, making it undesirable to preclude contracting-out.[[313]](#footnote-314)

1. A further reason for excluding a number of consumer rights for goods available for retail sales to goods sold at auctions is the separate legal requirements that apply to auctioneers.[[314]](#footnote-315)
2. When there is a failure to meet the guarantees for a good sold by auction, any action to right the failure will need to be pursued against the person who provided the good for auction. Generally, this will be the business putting their good up for auction through the auction house.
3. Auctions are frequently used by insolvency professionals to ensure that in disposing of goods they are getting the best possible price. When an insolvency practitioner is appointed they are acting on another entity’s behalf. The company under administration remains responsible for the provision of consumer guarantees, not the insolvency practitioner.

Relevant state and territory laws

1. In addition to the ACL, auctions and auctioneers are regulated by various state and territory laws. The various laws prescribe the conditions under which auctions can be held and the licencing of auctioneers. Many auctioneering laws require that an auctioneer must not knowingly misrepresent their description of the goods being sold.
2. State and territory regulations prescribe their own requirements. For example, *The Motor Dealers and Chattel Auctioneers Act 2014* (Qld) provides consumers with an additional statutory warranty in relation to motor vehicles, including those sold at auction, in certain circumstances.

The Problem

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| SummaryGoods sold, in trade or commerce, via auction are currently exempt from the majority of consumer guarantees. This includes goods sold via an online auction. The Review reached the conclusion that the ‘sale by auction exemptions’ should be modernised to take account of the increasing number of online auctions which do not allow for prior inspection of goods, so that the consumer guarantees apply to all online auctions. Consumers are less likely to have a practical opportunity to inspect goods in person for goods sold via an online auction. Accordingly, there is a concern that the rationale for exempting goods sold via auction is less applicable to online auctions. A further concern is that there can be uncertainty for consumers in understanding the exemption from the consumer guarantees and complexity for businesses in determining whether the exemption applies.  |

1. Auctions are a popular way for consumers to purchase goods and for businesses to dispose of goods cheaply and efficiently. Auctions fulfil an important role in the economy by allowing businesses to dispose of goods quickly and without ongoing liabilities. This low cost mechanism is particularly important for businesses in receivership or seeking to dispose of goods at the end of their saleable life. The exclusion of consumer rights for goods sold at auction pre-dates the use of online auctions to sell goods. Stakeholders indicated that while the exemptions from consumer guarantees for auctions are longstanding, they were introduced at a time when inspection of a good was likely to provide a consumer with sufficient opportunity to inspect and assess the condition of the good.[[315]](#footnote-316) Over time, the complexity of products sold at auctions has significantly increased and more auctions are now held online, rather than in person.
2. For most auctions, the only source of information available to consumers is the representations made by the auctioneer regarding the quality and nature of the goods, or through a physical inspection of the goods. The information supplied by the seller is subject to the false and misleading provisions in the ACL. Goods sold via online auction are also typically accompanied by detailed photos of the good, giving the prospective buyer an opportunity to make an assessment of the condition of a good.
3. Some businesses and consumer groups are of the view that the exemptions from the consumer guarantees for goods sold via auction should not be maintained. For example, in relation to motor vehicles, the Motor Trades Association of Australia submitted that the exemptions provide an unfair commercial advantage for vehicles sold by auction, they stated that ‘[a]uction houses should not be provided a competitive advantage over other retail models … due to reduced obligations to consumers’.[[316]](#footnote-317) A number of stakeholders put forward submissions to the effect that ‘the mode of sale should not determine what rights a person has.’[[317]](#footnote-318) Additionally, stakeholders submitted that inspections are not always sufficient to determine the quality of a good.[[318]](#footnote-319)
4. The Auctioneers and Valuers Association of Australia (AVAA) indicated that their members sell a wide variety of assets through online auctions that include many second-hand or reconditioned goods.[[319]](#footnote-320) They submitted that if all consumer guarantees were made available, it would be uneconomical to sell these goods.[[320]](#footnote-321) It was also submitted that consumers purchase these goods in the full knowledge that they are taking a risk in purchasing such goods and are willing to take this risk in exchange for often significant discounts. The AVAA observe that ‘At the moment, buyers have a grasp of the risk associated with bidding on lower value, second-hand goods’.[[321]](#footnote-322)
5. A further concern raised in submissions, is that if the guarantees applied to goods sold via auction, it would become unprofitable to continue to sell some goods via auction, and instead, these goods may end up in landfill. However, it does not appear that all consumers understand that goods sold at auction are largely sold as a buyer beware basis. Various submissions raised the prospect that auction houses should be compelled to disclose that consumer guarantees do not apply. Even though some, but not all, consumer guarantees currently apply.
6. Further, data from State and Territory regulators reveals low levels of complaints regarding auctions in absolute terms. However, the contact levels appear high where consumers cannot obtain regulator support in the event of a good failing to perform. Given the traditional assumptions regarding the nature of risk in auctions, the Consumer Action Law Centre (CALC) noted that while complaints are low, the uncertainty surrounding auctions means that consumers are unlikely to seek assistance in the event something going wrong.[[322]](#footnote-323) CALC noted that in the past 12 months, of the 25 calls received regarding auctions, 19 related to traditional auctions, five related to online auctions and one was unclear.[[323]](#footnote-324) This suggests there is a small degree of lack of awareness that the guarantees relating to performance, quality and description are not available for goods purchased at auctions.
7. In summary, there are competing views amongst businesses and consumer groups about the appropriateness of the current exemptions from the consumer guarantees for goods sold at auctions, and on whether the exemptions are appropriate for goods sold via an online auction.

Policy Objective

1. The policy objective is to ensure that exemptions from the consumer guarantees framework in the ACL are facilitating the effective operation of the auction market by balancing the needs of businesses to efficiently dispose of a variety of goods and the needs of consumers to have confidence when purchasing those goods.
2. The options proposed seek to improve the operation of the market for consumers who are purchasing through auctions to ensure that they have appropriate access to remedies in the event something goes wrong.

Options and Impact Analysis

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| SUMMARYCurrently goods sold by auction are exempt from a number of the consumer guarantees. To address the problem, four options are proposed:**Option 1:** Status quo.**Option 2**: Goods purchased through online 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). The status quo remains if the auctioneer makes the goods reasonably available for inspection. **Option 3:** Goods purchased through online auctions receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). This is regardless of the ability for a prior inspection (including traditional auctions that allow online bidding). The status quo will remain for consumers who purchase from auctions in person. **Option 4:** All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).The following costs and benefits have been quantified to support evaluation of each Option:* The cost to sellers of purchasing a warranty to cover the risk of being liable for the additional ACL rights for those goods now liable for the remained of ACL rights;
* The cost to auction houses of facilitating additional inspections where those would not have occurred under the status quo;
* The one-off transition costs faced by auction houses in facilitating and training staff on the change to the ACL; and
* The benefit to consumers from not having to repair, replace or salvage costs from goods which would not have been covered by the ACL but now are.
 |

Option 1: Status quo (Preferred)

1. Option 1 maintains the existing regulatory regime for goods sold via auction. This means that consumers, who purchase goods via auction, whether online or in person, will continue not to have access to the guarantees going to quality and fitness in the event of a product failure.
2. However, the existing protections for consumers will remain in force. Consumers have consumer guarantee rights that address title, undisturbed possession and undisclosed securities. Further, regulators can promote awareness of rights and obligations and take enforcement activity where appropriate.
3. Market places and online auction sites such as eBay, do not fall within the ACL’s definition of an auction and are not exempt from consumer guarantees. The website acts as a marketplace, where sellers make their own representations and act as their own agent through the auction or sale process. Sellers are responsible for the information they provide during the auction and the ACL applies to Australian businesses selling through the platform.
4. This differs to ‘traditional auctions’, where sellers engage an agent to make representations on their behalf and conduct the sale of their good. Currently, goods sold at auction must correspond with the description provided, with the burden placed on the consumer to check and decide if the goods are “acceptable quality”’.
5. Consumers place value and rely on the information provided by auctioneers on behalf of sellers. Additionally, as noted by the AVAA ‘The majority of auctions allow for inspections prior to the auction’ which allows consumers seeking to purchase goods at auction the ability to make a determination about a good quality.[[324]](#footnote-325) Auctioneers will continue to be subject to the prohibitions in the ACL on making false or misleading representations.
6. Additionally, the majority of auctioneers currently offer services to consumers in the event of a consumer guarantee failure. The AVAA note that ‘complaints are extremely low and AVAA members recognise that their member companies’ corporate reputation is inextricably linked to providing good end-to-end coverage for vendors and buyers. Because our members have worked to build their corporate and business reputations, there is more disclosure than ever before and buyers enjoy significant protections on goods.’[[325]](#footnote-326) This will continue to be the case under the status quo.
7. As Option 1 maintains the status quo, it will not address the concerns outlined in the Problem section. As a result, there will continue to be concerns about uncertainty for consumers in understanding the exemption from the consumer guarantees and complexity for businesses in determining whether the exemption applies, however the benefit of having continued access to potentially discounted goods may outweigh this concern.

Impact Analysis

1. As Option 1 does not change the current regulatory environment, it will not result in new benefits or costs for consumers, traders or other stakeholders. Traders will not have to make any changes to auction practices or amend standard contracts.
2. Under the status quo, consumers will continue to have access to a wide range of products, ranging from goods sold for parts through to new stock. While consumers purchasing at auctions do not have access to the majority of the consumer guarantees, this is often balanced with the possibility of obtaining a good at lower prices than retail.
3. Most auctions in the Australian marketplace will continue to offer inspections. Consumers are able to inspect in person or have a friend; relative or professional inspect goods on their behalf.
4. Whilst Option 1 itself has no additional benefits or costs, it provides a basis for illustrating and comparing the costs and benefits of the other options.
5. Maintaining the status quo is the preferred option as it is likely to offer the greatest net benefits. Despite the concerns raised about the current exemptions from the consumer guarantees for goods sold via auction, the benefits of changing the status quo are significantly outweighed by costs to businesses and consumers.

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| BENEFITS | COSTS |
| * Consumers continue to have access to a wide range of goods at auctions and the possibility of purchasing like for like goods at lower prices than that supplied by traditional retailers.
 | * Consumers will continue to not have automatic remedies for defective or unfit goods purchased through auctions.
 |
| * Auctioneers will continue to compete for buyers by offering services that improve customer satisfaction (over and above their statutory requirements), such as dispute resolution services.
 | * Consumers will continue to face the costs of rectifying goods in the event of a failure or defect.
 |
| • No additional compliance costs are incurred by traders or consumers. |  |

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.

1. Under Option 2, only online auctions that do not allow a person a reasonable opportunity to inspect the goods will have the remaining consumer guarantee rights applied. This follows from the rationale behind the current exemptions that additional consumer guarantees are not necessary when consumers can inspect the goods at auction.
2. A consumer will not receive the remainder of the consumer guarantees if they participated in an auction where there was a reasonable opportunity to inspect goods. This includes both auctions where:
* a “traditional auction” operates an online portal for remote bidding; and
* a website offers auction services with a facility for consumers to inspect the goods.
1. The auction industry, as noted in Option 1, have highlighted that the majority of auctions already offer inspections. As the majority of auctions offer inspections this option would only have a very limited impact as it only expands the consumer grantee to a small number of goods. Additionally, the AVAA noted that most goods are available for inspection and that only salvage items ‘(which are not appealing to consumers) are not commercially viable to inspection.’[[326]](#footnote-327)
2. Both of the examples at paragraph 4.33 above allow consumers a reasonable opportunity to view the goods before determining their bidding strategy. A reasonable opportunity for inspection could encompass the approach taken in “traditional auctions” towards the inspection of goods, where goods are available for inspection in a specified place at a specified time. In general, the ACL does not define what “reasonable”’ is taken to mean and leaves matters to a court to decide within the context of a given case.
3. Auctioneers’ responsibilities will not change in relation to the consumer guarantees as it is the seller of the goods who is responsible for providing a remedy in the event something goes wrong. Auctioneers must not mislead or deceive a consumer in relation to the availably of a consumer guarantee or description the goods for sale.

Impact Analysis

1. Consumers who purchase goods from “online only” auctions will likely have increased confidence when purchasing goods, knowing that in the event of an undisclosed product failure they will have access to consumer guarantees. However, the benefits to consumers will only be modest as Option 2 results in a minute expansion of the consumer guarantees regime; and as noted by auctioneers, only a very small number of auctions do not offer inspections.
2. Where the auctioneering facility provides a reasonable opportunity to view goods, consumers can choose to inspect the good, however this may not disclose the existence of a defect. As is currently the case, consumers who cannot physically inspect goods have alternatives to gain information about a product apart from the seller’s representations.
3. Confusion regarding the application of the consumer guarantees regime will continue. Some consumers will be unaware of their ability to access consumer guarantees and other consumers will experience disappointment if they consider they should have access to a consumer guarantee. This may particularly be the case where the consumer is purchasing a new or near new article and the price is close to the goods retail sale price.
4. Businesses selling goods via auction will continue to have access to an important low cost mechanism for the disposal of goods, for example if a business has been placed into administration and its stock needs to be liquidated, while being able to recover costs. Businesses selling through “online only” auctions will have an increase in potential ongoing liabilities in relation to the application of consumer guarantees for the small percentage of online sales that not provide for inspection. However, these businesses will likely be aware of their obligations under the consumer guarantee regime and have systems in place to address consumer guarantee claims as they typically sell through other retail avenues.
5. Businesses will have increased costs as they will be required to provide remedies that at present they do not. Cost benefit analysis indicates that this may amount to $58.9 million over ten years in costs to sellers and could lead to an increase in the sale price of goods.
6. As Option 2 does not alter the access to consumer guarantees for auctioneering facilities that offer online auctions and traditional auctions for the same auction it is unlikely to result in a reduction in the number of auctioneering facilities or goods sold at auction. This will ensure consumers continue to be able to purchase goods from a wide range of auctioneering facilities.
7. Businesses that sell through “online only” auctions may be incentivised to provide better information to the auction houses for prospective purchasers and to provide opportunities for the goods to be inspected under Option 2. As discussed earlier the consumer guarantees are flexible and take into account the nature of the individual goods being sold.
8. Accordingly, it is possible that businesses may choose to incur higher costs in providing greater information about the products they sell in “online only” auctions with a view to minimising their consumer guarantee liability.
9. This option has a net present value of -$23.7 million over ten years. It has only modest benefits for consumers while imposing significant costs on auctioning businesses and sellers of goods at auction. This option provides only modest protection, in auctions where there is no physical inspection, for a small number of consumers. The option increases costs to sellers of goods and auctioneers.
10. Only a small number of sellers will be required to provide consumer guarantees under this option as the majority of auctions already offer inspections. Over ten years this is expected to cost sellers of goods $58.9 million.
11. Auctioneers may face increased costs as sellers of goods seek to ensure that auctions do offer an inspection.
12. Consumers will have benefits of $35.2 million over ten years as they will be able to access consumer guarantees when they purchase a good from an auction where there is no opportunity for inspection.

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| --- | --- |
| BENEFITS | COSTS |
| * Consumers will be able to purchase goods through online auctions with no inspection with increased confidence as they will be able to rely on consumer guarantees.
 | * Sellers using ‘online only’ auctions are likely to incur additional costs if they provide better information to consumers as to the condition of articles.
 |
| * Sellers may provide better information to prospective purchasers as to the condition of articles. (Unquantified)
 | * There will be training costs to auctioneering facilities as well as for sellers using auctions to be aware of the new requirements for ‘online only’ auctions.
 |
| * Sellers will continue to be able to access local auction facilities (especially in regional areas) that offer online bidding, maintaining their access to the widest pool of purchasers of goods at auctions. (Unquantified)
 | * Businesses that sell through ‘online only’ auctions will need to comply with additional consumer guarantees.
 |

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

1. In this option, when a consumer purchases a good from an online auction (including from traditional auctions in which online bidding is available), in trade or commerce, they will be entitled to the full range of consumer guarantees even if an inspection is possible. This option creates a simple regime for consumers who may be purchasing through online auctions. However, consumers who purchase from auctions in person will not receive access to the remainder of consumer guarantees.

Impact Analysis

1. Compliance costs under Option 3 are expected to be higher than Option 2 as this option affects all auctions that offer an online ability to bid on goods. This option provides access to the consumer guarantees even where there is a reasonable opportunity to view goods, and applies to all goods sold through any online auction platform in trade or commerce.
2. As a consumer will be able to access the full range of guarantees if they bid through an online portal, consumers may preference online purchasing channels over attending traditional auctions. In this event, it is unclear whether sellers will prefer online auctions, which may obtain a greater pool of bidders, albeit with the potential for new consumer guarantee liability, or traditional auctions, where their goods may be bid on by a smaller audience with less consumer guarantee liability.
3. It is possible that businesses that sell through online auctions, where the full range of the ACL consumer guarantees apply, will be incentivised to provide better information to prospective purchasers as to the condition of articles for sale. As noted previously in relation to Option 2, this situation may arise as businesses seek to minimise consumer guarantee liability [see 4.43, 4.44].
4. Sellers of goods through auctions that allow online bidding will face significant ongoing costs from the provision of consumer guarantee remedies. Presently sellers are under no obligation to provide a remedy in the event of a consumer guarantee failure (except relating to title). Under this option sellers will have ongoing responsibilities to provide remedies.
5. Auction houses will be required to update their disclaimer documents and ensure mechanisms are in place to allow a consumer to make contact with the buyer in the event the good is not of acceptable quality, and provide training to staff to assist consumers in the event of a product failure. Auctioneers at present generally do not need to facilitate consumers dealing with sellers of goods from consumer guarantee issues, although this would change under Option 3. There will be additional training requirements for businesses seeking to dispose of goods via auction.
6. The net benefit of Option 3 is -$2,019.1 million over ten years. The ongoing costs related to repairing, replacing and refunding faulty goods faced by sellers of the goods are estimated at $3,129.9 million over ten years. The ongoing costs to the seller are significantly higher under Option 3 than Option 2 as all goods sold online will be subject to the full range of consumer guarantees.
7. While auction houses will have one-off transition costs, they will not have any ongoing costs associated with this option.
8. Consumers would have benefits of $1,110.8 million over ten years from increased access to ACL protection in the event of a consumer guarantee failure. However consumers may pay higher prices for auctioned goods.

|  |  |
| --- | --- |
| BENEFITS | COSTS |
| * Consumers can purchase goods through online auctions with increased confidence that they will be able to rely on a relevant consumer guarantee.
 | * Sellers will face the potential for ongoing costs from providing remedies for goods purchased at auctions.
 |
| * It will be easier for consumers to know and understand the consumer guarantee regime and when it applies to auctions (Unquantified).
 | * All auctioneering facilities offering online portals and sellers of goods through auctions will face staff training costs regarding the new regime.
 |
| * Sellers may provide better information to prospective purchasers as to the condition of goods
 | * Auctioneering facilities will need to amend their terms and conditions.
 |

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)

1. This option removes all consumer guarantee exemptions for goods bought through auctions. It will result in consumers having the same level of consumer guarantee protection when they buy from a business regardless of whether the good was purchased at auction, a traditional retail store or an online trading store.
2. This option will increase consumer protection by ensuring that all goods purchased at auctions in trade or commerce come with access to all consumer guarantees. It will also remove confusion for consumers, auctioneers and businesses by clarifying and simplifying the rights that apply.
3. Some overseas jurisdictions have removed exemptions for auctions. In particular, New Zealand removed the exemptions for sale by auction in 2014.

| Consumer Guarantees at auctions in New Zealand The *Consumer Guarantees Act 1993 (NZ)* will apply if the seller is in trade and the property is usually purchased for personal, domestic or household use.Under the Consumer Guarantees Act, goods must:* match their description;
* have no undisclosed defects;
* be fit for their normal purpose;
* be safe, durable, and of a reasonable quality; and
* be acceptable in look and finish.
 |
| --- |

Impact Analysis

1. Compliance costs under Option 4 will be higher than the other options as this option affects all auctions, regardless of whether they are online or not. This will require all businesses selling goods through auctions to be aware that they have increased responsibilities in relation to consumer guarantees.
2. Under the ACL, auctioneers are not responsible for the provision of consumer guarantees. Sellers are responsible for providing remedies in the event of a product failure.[[327]](#footnote-328) This option does not make auctioneers responsible or change who has responsibility for honouring consumer guarantees. However, many auctioneers submitted that they preferred to resolve disputes, independent of the ACL in the event of a problem and have dispute resolution mechanisms. While auctioneers can adopt this approach, the liability for consumer guarantees will sit with the seller of the goods.
3. Auctioneers already facilitate consumers’ interaction with sellers in the event of a consumer guarantee failure (against sections 51-53 of the ACL). This option expands the number of situations in which a consumer may seek to have an auctioneer facilitate their relationship with a seller of goods.
4. Sellers of goods at all auctions will face significant increases in costs from the ongoing liabilities associated with providing consumer guarantee remedies. As discussed in other options, this option will require sellers of goods to provide remedies in the event of a consumer guarantees failure. Cost benefit analysis has identified that this is likely to result in a cost to sellers of goods at auction of $4,883.3 million over ten years.
5. Option 4 dramatically simplifies the consumer guarantees regime for consumers purchasing at auction. Rather than having a mix of exemptions depending on the medium through which an auction occurs (as proposed by the other options) they will have access to the consumer guarantees.
6. Some minor confusion may still exist in the auctions regime as many goods sold at auction may not be inside the scope of ‘trade or commerce’. That is, in the event of a failure to meet the guarantees, buyers only have a right to a consumer guarantee remedy against a seller acting in trade or commerce.[[328]](#footnote-329) It may not be clear to buyers in an auction whether the article has been offered for sale by a person in trade or commerce. A similar observation has been made in the context of New Zealand’s repeal of its auctions exemption.[[329]](#footnote-330)
7. Similarly, for businesses who sell goods at auction and through retail channels, there is the prospect of simplification through one set of rules governing consumer guarantee liability.
8. Option 4 has a net benefit of -$3,149.7 million over ten years. The ongoing costs faced by sellers of the goods (from offering a consumer guarantee remedy) are estimated at
$4,883.3 million over ten years. The ongoing costs to the seller are significantly higher under Option 4 as all goods sold are now subject to the ACL guarantees.
9. Auction houses are not expected to face any ongoing costs from facilitating additional inspections as there is no incentive to offer additional inspections. Auction houses will face one-off transition costs associated with training staff and updating process to account for the changes to the ACL.
10. Consumers would receive benefits from no longer having to have goods remedied themselves, or to seek ex gratia payments from auction houses in the event of the good failing to perform. This has a benefit of $1,733.6 million over ten years.

The impact of the New Zealand changes

1. The impact of New Zealand’s reforms to remove the exemptions for auctions is not clear. There is limited data on whether the reforms have led to increases in prices at auctions. The AAVA submitted that following the removal of the exemptions, there was a shift from auctions to conventional retail sales for motor vehicles.
2. The AAVA submitted that in New Zealand there have been cost increases to buyers and sellers.[[330]](#footnote-331) In contrast, CALC undertook an analysis of financial reports of New Zealand’s largest second hand vehicle retailers and found:

Turners [a large New Zealand auction firm] 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 $36.3m respectively, while in 2016 auction revenue was $37.173m and in 2017 it was $38.169m.[[331]](#footnote-332)

1. While access to the additional consumer guarantees for goods purchased through “online only” auctions may improve the confidence of consumers purchasing goods through these auctions, there is a lack of data on whether New Zealand’s reforms led to higher prices at auctions.
2. CAANZ notes that New Zealand will be undertaking a review in late 2018 and 2019 of its recent consumer law reforms including consumer protections applying to auctions.

|  |  |
| --- | --- |
| BENEFITS | COSTS |
| * Consumers will have easier access to remedies for good purchased at auctions in the event of product failures.
 | * Increased compliance costs due to the need to be aware of the revised framework, consumer education and the possibility of being liable for consumer guarantees.
 |
| * Consumers will no longer face the costs of rectifying products purchased at auctions in the event of a product failure.
 | * Auctioneering facilities may need to enhance their existing mechanisms to link consumers with sellers in the event a product fails to meet a consumer guarantee.
 |
| * One level of consumer protection applies across all business sales to consumers.
 | * Sellers of goods will incur significant ongoing costs through providing consumer guarantee remedies and additional information to consumer regarding the nature of their goods.
 |
| * Sellers may provide more explicit information regarding the quality of the goods they sell through auctions, this will provide consumers with enhanced information.
 | * Sellers may have to rectify goods that fail to meet the consumer guarantees. Through all other retail means these businesses are required to be aware of the consumer guarantees regime and will not need to develop new systems.
 |

Implementation

1. The Legislative and Governance Forum on Consumer Affairs (CAF) will meet in August 2018 to vote on the proposed policy response.
2. Should CAF agree to the preferred policy option, there will be no required legislative change.
3. ACL regulators will provide guidance that facilitates consumer understanding of the ACL framework and consumer rights when buying goods at auction.

Monitoring

1. CAANZ will monitor consumer contacts relating to auctions and the effectiveness of its guidance.
2. In late 2018 and 2019, New Zealand will be undertaking a review of the consumer law reforms that took effect in New Zealand between 2013 and 2015. This will include the changes made to the consumer protections applying to auctions. CAANZ will monitor this review and its outcomes.

Decision Regulation Impact Statement

Chapter five

Appendices

Consumer Affairs Australia and New Zealand

2018

Appendix A: Compliance Cost Estimates

As required by the Office of Best Practice Regulation, regulatory burden costings have been calculated for each proposal and option. These are shown in Tables A1 to A5 below. Positive values indicate an increase in regulatory burden. In line with the regulatory burden measurement framework, the cost of each option refers to the average annual cost over the analysed period, without taking into account inflation or discounting.

Table A1: Regulatory burden costings for Chapter 1, Average annual regulatory costs
(from business as usual), change in costs ($m)

|  |  |  |  |
| --- | --- | --- | --- |
| **Cost** | **Option 1** | **Option 2** | **Option 3** |
| Business staff training transition cost | 0.0 | 0.4 | 0.4 |
| Business staff training ongoing cost | 0.0 | 0.0 | 0.4 |
| **Total business costs** | **0.0** | **0.4** | **0.8** |

Table A2: Regulatory burden costings for Chapter 2, Problem 1, Average annual regulatory costs (from business as usual), change in costs ($m)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Cost** | **Option 1** | **Option 2** | **Option 3a** | **Option 3b** |
| Business staff training transition cost | 0.2 | 0.2 | 0.2 | 0.2 |
| **Total business costs** | **0.2** | **0.2** | **0.2** | **0.2** |

Table A3: Regulatory burden costings for Chapter 2, Problem 2, Average annual regulatory costs (from business as usual), change in costs ($m)

|  |  |  |  |
| --- | --- | --- | --- |
| **Cost** | **Option 1** | **Option 2** | **Option 3** |
| Business staff training transition cost | 0.0 | 0.3 | 0.3 |
| **Total business costs** | **0.0** | **0.3** | **0.3** |

Table A4: Regulatory burden costings for Chapter 3, Average annual regulatory costs (from business as usual), change in costs ($m)

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Cost** | **Option 1** | **Option 2** | **Option 2a** | **Option 2b** | **Option 3** |
| Business staff training transition cost | 0.0 | 0.7 | 0.5 | 0.4 | 0.9 |
| Business disclosure material development transition cost | 0.0 | 0.2 | 0.2 | 0.0 | 0.2 |
| Business cost from lost sales, time and material component | 0.0 | 0.8 | 0.0 | 0.5 | 0.0 |
| **Total business costs** | **0.0** | **1.7** | **0.7** | **0.9** | **1.0** |

Table A5: Regulatory burden costings for Chapter 4, Average annual regulatory costs (from business as usual), change in costs ($m)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Cost** | **Option 1** | **Option 2** | **Option 3** | **Option 4** |
| Business staff training transition cost | 0.0 | 0.3 | 0.3 | 0.3 |
| **Total business costs** | **0.0** | **0.3** | **0.3** | **0.3** |

Appendix B: Consultation Process

The Australian Treasury, on behalf of Consumer Affairs Australia and New Zealand, conducted an extensive public consultation process from 9 March 2018 to 23 April 2018 which included releasing a consultation regulation impact statement: *Clarification, Simplification and Modernisation of the Consumer Guarantee Framework*.[[332]](#footnote-333) The objective of the consultation was to gather additional evidence on the extent of the identified problems and the available policy options.

The Australian Treasury received about 50 written submissions from organisations and entities (including eight confidential submissions). In addition, around 30 individual consumer submissions and comments were lodged through the Treasury consultation website or received via email. Treasury officials also met with around 50 stakeholder organisations and entities over a number of bilateral and roundtable meetings during this consultation period to address questions about the policy options and better understand the impact of each of the proposed options on industry and consumers. A list of all non-confidential submissions received from organisations and entities is at Appendix C.

Information received during these consultations has been used to improve the understanding of the identified policy problems, fine-tune the scope of the policy options and develop a targeted and effective implementation plan. Data and evidence received has been used to understand the potential impacts and cost-benefit analysis of the proposals. Reflecting this, there are references to specific findings from the consultation throughout the chapters.

Appendix C: List Of Non-Confidential Submissions

A

Ai Group

ARITA

Auctioneers and Valuers of Australia

Australian Automobile Association

Australian Automotive Aftermarket Association

Australian Automotive Dealer Association

Australian Banking Association

Australian Chamber of Commerce and Industry

Australian Communications Consumer Action Network

Australian Finance Industry Association

Australian Retailers Association

Australian Small Business and Family Enterprise Ombudsman

B

Brightside Cover

C

Caravan Council of Australia

CHOICE

Communications Alliance

Consumer Advocate – Destroy My Jeep

Consumer Credit Legal Service WA

Consumer Electronics Suppliers Association

D

Direct Selling Australia

F

Federal Chamber of Automotive Industries

G

Grain Growers Ltd

I

Insurance Council of Australia

J

Joint submission from Consumer Action Law Centre, WEstjustice, National Association of Community Legal Centres, Federation of Community Legal Centres (Victoria) Inc

L

Legal Aid NSW

Legal Aid Queensland

Legal Services Commission of South Australia

Lemon Caravans and RVs in Aus

Lighting Council Australia

M

Motor Trade Association of South Australia

Motor Trades Association of Australia

Motor Trades Association Queensland

N

National Retail Association

NSW Business Chamber

Q

Queensland Law Society

S

Seniors Rights Service

T

Telecommunications Industry Ombudsman

The Consumer Law Centre of the ACT

The Warranty Group

V

Victorian Automobile Chamber of Commerce

W

Western Australia Small Business Development Corporation

Winemakers Federation of Australia

Appendix D: Summary Of Stakeholder Views

Below is a non-exhaustive summary of stakeholder views from consultation. It is a summary of the general positions of stakeholder groups and may not accurately reflect the views of particular stakeholders.

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

Most stakeholders support increasing the threshold to $100,000.

Small business groups, consumer groups and motor trade associations are generally supportive of increasing the threshold amount.

Industry associations have expressed mixed views.

Some industry associations have expressed concern that the number of “consumer” claims will increase as the scope of product purchases covered by the threshold amount is broadened.

Some consumer and small business groups criticised the definition of consumer itself, which gives any business, large or small, access to consumer guarantees for a purchase under the threshold.

At present, a large business that purchases a good under the threshold from a small business could pursue the small business in the event of a consumer guarantee failure. Increasing the threshold to $100,000 would expand the scope for this. Some stakeholders, including retailer groups, supported the principle of extending small business access to consumer guarantees but were concerned about this consequence.

There are mixed views on whether to lift the threshold to a flat figure, or lift the threshold and provide for indexation into the future.

Some small business groups were concerned about a missed opportunity to keep the threshold current into the future if indexation is not applied now, given the difficulty of securing legislative change.

However, a variety of stakeholders emphasised that regular indexation may result in consumer and industry uncertainty and increased compliance and training costs for businesses.

Clarifying the consumer guarantee remedies

Proposal about failures in a short period of time

Industry associations are strongly opposed, with concerns this would impose significant cost burdens, particularly on suppliers of high value and complex goods. Opposition from motor trade associations is especially pronounced.

Industry is concerned about higher costs flowing through to retailers due to increased claims for refunds and those costs not being reimbursed by manufacturers or suppliers of the good. There were concerns a single failure that was easily capable of repair would trigger a right to a refund.

A number of small business groups and industry associations expressed concern about the proposal aggravating the difficulties retailers face getting reimbursement from manufacturers if they provide a refund.

Consumer groups strongly support the proposal in the context of consumers experiencing difficulty asserting existing rights. Several consumer groups proposed a variety of alternative measures to improve access to consumer guarantee remedies.

Several stakeholders emphasised the lack of clarity in the law about the meaning of ‘non-major failure’ and that regulatory guidance is limited.

Some large retailers of typically low-value goods expressed support because their existing practices already align with the proposal.

Proposal about multiple non-major failures

Consumer groups are strongly supportive. This appears motivated in large part by consumers’ experiences with multiple failed repairs.

Consumer groups presented evidence of widespread problems getting remedies for multiple failures with motor vehicles and caravans.

Industry associations are broadly opposed, particularly if unrelated non-major failures that are easily repairable would give a right to a refund. However, opposition is less pronounced than the proposal about failure in a short period.

Some retailer groups and wholesale suppliers support clarification.

If the proposal goes ahead, industry stakeholders oppose specifying in the law that a particular number of failures trigger a right to a refund or replacement.

Many in the automotive sector oppose this proposal on the basis that motor vehicles can be expected to have a number of faults. However, some automotive traders support clarification.

Enhanced disclosure for extended warranties

Feedback on the consultation RIS indicated a range of different views on the regulation of extended warranties. Approximately one quarter of stakeholders that indicated their position in submissions supported maintaining the status quo. Some stakeholders also supported an education campaign to increase awareness of consumer rights. Other proposals included further research and increased regulator guidance. Option 2 (disclosure and a cooling-off right) received the strongest support.

Consumer and community groups strongly supported enhanced disclosure for extended warranties and typically favour an opt-in process. There were mixed views from industry stakeholders that provided a submission, which included extended warranty providers and other interested industry stakeholders. Although some industry stakeholders supported maintaining the status quo, there was a degree of comfort from some industry stakeholders with a change in the law requiring disclosure and a cooling off right.

Some industry stakeholders raised concerns of high costs from requiring oral disclosure (in addition to written disclosure) due to the risk of misrepresentation at point of sale and the compliance burden of training staff. Other industry stakeholders indicated comfort with basic oral disclosure of the existence of the cooling off right.

There was minimal interest from stakeholders in sub-options 2a (disclosure only) and 2b (cooling-off right only).

Access to consumer guarantees for goods sold at auctions

Auctioneers and groups representing insolvency practitioners are very strongly opposed to changing the current partial exemption from consumer guarantees for goods sold at auctions. These groups also challenged the premise that consumers do not have an opportunity to inspect goods before they are sold through an online auction.

Consumer groups strongly support removing the auctions exemption, considering it unfair that the method used to sell the goods determines what rights a consumer has. Consumer groups also emphasised that consumer guarantees apply to goods bought from a traditional retail store despite the consumer clearly having an opportunity to inspect.

Some business groups support removing the exemption to ensure a level playing field. They view the auctions exemption as conferring an unfair competitive advantage simply because of the method used to sell the goods.

Auctioneers assert that goods sold at auction are sold at a discount, relative to retail sales, due to the absence of a guarantee of acceptable quality for these goods. Further, auctioneers advise they encounter very low level of complaints and address those issues voluntarily when they arise.

1. Costs and benefits are in present value terms calculated as the sum over ten years. [↑](#footnote-ref-2)
2. However, larger businesses are not precluded from claiming protection under the ACL. In *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43, Aravco made a successful claim against Qantas for failure to render services worth around $5,000 with due care and skill under the section 74 of the *Trade Practices Act 1974* (Cth). [↑](#footnote-ref-3)
3. Swanson Committee, Trade Practices Act Review Committee Report 1976, [9.40]. [↑](#footnote-ref-4)
4. Swanson Committee, Trade Practices Act Review Committee Report 1976, [9.40]. [↑](#footnote-ref-5)
5. Parliament of the Commonwealth of Australia, Trade Practices Revision Bill 1986 – Explanatory Memorandum, [13]. [↑](#footnote-ref-6)
6. ABS Media Release, *Business numbers up 2.4% from June 2015* [http://www.abs.gov.au/ausstats/abs@.nsf/media
releasesbytitle/950EC94DB899312ECA2573B00017B8F4](http://www.abs.gov.au/ausstats/abs%40.nsf/mediareleasesbytitle/950EC94DB899312ECA2573B00017B8F4). [↑](#footnote-ref-7)
7. Productivity Commission Inquiry Report, *Review of Australia’s Consumer Policy Framework*, 2008, page 318. [↑](#footnote-ref-8)
8. Aviva Freilich and Eileen Webb, ‘Small Business: Forgotten and in need of protection from unfairness?’ (2013) 37 *University of Western Australia Law Review* 134, 138. [↑](#footnote-ref-9)
9. Aviva Freilich and Eileen Webb, ‘Small Business: Forgotten and in need of protection from unfairness?’ (2013) 37 *University of Western Australia Law Review* 134, 138-139. [↑](#footnote-ref-10)
10. Western Australia Small Business Development Corporation, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=598512069> (‘WA Small Business Development Corporation’), page 1. [↑](#footnote-ref-11)
11. Australian Industry Group, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework,* <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=62096997>(‘AiG’), page 2. [↑](#footnote-ref-12)
12. AiG submission, page 2. [↑](#footnote-ref-13)
13. Legal Aid Queensland, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=97815662> (‘Legal Aid Queensland’), page 3. [↑](#footnote-ref-14)
14. Grain Growers Ltd, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=494876915> (‘Grain Growers Ltd’), page 5. [↑](#footnote-ref-15)
15. WA Small Business Development Corporation, submission to the *Australian Consumer Law Review: Interim Report*, <https://cdn.tspace.gov.au/uploads/sites/60/2016/12/Small-Business-Development-Corporation-1.pdf> (‘WA Small Business Development Corporation interim submission’), page 6. [↑](#footnote-ref-16)
16. Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report,* March 2017, page 74. [↑](#footnote-ref-17)
17. Consumer Law Centre of the ACT, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=708762173> (‘Consumer Law Centre of the ACT’), page 1. [↑](#footnote-ref-18)
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20. Consumer Action Law Centre, joint submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=886548778> (‘CALC joint submission’), page 5. [↑](#footnote-ref-21)
21. Grain Growers Ltd submission, page 4. [↑](#footnote-ref-22)
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24. Legal Aid Queensland submission, page 3. [↑](#footnote-ref-25)
25. National Retail Association, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=580952868> (‘National Retail Association’), paragraph 27. [↑](#footnote-ref-26)
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28. Reserve Bank of Australia, *Inflation Target* <https://www.rba.gov.au/inflation/inflation-target.html>. [↑](#footnote-ref-29)
29. Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, <https://www.coag.gov.au/sites/default/files/agreements/IGA_australian_consumer_law.pdf>, paragraph 19. [↑](#footnote-ref-30)
30. Costs and benefits are in present value terms calculated as the sum over ten years. [↑](#footnote-ref-31)
31. Other guarantees include that goods must: be fit for a disclosed purpose; match descriptions and samples; have spare parts and repair facilities available; come with full title and undisturbed possession; not carry any hidden debts or extra charges; satisfy any express warranty. [↑](#footnote-ref-32)
32. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009, page 198. [↑](#footnote-ref-33)
33. *Competition and Consumer Act 2010* (Cth), Schedule 2, Australian Consumer Law (‘ACL’), Part 5-4. [↑](#footnote-ref-34)
34. Commonwealth Consumer Affairs Advisory Council 2009, *Final Report - Consumer rights: Reforming statutory implied conditions and warranties*, <http://ccaac.gov.au/files/2012/10/ConsumerRights_FinalReport.pdf>, page 65. [↑](#footnote-ref-35)
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37. AAA submission, page 3. [↑](#footnote-ref-38)
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39. Legal Aid Queensland, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=97815662](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=97815662%20) (‘Legal Aid Queensland submission’), page 6. [↑](#footnote-ref-40)
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41. See, for example, National Retail Association, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury
.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=580952868](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=580952868) (‘National Retail Association submission’), pages 5-6; Consumer Affairs Australia and New Zealand 2018, consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/>, page 2-12. [↑](#footnote-ref-42)
42. See, for example, Legal Aid Queensland submission, page 6; National Retail Association submission, pages 5-6. [↑](#footnote-ref-43)
43. See e.g. *Prestige Auto v Bonnefin* [2017] NSWSC 149. [↑](#footnote-ref-44)
44. National Retail Association submission, page 7. [↑](#footnote-ref-45)
45. CALC joint submission, page 15. [↑](#footnote-ref-46)
46. AAA submission, page 3. [↑](#footnote-ref-47)
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49. Consumer Law Centre of the ACT, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=708762173> (‘Consumer Law Centre of the ACT submission’), page 7. [↑](#footnote-ref-50)
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view\_respondent?uuId=598512069](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=598512069) (‘WA Small Business Development Corporation submission’), page 7. [↑](#footnote-ref-57)
57. See, for example, CHOICE submission, pages 19 – 20. [↑](#footnote-ref-58)
58. See, for example, CALC joint submission, pages 9 – 10. [↑](#footnote-ref-59)
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gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=181101777](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=181101777)(‘Lemon Caravans and RVs in Aus submission’), page 4. [↑](#footnote-ref-60)
60. See, for example, AAA submission, page 2. [↑](#footnote-ref-61)
61. Australian Industry Group, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=62096997> (‘Ai Group submission’), page 7. [↑](#footnote-ref-62)
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63. *Review of Australia’s Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, 2008, Vol. 2, page 28. [↑](#footnote-ref-64)
64. Costs and benefits are in present value terms calculated as the sum over ten years. [↑](#footnote-ref-65)
65. These guarantees include that goods must: be of acceptable quality; be fit for purpose; match descriptions and samples; have spare parts and repair facilities available; come with full title and undisturbed possession; not carry any hidden debts or extra charges; satisfy any express warranty. [↑](#footnote-ref-66)
66. See, for example, National Retailers Association submission, page 7. [↑](#footnote-ref-67)
67. Ai Group submission, page 1. [↑](#footnote-ref-68)
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70. See, for example, Legal Aid NSW, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=895050386> (‘Legal Aid NSW submission’), page 5; ACT Consumer Law Centre submission, page 2. [↑](#footnote-ref-71)
71. See, for example, Lighting Council Australia, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury.
gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=714503759](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=714503759) (‘Lighting Council Australia submission’), page 3; see also NSW Business Chamber, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/
view\_respondent?uuId=976205851](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=976205851) (‘NSW Business Chamber submission’), page 5. [↑](#footnote-ref-72)
72. See *Consumer Rights Act 2015* (UK) ss 20, 22. [↑](#footnote-ref-73)
73. *Consumer Rights Act 2015* (UK) ss 24(8)-(10). [↑](#footnote-ref-74)
74. *Consumer Rights Act 2015* (UK) ss 19(14)-(15). [↑](#footnote-ref-75)
75. Consumer Credit Legal Service WA submission, page 2. [↑](#footnote-ref-76)
76. CALC joint submission, page 12. [↑](#footnote-ref-77)
77. AAA submission, pages 2-3. Note however that Holden’s policy under this enforceable undertaking offers the consumer the choice of remedy where the vehicle experiences a defect within 60 days and ‘*the defect caused the vehicle to become immobile and no longer driveable*’ (see Annexure H to the undertaking: [https://www.accc.gov.
au/public-registers/undertakings-registers/s87b-undertakings-register/gm-holden-ltd-s87b-undertaking](https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/gm-holden-ltd-s87b-undertaking)). [↑](#footnote-ref-78)
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79. See, for example, Federal Chamber of Automotive Industries, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_
respondent?uuId=355881449](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=355881449) (‘Federal Chamber of Automotive Industries submission’), page 6. [↑](#footnote-ref-80)
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81. Australian Small Business and Family Enterprise Ombudsman, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, [https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_
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82. See, for example, Communications Alliance submission, page 8. [↑](#footnote-ref-83)
83. See, for example, Australian Automotive Dealer Association, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*,
[https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_
respondent?uuId=294771009](https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=294771009) (‘AADA submission’), page 12. [↑](#footnote-ref-84)
84. See e.g. Federal Chamber of Automotive Industries submission, page 5. [↑](#footnote-ref-85)
85. NSW Business Chamber submission, pages 5-6. [↑](#footnote-ref-86)
86. AADA submission, page 10. [↑](#footnote-ref-87)
87. See e.g. Interactive Games and Entertainment Association submission to ACL Review Interim Report, 9 December 2016, <http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/interim-report/>. [↑](#footnote-ref-88)
88. See e.g. Australian Retailers Association submission, page 4. [↑](#footnote-ref-89)
89. AADA submission, page 16. [↑](#footnote-ref-90)
90. WA Small Business Development Corporation submission, page 6. [↑](#footnote-ref-91)
91. AADA submission, page 16. [↑](#footnote-ref-92)
92. Australian Retailers Association submission, page 4. [↑](#footnote-ref-93)
93. Ai Group submission, pages 5 -6. [↑](#footnote-ref-94)
94. Direct Selling Australia submission, page 6. [↑](#footnote-ref-95)
95. See e.g. Australian Finance Industry Association, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=450720182>, page 3. [↑](#footnote-ref-96)
96. Communications Alliance submission, pages 9-10. [↑](#footnote-ref-97)
97. Australian Retailers Association submission, page 5; Federal Chamber of Automotive Industries submission, page 12; Australian Chamber of Commerce and Industry submission, page 2. [↑](#footnote-ref-98)
98. Legal Services Commission of South Australia submission, page 2. [↑](#footnote-ref-99)
99. Calculated in present value terms as the sum over ten years. [↑](#footnote-ref-100)
100. See also WA Small Business Development Corporation submission, page 5. [↑](#footnote-ref-101)
101. CALC joint submission, page 2. [↑](#footnote-ref-102)
102. Grain Growers Ltd, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=494876915>(‘Grain Growers Ltd submission’), page 2. [↑](#footnote-ref-103)
103. Grain Growers Ltd submission, page 9. [↑](#footnote-ref-104)
104. National Retail Association submission, page 6. [↑](#footnote-ref-105)
105. Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, page 17. [↑](#footnote-ref-106)
106. WA Small Business Development Corporation, pages 3-4. [↑](#footnote-ref-107)
107. Calculated in present value terms as the sum over ten years. [↑](#footnote-ref-108)
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109. Direct Selling Australia submission, page 8. [↑](#footnote-ref-110)
110. Calculated in present value terms as the sum over ten years. [↑](#footnote-ref-111)
111. Consumer Affairs Australia and New Zealand, *ACL Review Interim Report*, October 2016, page 54 (details stakeholder concerns regarding multiple non-major failures). [↑](#footnote-ref-112)
112. See ACL section 260. [↑](#footnote-ref-113)
113. Ai Group submission, page 1. [↑](#footnote-ref-114)
114. Australian Chamber of Commerce and Industry submission, page 2. [↑](#footnote-ref-115)
115. AADA submission, page 11. [↑](#footnote-ref-116)
116. See e.g. Telecommunications Industry Ombudsman, submission to the consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=765713042>, page 2. [↑](#footnote-ref-117)
117. See e.g. Legal Services Commission of South Australia submission, page 3. [↑](#footnote-ref-118)
118. WA Small Business Development Corporation submission, page 5. [↑](#footnote-ref-119)
119. See *Prestige Auto v Bonnefin* [2017] NSWSC 149 at [148]. [↑](#footnote-ref-120)
120. Calculated in present value terms as the sum over ten years. [↑](#footnote-ref-121)
121. See e.g. Direct Selling Australia submission, page 9. [↑](#footnote-ref-122)
122. Legal Services Commission of SA submission, page 3. [↑](#footnote-ref-123)
123. [2017] NSWSC 149. [↑](#footnote-ref-124)
124. See, for example, AADA submission, page 18. [↑](#footnote-ref-125)
125. National Retail Association submission, page 7. [↑](#footnote-ref-126)
126. Calculated in present value terms as the sum over ten years. [↑](#footnote-ref-127)
127. Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, <https://www.coag.gov.au/sites/default/files/agreements/IGA_australian_consumer_law.pdf>, paragraph 19. [↑](#footnote-ref-128)
128. *Competition and Consumer Act 2010* (Cth) (‘Competition and Consumer Act’), Schedule 2, Australian Consumer Law (‘ACL’). [↑](#footnote-ref-129)
129. However, goods sold via auction are exempt from the majority of the consumer guarantees (ACL sections 54(1)(b), 55(1)(b), 56(1)(b), 57(1)(b), 58(1)(b), 59(1)(b) and 59(2)(b)). [↑](#footnote-ref-130)
130. See e.g. Brightside cover, submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework*, https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=235003627 (‘Brightside cover submission’), page 7;
The Warranty Group, submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework*, https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=442822885 (‘The Warranty Group submission’), page 7. [↑](#footnote-ref-131)
131. The Warranty Group submission, page 6. [↑](#footnote-ref-132)
132. Brightside Cover submission, page 7. [↑](#footnote-ref-133)
133. Brightside Cover submission, page 6. [↑](#footnote-ref-134)
134. ACL section 59. [↑](#footnote-ref-135)
135. ACL section 102(3). [↑](#footnote-ref-136)
136. ACL section 192; *Competition and Consumer Regulations 2010* (Cth) regulation 90. [↑](#footnote-ref-137)
137. Brightside Cover submission, page 1. [↑](#footnote-ref-138)
138. Grain Growers Ltd, submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view_respondent?uuId=494876915> (‘Grain Growers Ltd submission’), page 10. [↑](#footnote-ref-139)
139. Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017 (‘ACL Review Final Report’), page 23. [↑](#footnote-ref-140)
140. ACL Review Final Report, page 24. [↑](#footnote-ref-141)
141. See e.g. Communications Alliance, submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework*, https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=1046933074 (‘Communications Alliance submission’), page 14. [↑](#footnote-ref-142)
142. Consumer Action Law Centre, joint submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework*, https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/consultation/view\_respondent?uuId=886548778 (‘Consumer Action Law Centre joint submission’), page 23. [↑](#footnote-ref-143)
143. However, goods sold via auction are exempt from the majority of the consumer guarantees. [↑](#footnote-ref-144)
144. The Australian Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, May 2016 (‘Australian Consumer Survey’), page 21. [↑](#footnote-ref-145)
145. Australian Consumer Survey, page 21. [↑](#footnote-ref-146)
146. Commonwealth Consumer Affairs Advisory Council, *Consumer Rights: Reforming statutory implied conditions and warranties*, Final Report, October 2009, http://www.ccaac.gov.au/files/2012/10/ConsumerRights\_FinalReport.pdf, page 5. [↑](#footnote-ref-147)
147. National Education and Information Taskforce, *National Baseline Study for Statutory Warranties and Refunds,* Research Paper No 2, October 2009. [↑](#footnote-ref-148)
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184. CHOICE submission, pages 15-16. [↑](#footnote-ref-185)
185. CHOICE submission, page 16. [↑](#footnote-ref-186)
186. CHOICE submission, page 16. [↑](#footnote-ref-187)
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191. Communications Alliance submission, page 14. [↑](#footnote-ref-192)
192. Consumer Action Law Centre joint submission, page 18. [↑](#footnote-ref-193)
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194. Legal Aid Queensland submission, page 13. [↑](#footnote-ref-195)
195. Legal Aid Queensland submission, page 14. [↑](#footnote-ref-196)
196. Legal Aid Queensland submission, page 14. [↑](#footnote-ref-197)
197. Brightside Cover submission, page 1. [↑](#footnote-ref-198)
198. Brightside Cover submission, page 1. [↑](#footnote-ref-199)
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201. Insurance Council of Australia submission, page 1. [↑](#footnote-ref-202)
202. See e.g. The Warranty Group submission, page 7. [↑](#footnote-ref-203)
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218. CHOICE submission, page 16. [↑](#footnote-ref-219)
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234. CHOICE submission, pages 16-17. [↑](#footnote-ref-235)
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236. Communications Alliance submission, page 16. [↑](#footnote-ref-237)
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238. The Warranty Group submission, page 10; Australian Chamber of Commerce and Industry submission, page 3; NSW Business Chamber submission, page 9. [↑](#footnote-ref-239)
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248. Brightside Cover submission, page 12; The Warranty Group submission, page 9. [↑](#footnote-ref-249)
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251. National Retail Association submission, page 8. [↑](#footnote-ref-252)
252. Confidential submission to the consultation regulation impact statement on the *Clarification, simplification, and modernisation of the consumer guarantee framework.* [↑](#footnote-ref-253)
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255. Grain Growers Ltd submission, page 10. [↑](#footnote-ref-256)
256. Consumer Action Law Centre joint submission, page 18. [↑](#footnote-ref-257)
257. Australian Automotive Aftermarket Association submission, page 5. [↑](#footnote-ref-258)
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259. Consumer Action Law Centre joint submission, page 21. [↑](#footnote-ref-260)
260. Consumer Action Law Centre joint submission, page 6; CHOICE submission, page 16. [↑](#footnote-ref-261)
261. Consumer Action Law Centre joint submission, page 2. [↑](#footnote-ref-262)
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278. National Retail Association submission, page 8. [↑](#footnote-ref-279)
279. *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’) part 2, division 2. [↑](#footnote-ref-280)
280. ASIC Act sections 12BAA(1) and (5); *Corporations Act 2001* (Cth) (‘Corporations Act’) sections 763A and 763C. [↑](#footnote-ref-281)
281. Competition and Consumer Act section 131A. [↑](#footnote-ref-282)
282. ASIC Act section 12DA; ACL section 18. [↑](#footnote-ref-283)
283. ASIC Act sections 12CA and 12CB; ACL sections 20 and 21. [↑](#footnote-ref-284)
284. ASIC Act section 12DB; ACL sections 29(1)(n) and 151(1)(n). [↑](#footnote-ref-285)
285. Competition and Consumer Act section 131A. [↑](#footnote-ref-286)
286. Corporations Act sections 763A and 763C; ASIC Act sections 12BAA(1) and (5). [↑](#footnote-ref-287)
287. Issuing a financial product, or arranging to issue a financial product, constitutes a dealing in a financial product and therefore amounts to providing a financial service (ASIC Act sections 12BAB(1)(b), (7)(b) and 8). Arranging for a person to apply for a financial product also constitutes the provision of a financial service (ASIC Act sections 12BAB(1)(b), 7(a) and 8). [↑](#footnote-ref-288)
288. Corporations Actsection 764A(1)(d); ASIC Act section 12BAA(7)(d). [↑](#footnote-ref-289)
289. ASIC, *Information Sheet 198: Extended warranties,* July 2014, http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/extended-warranties/. [↑](#footnote-ref-290)
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291. Brightside Cover submission, page 2; The Warranty Group submission, page 3. [↑](#footnote-ref-292)
292. Brightside Cover submission, page 2. [↑](#footnote-ref-293)
293. ACL section 64. [↑](#footnote-ref-294)
294. ASIC Act section 12ED. [↑](#footnote-ref-295)
295. ASIC Act section 12ED(1)(a). [↑](#footnote-ref-296)
296. ASIC Act section 12ED(1)(b). [↑](#footnote-ref-297)
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298. ASIC Act section 12DA; ACL section 18(1). [↑](#footnote-ref-299)
299. *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393. [↑](#footnote-ref-300)
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301. ACL section 151(1)(n), section 29; ASIC Act section 12DB. [↑](#footnote-ref-302)
302. ACL section 29(1)(m); ASIC Act section 12DB(1)(i). [↑](#footnote-ref-303)
303. ACL section 29(1)(l); ASIC Act section 12DB(1)(h). [↑](#footnote-ref-304)
304. ACL section 29(1)(n); ASIC Act section 12DB(1)(j). [↑](#footnote-ref-305)
305. Stephen Corones, ‘Getting what they paid for: Consumer guarantees and extended warranties’ (2011) 39 *Australian Business Law Review*, page 346. [↑](#footnote-ref-306)
306. Ibid page 348. [↑](#footnote-ref-307)
307. ACL section 20; ASIC Act section 12CA. [↑](#footnote-ref-308)
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310. *Competition and Consumer Act 2010* (Cth) (‘Competition and Consumer Act’), Schedule 2, Australian Consumer Law (‘ACL’), sections 54(1)(b), 55(1)(b), 56(1)(b), 57(1)(b), 58(1)(b), 59(1)(b) and 59(2)(b)). [↑](#footnote-ref-311)
311. Throughout this RIS chapter ‘traditional auction’ will be used to define an auction that occurs in a face‑to‑face manner by an agent. [↑](#footnote-ref-312)
312. ACL, section 51: Guarantee as to title, section 52: Guarantee as to undisturbed possession, section 53: Guarantee as to undisclosed securities. [↑](#footnote-ref-313)
313. R.M. Goode, ‘Commercial Law’, (4th Ed, edited and fully revised by Ewan McKendrick) LexisNexis and Penguin Books Ltd 2009, at page 358. [↑](#footnote-ref-314)
314. Trish O’Sullivan, The Exclusion of Consumer Rights in e-Auctions-Is an e-Auction Really an Auction at all?, *International Journal of Economics and Management Engineering*, Vol. 4, No. 6, 2010. [↑](#footnote-ref-315)
315. CHOICE page 17. [↑](#footnote-ref-316)
316. MTAA page 3. [↑](#footnote-ref-317)
317. Consumer Law Centre of the ACT page 7. [↑](#footnote-ref-318)
318. CHOICE page 17. [↑](#footnote-ref-319)
319. AVAA page 13. [↑](#footnote-ref-320)
320. AVAA page 13. [↑](#footnote-ref-321)
321. AVAA page 23. [↑](#footnote-ref-322)
322. CALC page 25. [↑](#footnote-ref-323)
323. CALC page 25. [↑](#footnote-ref-324)
324. AVAA page 24. [↑](#footnote-ref-325)
325. AVAA page 9. [↑](#footnote-ref-326)
326. AVAA page 25 [↑](#footnote-ref-327)
327. The New Zealand experience of the removal of the consumer guarantee can serve as a model for how this option would operate in the Australian context. In *A Tec Designs Limited v Turners Groups NZ Limited* [2018] NZMVDT 7, the Motor Vehicles Dispute Tribunal of New Zealand demonstrated that sellers in the New Zealand model continue to be liable for consumer guarantees (not auctioneers) but that auctioneers are responsible for representations they make with regard to products (as is currently the case in Australia). [↑](#footnote-ref-328)
328. This same scenario applies in relation to consumer purchasers from businesses on online platforms like Ebay. At present, it is common for sellers on Ebay to identify themselves as businesses. However this same practice has not emerged for businesses selling via auction. One off sales by individuals are not likely to be in trade or commerce. [↑](#footnote-ref-329)
329. Kate Tokeley, When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace, 2017, 39(1) *Sydney Law Review*, page 59. [↑](#footnote-ref-330)
330. AVAA page 17. [↑](#footnote-ref-331)
331. CALC page 26. [↑](#footnote-ref-332)
332. Consumer Affairs Australia and New Zealand 2018, consultation regulation impact statement on the *Clarification, simplification and modernisation of the consumer guarantee framework*, <https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/>. [↑](#footnote-ref-333)