Australian Government
The Treasury

Decision Regulation Impact Statement

Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law

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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

Contents

Executive Summary

Consumer guarantees and supplier indemnification issues are prevalent across the economy, with consumers and suppliers facing challenges in accessing the remedies and indemnification they are entitled under the Australian Consumer Law (ACL).

Breach of the existing consumer guarantees and supplier indemnification provisions in the ACL gives rise to a private right of action. However, regulators are currently unable to bring proceedings seeking civil penalties or issue infringement notices against parties in breach, or alleged breach, of requirements when:

- suppliers and manufacturers fail to provide a remedy for consumer guarantees failures, when they are legally required to do so
- manufacturers fail to reimburse suppliers for consumer guarantees failures that the manufacturers are responsible for.

The objective of the government's policy response is to improve the current regime by creating greater incentives for suppliers and manufacturers to comply with their obligations to provide consumer guarantees remedies and supplier indemnification when required.

The government has considered 3 options for consumer guarantees and 4 options for supplier indemnification:

Consumer guarantees – Part A

- Option 1: Maintain the status quo
- Option 2: Education and guidance campaign
- Option 3: Civil pecuniary penalties and enforcement options for not providing a remedy for consumer guarantees failures

Supplier indemnification – Part B

- Option 1: Maintain the status quo
- Option 2: Education and guidance campaign
- Option 3: Civil pecuniary penalties and enforcement options for not indemnifying suppliers
- Option 4: Civil pecuniary penalties and enforcement options for retaliating against suppliers

Having considered feedback from public consultations in 2021 and 2024, and a detailed cost-benefit analysis, it is recommended the Government introduce civil pecuniary penalties and enforcement options for both the consumer guarantee and supplier indemnification obligations (Option 3 in both Part A and B). These options are recommended as they were supported by stakeholders and the cost-benefit analysis and would achieve the government's objectives, including deterring non-compliance by both suppliers and manufacturers. Penalties set should align with those for other key general protections in the ACL such as false or misleading representations and unconscionable conduct.

To support the introduction of penalties, the Australian Competition and Consumer Commission (ACCC), and potentially state and territory regulators, would also be empowered to use the full range of enforcement tools available under the ACL for other key general protections. For example, the ability to issue infringement notices. It is recommended these options be implemented economy-wide (rather than just for motor vehicles) and apply irrespective of the value of the good or service (thus maintaining the monetary threshold set for the broader ACL (i.e. generally purchases under $100,000).

Subject to government budget priorities and processes, education and guidance could be considered as a complement to the introduction of the new civil penalties and enforcement options to help suppliers and manufacturers understand and meet their obligations (Option 2 in Part A and B).

The total cost of implementing civil pecuniary penalties and enforcement options for both consumer guarantees and supplier indemnification is expected to be fully offset by the total benefits. Based on an initial analysis by Deloitte Access Economics (Deloitte) in December 2020, there would be a net benefit of $4.6 billion for consumer guarantees and $194 million for supplier indemnification in net present value (NPV) terms over 10 years to 2031.[1] Treasury analysis undertaken to update figures for 2025 indicate a net benefit of $5.3 billion for consumer guarantees and $225 million for supplier indemnification in NPV over 10 years to 2035 (see Appendix D).

Making changes to the consumer guarantees regime to improve its clarity and fairness is also recommended. This will include removing uncertainty around what constitutes a 'major failure' and introducing the ability of suppliers to depreciate refund amounts when a consumer has had substantial trouble-free use of a good. It will also include a new 30-day rule to ensure that if a problem arises with a good within the first 30 days after receipt, consumers will not be required to prove it has failed a consumer guarantee. The economic impacts of these recommended improvements are relatively smaller and difficult to isolate or quantify when considered against the backdrop of the more substantial structural shifts recommended above. While they have not all been quantified, the changes will contribute to greater fairness and enhance system equity.

Implementation of the recommended options will require legislative amendments to the ACL, which will be considered and agreed in consultation with states and territories in accordance with the *Intergovernmental Agreement for the Australian Consumer Law*.

1 The cost benefit analysis conducted by Deloitte is not published. The estimated figures from that analysis have been adjusted by an inflation factor to illustrate the financial impacts over the next 10 years (2025-2035) and are set out at Appendix D.

Background

Context

Consumer guarantees

The ACL contains a basic set of guarantees for consumers who buy goods and services from suppliers, importers and manufacturers who engage in trade or commerce within Australia, or between Australia and places outside of Australia. These rights are known as consumer guarantees.

The protections provided by the consumer guarantees are available to 'consumers'.[2] A purchaser will be a consumer for the purpose of the transaction if they purchase goods and services for personal, domestic, or household use.[3] In other instances, individuals or businesses will be considered a consumer for the purposes of the transaction because their purchases do not exceed a threshold of $100,000 (subject to other requirements).[4]

If a product or service fails to meet a consumer guarantee (a 'failure'), the consumer[5] will be entitled to a remedy from a supplier, such as a refund, repair, replacement, compensation or cancellation of contract, depending on the type of failure. Consumers may also have a right to claim compensation for consequential loss or damage that is reasonably foreseeable and caused by the failure to meet the consumer guarantee.

The ACL also provides that manufacturers are liable for indemnifying suppliers for the cost of providing the consumer with a remedy where the manufacturer is responsible for the consumer guarantees failure.

The statutory consumer guarantees were introduced in 2011 with the ACL, to replace implied conditions and warranties from the *Trade Practices Act 1974* (TP Act) and State and Territory Fair Trading Acts. As implied warranties, under the TP Act, consumers were expected to enforce their rights in tribunals or courts as breaches of contract. When statutory rights replaced these implied conditions and warranties, they also were framed as private rights enforceable by the impacted consumers or suppliers, rather than being framed as civil prohibitions with penalties.

ACL enforcement

The ACL is enforced by the ACCC and state and territory consumer protection agencies (collectively, the ACL regulators) on a 'one law, multiple regulators' model. Each ACL regulator has a compliance and enforcement policy which details the compliance and enforcement powers and tools available to them under the ACL and supporting legislation. These include court action, infringement notices, enforceable undertakings, administrative resolutions, guidance and education, formal written warnings to a business, dispute resolution, and public warnings or other public statements.

ACL regulators take proportionate action when enforcing the law and may take compliance and enforcement action where they have reasonable grounds to believe that a business has contravened certain consumer protection provisions. Noting that, unlike many provisions in the ACL, such as false or misleading representations, the Consumer Guarantees and Supplier Indemnification (CGSI) provisions are framed as private rights enforceable by the impacted consumer or supplier, rather than

2 The full criteria for the term 'consumer' is set out in section 3 of the ACL.

3 Or because the good being acquired is a vehicle or trailer acquired for use principally in the transport of goods on public roads.

4 For example, that goods are not acquired for resupply (i.e., resale); or transformation in manufacture or repair/treating other goods or fixtures on land.

5 'Consumer' is used throughout the Decision RIS to also refer to business transactions that are covered by the consumer guarantees.

being framed as civil prohibitions in the ACL. This limits options available to ACL regulators in responding to CGSI issues.

About this Decision Regulation Impact Statement (RIS)

In 2021, the previous government undertook consultation on a range of options to improve the effectiveness of the CGSI provisions. The regulation impact statement *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law* sought stakeholder feedback on the relative impact of:

- maintaining the status quo
- a 3-month education and guidance campaign to improve consumers' and businesses' knowledge of the CGSI provisions
- the introduction of civil prohibitions and penalties to:
  - prohibit suppliers from refusing to provide a remedy specified by the consumer for a major failure under the consumer guarantees
  - prohibit manufacturers from not indemnifying suppliers when requested
  - make it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification following a consumer guarantees failure.

Ministers agreed to consider the relative costs and benefits of applying these options across all sectors of the economy and to new motor vehicles only.

On 16 October 2024, the former Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP, announced the government would work with the states and territories and stakeholders to strengthen protections for consumers and small businesses under the CGSI provisions. This included empowering ACL regulators to issue infringement notices or pursue penalties.[6]

Consultation occurred between 16 October to 14 November 2024 to seek stakeholder feedback on the design of proposed new civil prohibitions and penalties. This consultation was initiated to ensure that any proposed enforcement options being considered were both proportionate and effective in ensuring that consumers and businesses can access the remedies they are entitled.

This Decision RIS assesses the impact of the government's proposal to introduce civil penalties and enforcement options to improve the effectiveness of the CGSI regime. The policy options and analyses presented in this Decision RIS were consulted on during the 2021-22 and 2024 consultation process, with some additional matters being considered that arose in consultation.

In assessing the potential costs and benefits of each option, this Decision RIS has been informed by a cost benefit analysis (CBA) undertaken in December 2020 by Deloitte, who were contracted by the Commonwealth Treasury. Noting the passage of time since this analysis was conducted, Treasury assesses that the benefit of updating the analysis does not outweigh the cost, in terms of the time and resources updates would require, for the purposes of making recommendations in this Decision RIS. The legal framework on which the analysis was conducted has not notably changed since the analysis was undertaken as, while there have been amendments to the ACL, they have not had a significant impact on the operation of the CGSI provisions. The institutional and regulatory setting have also not changed significantly in their nature. For example, while penalties where increased in 2022 for many provisions in the ACL, they did not alter the fundamental operation of the CGSI provisions in a way that would undermine the analysis. While there have been changes in the market for consumer goods, particularly in response to COVID-19, and the increasing emergence of online commerce and digitally enabled products, these do not undermine the economic relationships and assumptions used in the

6 Prime Minister of Australia (2024), *Albanese Government to stop the rip offs from unfair trading practices*, Prime Minister of Australia website.

analysis to an extent significant enough to outweigh the costs of updating it. For example, while the costs of consumer goods have increased, so too has the costs of doing business, thus the broad relationship between relative costs and benefits used in the analysis remains broadly valid. Treasury has provided details of the analysis and core assumptions throughout the Decision RIS to support understanding of the decision-making process, along with details of assumptions and summary tables at Appendix C. Deloitte's analysis estimated the costs and benefits in NPV terms for a period of 10 years (2021-2031). To support policy-decision making, Treasury has adjusted the estimated 2021 NPV's of the costs and benefits by an inflation factor, to illustrate the financial impacts over the next 10 years (2025-2035). These figures are presented alongside the original NPV's in the impact analysis section for each policy option, with further detail of the methodology at Appendix D.

Consultation

This Decision RIS is based on two separate consultation processes conducted in 2021-22 and 2024. It uses a mixed approach to reflect stakeholder views from both these consultations to help ensure analysis is as precise as possible, but also reflects the complexity of views expressed in submissions and consultations.

Where submissions presented clear and easily differentiated positions, the Decision RIS uses figures to provide an indication of the number of stakeholders who expressed that position (for example, 6 of 46 submissions). However, as with the nature of the subject matter, many submissions were complex, raised overlapping issues or expressed views in nuanced terms that required interpretation. In these circumstances the Decision RIS uses approximate descriptors such as "almost half" to reflect the general views presented in submissions without conveying a false sense of precision. This approach was used to ensure views were represented fairly and proportionately without over-simplifying nuanced responses.

2021-22 consultation process

On 14 December 2021, the previous government released a Consultation (RIS) seeking stakeholder feedback on options to improve the effectiveness of the CGSI provisions in the ACL. The options included no action (status quo), increased education and guidance, and the introduction of civil prohibitions and penalties. It included analysis undertaken by Deloitte on the total benefits to the economy in net present value (NPV) terms of each option. A total of 46 submissions (including 8 confidential submissions) were received from consumer advocacy groups, consumers, members of the motor vehicle industry and business organisations. Submissions have been published on the Treasury website.

Key themes and findings

Consumer Guarantees

Analysis of the stakeholder feedback received in response to the 2021 Consultation RIS showed little support for the current regime, with just 6 out of 46 submissions in support of the status quo. Some stakeholder submissions expressed concern that the introduction of civil prohibitions and penalties would increase uncertainty and add undue compliance costs for businesses. Business representatives raised particular concerns about the introduction of penalties in an area of law that is open to interpretation and disagreement. Some suggested that there is no need for civil penalties as the existing provisions are adequate and there are already significant incentives for businesses to provide remedies to consumers.

Almost half of submissions supported the provision of greater education and guidance to consumers and suppliers, either as a stand-alone option or in addition to proposed civil prohibitions and civil penalties, to ensure that businesses understand their obligations. The ACCC submitted that educating

consumers has had minimal impact on changing business' compliance. It found that non-compliance with the consumer guarantees is widespread despite the availability of guidance materials and resources. This view was shared by other stakeholders including consumer advocacy groups who indicated that consumers already have access to information on their consumer guarantee rights but face barriers to enforcing those rights.

Around one-third of stakeholders expressly supported the introduction of civil prohibitions and penalties. They considered that civil prohibitions and penalties would incentivise businesses to provide consumers with a timely refund, repair or replacement as required by the ACL. This view was supported by consumer representatives, ACL regulators, some academics and business stakeholders. The significant and growing number of consumer guarantee related contacts received by the ACCC and the ACL regulators was also highlighted by the ACCC as a reason for supporting the reform. Those who supported civil prohibitions and penalties also largely supported their introduction economy wide rather than in relation to new motor vehicles only.

Supplier Indemnification

As with consumer guarantees, a small minority of stakeholder submissions (3 of 46 submissions) advocated for no changes to be made to the current supplier indemnification regime (i.e. maintaining the status quo). Stakeholders who supported the current regime submitted there was limited evidence to justify civil prohibitions and penalties for failure to indemnify suppliers under the ACL, and that matters of indemnity are best administered commercially as between the supplier and relevant manufacturers.

Around one-quarter of stakeholders supported an education and guidance campaign about supplier and manufacturer rights and responsibilities in relation to supplier indemnification. Of the handful number of submissions that commented on the remit of the campaign, the Consumer Electronics Suppliers Association and one confidential submitter preferred a campaign specific to new motor vehicles rather than one that applied economy wide. The Australian Industry Group and the Caravan Industry Association of Australia supported an economy-wide education and guidance campaign.

A number of stakeholders submitted that suppliers often inappropriately bear the cost of providing remedies to consumers and are not reimbursed by recalcitrant manufacturers which fail to comply with their obligations. Stakeholders including the ACCC and the Australian Automotive Dealer Association (AADA) considered that a deterrent is required and supported the introduction of civil prohibitions and penalties to incentivise businesses to indemnify their suppliers in a timely fashion in accordance with the ACL. Those who supported the introduction of penalties largely supported the introduction of penalties economy wide rather than in relation to new motor vehicles only.

Stakeholders expressed mixed views about the introduction of civil prohibitions and penalties for manufacturers who retaliate against a supplier who requests indemnification. While some stakeholders submitted that a prohibition would protect suppliers from retaliatory action, others noted that they were not aware of any instances of retribution or retaliation from manufacturers.

2024 consultation process

On 16 October 2024, the government released a consultation paper *Consumer guarantees and supplier indemnification under the Australian Consumer Law: Consultation on the design of proposed new civil prohibitions and penalties* to inform the development of this Decision RIS. The paper built on the work undertaken in 2021 and sought stakeholder feedback on the design of proposed new civil prohibitions and penalties. Given the significance of the proposed reforms, the government undertook further consultation to ensure the proposed civil prohibitions and penalties would be proportionate and effective in ensuring that consumers and businesses can access the remedies they are entitled.

The consultation ran for 4 weeks and Treasury received 31 submissions (including 4 confidential submissions). As part of consultation, Treasury facilitated 4 online roundtables and 3 bilateral

meetings with key stakeholders from the consumer advocacy groups, motor vehicle industry, academia and business organisations. Non-confidential submissions will be published on the Treasury website.

Key themes and findings

Consumer Guarantees

Stakeholders typically supported the introduction of civil prohibitions and penalties for failure to provide a consumer guarantees remedy as a means of encouraging greater compliance with the consumer guarantees provisions. Persistent non-compliance with the consumer guarantees was identified as a recurring issue for consumers across several different industries and product types, leading most stakeholders to support the introduction of penalties economy wide rather than in relation to new motor vehicles only. Stakeholders also noted that the application of prohibitions and penalties economy wide avoids adding unnecessary complexity to the regime and creating inconsistent approaches across industries.

Around two-thirds of stakeholders called for greater clarity about how the principles-based provisions should be applied, to ensure businesses have certainty about their obligations prior to the introduction of civil prohibitions and penalties. In particular, stakeholders called for greater clarity about when there has been a 'major failure' and when businesses must provide a refund. Most stakeholders agreed the civil penalty amount should be sufficiently high to encourage greater compliance with the consumer guarantees provisions and should be consistent with penalties for other key general protections in the ACL but declined to state a specific penalty amount.

Supplier indemnification

Of those who commented, around one-third of stakeholders supported the introduction of civil prohibitions and penalties to apply to all failures by a manufacturer to indemnify a supplier, and not just in relation to new motor vehicles only. The ACCC supported the economy-wide application of proposed prohibitions and penalties, stating it observes non-compliance across a broad range of industries. It would also simplify compliance obligations and ensure consistency between proposed penalties for contraventions of the consume guarantees and supplier indemnification provisions.

A minority of stakeholders (less than 5) considered that the introduction of prohibitions and penalties was not justified, and that other measures such as education and guidance would ensure manufacturers met their indemnification obligations without imposing undue burdens on them. A small number of stakeholders (less than 5 submissions) considered there is lack of data to justify the imposition of penalties on manufacturers for a failure of manufacturers to indemnify suppliers, or for retaliation by manufacturers against suppliers who request indemnification.

Consistency of language between consultation processes and this Decision RIS

The 2021 consultation referred to a prohibition against not providing a remedy for a consumer guarantee failure, supported by penalties and other enforcement mechanisms. The 2024 consultation referred to prohibitions and penalties for failure to provide a consumer guarantee remedy. Both used equivalent language for supplier indemnification.

This Decision RIS refers to civil pecuniary penalties and enforcement options. The intention of this framing is to reflect that CGSI provisions are already statutory rights available for consumers under the ACL and the policy intent to consider introducing civil penalties and other enforcement options available to ACL regulators under the ACL. Whether this is framed as a prohibition supported by penalties, or a penalty alone, or as enforcement mechanisms, or options, is not intended to alter the

policy intent of the Decision RIS. The exact framing of provisions will be considered during the legislative development phase should the Decision RIS's recommendations be agreed.

What is the identified problem?

The success of the consumer guarantees and supplier indemnification framework depends in part on parties being well informed and acting in good faith: with consumers and suppliers understanding and asserting their rights and suppliers and manufacturers meeting their obligations. However, data from the ACL regulators indicates that consumer guarantees issues are highly prevalent across the economy, with many consumers finding it difficult to obtain remedies from suppliers and manufacturers where there is a consumer guarantees failure.

In 2023, the ACCC received more than 28,000 reports and enquiries about consumer guarantee issues, which represents about 30 per cent of the more than 98,000 total reports and enquiries made to the ACCC in that year.[7] However, this is still unlikely to represent the full scale of consumer concerns, as many consumers do not complain to the ACCC when there is a consumer guarantee failure. According to the *2023 Australian Consumer Survey*, most consumers would only complain if the value of the good was significant, or if the businesses did not respond appropriately to being contacted by the consumer.[8] Of those consumers that would make a complaint, only 30 per cent of consumers said they would complain to the ACCC if they felt a business had treated them unfairly or misled them.[9] Consumers also reportedly spent an average of 13 hours resolving a consumer guarantee problem. They did, however, report they spent less time resolving the problem when it had been resolved to their satisfaction (11 hours), compared to when they felt it had not been satisfactorily resolved (15 hours).[10]

Few consumers are willing, or able, to enforce their rights in a court or tribunal, especially when the cost of court and tribunal fees, legal advice and expert reports may exceed the value of the good or service in dispute.[11] For example, the standard fee for a general consumer proceeding in the NSW Civil and Administrative Tribunal is $62, which may exceed the value of the good or service. Even for higher value goods, the Consumer Policy Research Centre (CPRC) noted in relation to vehicle disputes stakeholder concerns around the fees and other costs for taking a complaint to a court or tribunal as well as concerns around delays and complexity.[12] For example, a used car complaint lodged with the Victorian Civil and Administrative Tribunal can involve more than 60 steps from discovering fault to a consumer receiving a resolution. This can take up to two years, making it difficult for consumers to engage with the process.[13] Other issues faced by consumers in pursuing their rights in a court or a tribunal include the power imbalance between consumers and manufacturers and a lack of information and experience in dealing with the legal system.

As a result, consumers are often unable or unwilling to assert their rights and suppliers and manufacturers have limited incentives to comply with their obligations. Even if consumers do seek to have their rights enforced by a court or tribunal, suppliers and manufacturers will only be liable for what they should have paid in the first place (such as compensation for the reduction in value of the

7 ACCC (Australian Competition and Consumer Commission) (2024), *Broken but out of warranty? Your consumer guarantee rights may still apply*, ACCC website.
8 The Australian Government the Treasury and Kantar Public Australia Pty Ltd (2023), *Australian Consumer Survey 2023 Final Report*, p 38, Australian Consumer Law website.
9 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 40, Australian Consumer Law website.
10 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 73, Australian Consumer Law website.
11 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 40, Australian Consumer Law website.
12 Consumer Policy Research Centre (2023), *Detours and Roadblocks: The consumer experience of faulty cars in Victoria*, p 42, CPRC website.
13 Consumer Policy Research Centre (2023), *Detours and Roadblocks: The consumer experience of faulty cars in Victoria*, pp 4, 25, CPRC website.

good) and damages for any loss or damage suffered. They will not be subject to enforcement actions by ACL regulators (such as a civil penalty) for refusing to provide a consumer guarantees remedy.

The *2023 Australian Consumer Survey* found that in dealing with issues related to the provision of remedies to consumers, the estimated cost to businesses in terms of the value of time spent was $3.12 billion per year. This estimate does not reflect the direct costs incurred by businesses such as costs to repair, replace or refund or legal costs.[14]

The options available to ACL regulators in responding to complaints are currently very limited. Regulators can publish guidance materials for consumers and businesses on their rights and obligations. Such compliance approaches are useful tools for businesses that wish to comply, but do not sufficiently incentivise compliance by all businesses. Regulators can also take enforcement actions for related conduct (such as where a business makes a false or misleading representation about consumer guarantee rights) and can commence representative actions. But these enforcement powers have limitations (discussed further below). They have not been sufficient to encourage greater compliance as evidenced by the large number of contacts made to ACL regulators.

With ACL regulators limited in how they can act, and many consumers unwilling or unable to pursue their rights, unscrupulous businesses have few incentives to act in good faith. This is to the detriment of consumers and competing businesses who do fulfil their obligations under the ACL.

As submitted by the ACCC, and some stakeholders, suppliers also face difficulties and uncertainty in securing reimbursement from manufacturers which could contribute to consumers not receiving the remedies they are entitled to.

There are some existing protections in the ACL that apply to small businesses which can help protect suppliers in business relationships. The unfair contract terms (UCT) regime prohibits the use and reliance on UCTs in standard form small business contracts and imposes a civil penalty regime for breach of these protections. Amendments to the Franchising Code of Conduct in 2015 codified the obligation for all parties to a franchise agreement to act in good faith. This requirement applies to all matters relating to the franchise agreement and the Franchising Code. Further amendments to the Franchising Code of Conduct in 2021 included mandating the automotive best practice principles and explicitly recognising dealers operating as a manufacturer's agent in relation to new vehicle sales. These two regimes, however, do not grant the same explicit statutory rights as the CGSI provisions. Businesses must meet the definition of a small business in the ACL to rely on the protections of the UCT regime and the Franchising Code is sector specific regulation. Thus, while they are considered critical reforms to improve the operation of the ACL, they have not been sufficient to address the problems outlined in relation to the CGSI regime.

Why is government action needed?

Government intervention is needed to ensure that consumers can obtain the remedies they are entitled to, and that suppliers obtain the indemnification they are entitled to. It is also needed to incentivise compliance and to ensure that non-compliant businesses do not obtain a competitive advantage over compliant businesses.

The *2016 Australian Consumer Survey* found that 59 per cent of consumers encountered at least one issue when purchasing a product or service in the past two years, while the 2023 survey found this figure was broadly stable at 61 per cent.[15] Of those consumers surveyed for the 2023 survey who

14 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 114, Australian Consumer Law website.
15 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 46, Australian Consumer Law website.

indicated they had encountered a problem with a product or service, 31 per cent had not yet achieved a resolution to that problem. The majority of these consumers further indicated that they considered it unlikely that their problem would be resolved at that point. Additionally, of the 69 per cent of the consumers surveyed in 2023 who indicated that they had had a problem resolved, 24 per cent of these consumers indicated that they were not satisfied with the resolution provided.[16]

Without government intervention, the current situation is likely to continue, leaving affected consumers and suppliers to enforce their rights directly through a court or tribunal if their attempts to access remedies and indemnification from businesses fail.

Resolving the CGSI issues through an industry-led process, such as voluntary codes, is likely to be less effective. This is as businesses who systemically refuse to comply with their obligations are unlikely to sign up to an industry-led solution, and this would maintain an unfair competitive environment where businesses who meet their obligations are disadvantaged compared to those who do not. Further, voluntary codes often lack robust enforcement mechanisms to sanction non-compliance, which significantly reduces their deterrent effect. As a result, voluntary codes may fail to effectively incentivise or motivate higher levels of compliance with CGSI obligations.

Additionally, there would be inherent complexity involved in developing, implementing, and administering a voluntary code that adequately captures the breadth and diversity of CGSI-related issues. This also suggests that such a code would be an inappropriate mechanism for ensuring compliance across a multitude of products and services.

Given the existing CGSI framework has been in place since 2011, the most efficient way to ensure business compliance with the CGSI provisions is to consider strengthening the current regime which the industry is familiar with and have become accustomed to.

16 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 71, Australian Consumer Law website.

Part A: Receiving remedies under the consumer guarantees

Policy Options, Stakeholder Views and Impact Analysis

Option 1: Status quo

Overview

Maintaining the status quo would involve no improvements to the current arrangements under the consumer guarantees in the ACL. A consumer would remain entitled to seek a remedy from a relevant supplier or manufacturer for a good or service that does not meet any one or more of the consumer guarantees. The supplier or manufacturer would continue to be required to provide an appropriate remedy.

Where a supplier or manufacturer fails to provide a remedy, a consumer could seek to have the right enforced by a court or a tribunal. However, the business will not receive a penalty or other sanction for failing to provide remedies for goods or services that do not meet any one or more of the consumer guarantees.

Stakeholder views

The 2021 Consultation RIS sought stakeholder views on options to improve the CGSI provisions, including the introduction of civil prohibitions and penalties. Feedback on the design of proposed new civil prohibitions and penalties was sought in the 2024 consultation. Approximately half of the submissions did not support the current regime and around one-third of stakeholders supported the introduction of civil pecuniary penalties which is discussed in more detail below.

Impact analysis

This option would not impose any additional regulatory costs. There would be no impact on businesses or consumers thus the problems identified above with the existing system would continue. For example, many consumers would not obtain remedies or would need to spend significant time and resources to obtain one.

Option 2: Education and guidance

Overview

Under this option, ACL regulators would undertake a 3-month education and guidance campaign targeted at suppliers (who sell goods or services in trade or commerce), manufacturers (who create products) and consumers with the aim of:

- Improving suppliers and manufacturers understanding of key consumer guarantees, when these guarantees apply, and the types of remedies to be provided according to the circumstances.
- Improving consumers awareness and understanding of the consumer guarantees, including when they have a right to seek a remedy and the types of remedies they are entitled to, according to the circumstances.

This option could be implemented either economy wide or in relation to new motor vehicles only.

The campaign would provide information and guidance on existing rights, obligations and responsibilities under the consumer guarantees framework. To achieve this, updated and strengthened guidance and education materials would be provided by ACL regulators.

The need for guidance is supported by the *2023 Australian Consumer Survey* which showed that approximately 17 per cent of consumers did not believe the government provides an adequate amount of information and advice about their rights when purchasing a good or service.[17] This indicates an education and guidance campaign would likely assist a large number of consumers to become more aware of their rights, and to better understand and assert their right to a consumer guarantees remedy.

Stakeholder views

Almost half the submissions to the 2021 consultation supported the option of an education and guidance campaign, either as a standalone option or to complement the introduction of a prohibition by civil penalties and other enforcement mechanisms. Approximately one-third of submissions to the 2024 consultation also indicated support for the provision of greater education and guidance material to consumers and suppliers.

This aligns with results from the *2023 Australian Consumer Survey* which also indicated that while around 77 per cent of businesses believe they have a moderate or better understanding of their obligations and responsibilities under the ACL, 22 per cent have either some or minimal/no understanding (16 and 6 per cent, respectively).[18]

For many stakeholders, the provision of greater education and guidance material was seen as only part of the solution. The Law Council of Australia considered that further education would "pay dividends" in terms of assisting businesses who are trying to comply but was unlikely to change the conduct of deliberately non-compliant businesses. Similarly, the ACCC noted non-compliance remained prevalent within the economy, despite the availability of comprehensive resources and guidance materials for both businesses and consumers. A common theme amongst stakeholders was that consumers have access to adequate information on their rights but continue to face considerable barriers in asserting those rights.

Stakeholders were of the view the consumer guarantees regime contained many principles-based provisions with subjective concepts such as 'acceptable quality', 'reasonably durable' and 'major failure' which are open to interpretation. There was widespread support for more detailed and explicit guidance to increase clarity and remove uncertainty for businesses and consumers prior to the introduction of penalties.

Industry stakeholders, such as the Caravan Industry Association of Australia (CIAA), the Consumer Electronics Suppliers Association (CESA) and the Australian Chamber of Commerce and Industry, noted that more explicit guidance could remove ambiguity, improve consistency in interpretation and reduce disputes in areas such acceptable quality and how long a product should reasonably be expected to last.

These views were echoed by consumer advocates including CHOICE, Consumer Action Law Centre (CALC) and the CPRC, which considered the clarification of what durability means (alongside rejection period clarification) is a key area to assist consumers in accessing their rights and welcomed additional guidance from regulators. These views were echoed by National Legal Aid, which considered there is a need for more formal guidance around how long consumers and suppliers can reasonably expect goods to last. They suggested the ACCC issue regulatory guidance which makes reference to specific goods such as motor vehicles and whitegoods.

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17 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 30, Australian Consumer Law website.

18 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 93, Australian Consumer Law website.

In addition, multiple stakeholders commented on the difficulties associated with understanding when a major failure has occurred, as discussed below under 'Major failures'.

Consumer advocates typically agreed additional education and guidance should be provided in addition to the introduction of civil penalties and enforcement options as set out in Option 3. Advocates noted the introduction of a prohibition and penalty regime would lead to increased judicial consideration, resulting in judicial precedents and greater clarity of the law. The Australian Small Business and Family Enterprise Ombudsman (ASBEFO) highlighted that a supportive regulatory approach that focuses on guidance and education would be a critical element if any penalties are introduced.

Stakeholders expressed widespread support for education and outreach activities which raise awareness about any new civil penalties. The ACCC's submission confirmed that if new civil penalties are introduced, it will undertake education, outreach and compliance activities regarding the changes, including engagement with stakeholders and the updating of guidance material.

Impact Analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of an economy-wide education and guidance campaign without regulatory change. The benefits to consumers for this option were estimated to be $41.1 million in NPV terms over 10 years to 2031 (See Table 1 for updated NPV to 2035). This is from consumers taking action to pursue a remedy and receiving the benefit of the good or service that was not functioning in instances where they otherwise would not have. Deloitte based these benefits on the willingness to pay/price of the good. See Table 1 for updated 2025 Treasury figures.

In terms of costs, this option was estimated to increase costs by $23 million in NPV terms over the 10 years to 2031 (See Table 1 for updated NPV to 2035). This includes costs to consumers of time and resources spent pursuing additional remedies they would otherwise not have pursued. It also includes increased costs for businesses associated with providing more remedies, spending additional time serving customers that would otherwise not have sought a remedy.

This option was estimated to result in a net benefit of $18 million in NPV over the 10 years to 2031 (See Table 1 for updated NPV to 2035). It estimated a benefit to cost ratio of 1.8. Identified benefits of an education and guidance campaign included potential reduction in the knowledge barriers some consumers face in asserting their rights, empowering them to pursue remedy claims and better negotiate with businesses armed with enhanced understanding of the consumer guarantees regime. In conducting this analysis Deloitte assumed the target of an education campaign would be the 15 per cent of consumers who reported in the *2016 Australian Consumer Law Survey* that they do not take action to resolve a problem because they were unsure where to go to for advice.[19] It assumed they would only take action where the price of the good exceeded the anticipated time accessing the remedy assumed to be two hours, or $65.

For suppliers and manufacturers, it is suggested the raised awareness and understanding of key consumer guarantees could assist in the recognition and determination of when a failure is considered major and increased awareness of remedy obligations flowing from that recognition, with a subsequent increase in compliance. However, this effect was not quantified by Deloitte in the resulting from education and guidance impact analysis.

A substantial amount of educational and guidance material on the ACL's consumer guarantee regime is provided by ACL regulators through either the ACCC or State and Territory consumer protection and fair trading agency websites. This range of material is targeted at both consumers and businesses and

19 The Australian Government the Treasury and EY Sweeney (2016) *Australian Consumer Survey 2016*, p 45, Australian Consumer Law website.

has been complemented over time by regulator education campaigns, information provided via enquiry lines, social media and industry engagement.

However, while these educational and guidance resources assist suppliers, manufacturers and consumers in gaining an understanding of the consumer guarantee provisions, many consumers still find it difficult obtaining a remedy when they are entitled to one. According to the *2023 Australian Consumer Survey*, 42 per cent of consumers were not satisfied with the response from a business when they had a problem with a product.[20]

Improving consumers' understanding of their rights does not necessarily mean the compliance of businesses with their consumer guarantee obligations will increase. While it could assist consumers when dealing with businesses in being aware of and asserting their rights, it will not, on its own, change the behaviour of those businesses, who while they may be aware of their obligations, continue to deliberately engage in non-compliance with consumer guarantees obligations for financial gain.

Table 1: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

	Deloitte CBA Estimate (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Benefits	41.1	47.7
Costs	22.9	26.6
Net benefit	18.1	21
Benefit to cost ratio	1.8	1.8

Option 3: Civil pecuniary penalties and enforcement options for not providing a remedy for consumer guarantees failures

Overview

This option will amend the ACL to introduce a civil pecuniary penalty and enforcement options if suppliers do not provide remedies for consumer guarantee failures when required under the law. This will allow:

- courts to impose a civil pecuniary penalty and/or make other orders such as granting an injunction to require businesses to act, or refrain from acting, in a certain way if the ACL regulators pursue litigation
- the ACCC (and potentially state and territory regulators) to exercise the full range of their existing ACL enforcement powers and compliance tools for other key general protections such as false or misleading representations, to address alleged contraventions, including accepting enforceable undertakings and issuing infringement notices.

This option was considered both economy wide and in relation to new motor vehicles only.

Stakeholder views

Civil pecuniary penalties

The ACCC and other ACL regulators have consistently highlighted that their actions to encourage compliance are indirect and less effective for consumer guarantees compared to other ACL

20 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 66, Australian Consumer Law website.

protections. The ACCC submitted that they have been limited in their ability to take direct action on consumer guarantee issues and must instead rely on related provisions such as false or misleading representations or, in rare instances, unconscionable conduct which do not deal with the core issue of businesses not providing consumers with the remedies they are entitled to. While ACL regulators can take representative actions on behalf of individuals, such proceedings are both time-consuming and costly, and the impact of such proceedings is limited to the remedy sought by the consumer(s) involved (repair, replacement or refund and potentially damages). These actions are also unlikely to provide any broader specific or general deterrent effect and therefore would not assist in improving compliance more broadly. In its 2021 *Right to repair* inquiry report, the Productivity Commission concluded that representative action powers for the ACCC are unlikely to drive better outcomes for consumers at a systemic level due to the case-specific nature and barriers to running such actions (e.g. some consumers may not be willing or able to invest significant time and effort to assist the regulator).[21]

Consumer groups, academics and the ACCC typically supported the introduction of penalties as a means to incentivise businesses to comply with their obligations and ultimately assist consumers and small businesses to enforce their rights. These stakeholders considered that penalties should apply to all failures to provide a remedy when a business is required to under the law, regardless of whether the relevant failure to meet the consumer guarantee was a major failure. Stakeholders submitted that a systemic refusal to remedy non-major failures could cause significant detriment and that application of a civil penalty to all failures would ensure the law is easy to understand and apply to all affected stakeholders. Others claimed that potential penalties should only apply to major failures to meet consumer guarantees obligations as this would target businesses who fail to meet substantial obligations, allowing for tolerance of minor issues.

Stakeholders who did not support the introduction of penalties, including those from the automotive industry, typically submitted that there was a lack of certainty about when a consumer is entitled to a remedy, and that this uncertainty was the main issue rather than any deliberate refusal to provide remedies. They submitted that greater clarity was required for the principles-based provisions to operate effectively, and that the rights of consumers and responsibilities of businesses should be clarified before penalties are introduced. Stakeholders such as the Motor Trades Association of Australia (MTAA) and Federal Chamber of Automotive Industries (FCAI) also considered that there were limitations in the generalised consumer data from the *2023 Australian Consumer Survey* and the ACCC, and that it did not provide a sufficient evidence base to justify the introduction of penalties applicable to the automotive industry.

Law Council of Australia raised concerns that the introduction of civil penalties for failure to provide a consumer guarantee remedy will mean that regulatory authorities must adjudicate on private disputes between suppliers or manufacturers and consumers. A small number of stakeholders questioned whether regulators are best placed to resolve such disputes, citing a potential lack of technical knowledge for them to assess potential faults in some products to enable the formation of appropriate view on alleged contraventions.

Stakeholders presented mixed views about the likely impact on consumer behaviour if civil penalties were introduced. Several industry stakeholders considered that new civil penalties would encourage consumers to seek remedies under the consumer guarantees when they did not have a valid claim, and that businesses would be pressured to comply, despite an unmeritorious claim, given the threat of enforcement action by regulators. While several examples were provided from members of the automotive industry in confidence, the FCAI reported there are instances where a consumer has sought to enforce consumer guarantee rights when a vehicle has been used for more than 10 years.

21 Productivity Commission (2021), *Right to Repair*, Inquiry Report no. 97, p 108, Productivity Commission website.

The MTAA also submitted that dealerships are seeing unmeritorious claims being driven by buyer's remorse or financial hardship. Other examples provided by automotive industry stakeholders include consumers making unjustified claims for refunds which arose from their failure to perform proper maintenance and the way consumers drove their vehicle (e.g. racing the vehicle when that type of use is expressly prohibited and not covered by the manufacturer). In some cases, dealers provided refunds (either in full or less any amount consumers owed the financier, or at market rates) while in other cases, the matter was heard by a tribunal. The frequency of these claims being made is not clear from the submissions.

In contrast, consumer advocates, government bodies and legal stakeholders submitted that a majority of consumers and suppliers only want what they have paid for, and that the time and costs involved discourage consumers from seeking a remedy unless they have a genuine entitlement to do so. They made the further point that regulators will only pursue enforcement action when justified, and that businesses will retain the right to refuse illegitimate claims. The Telecommunications Industry Ombudsman posited that as the pursuit of penalties would only be available to regulators, it would not be open to consumers to abuse the penalties provisions to make unreasonable claims. The ACCC submitted that there is little objective data or evidence to substantiate the view that consumers or suppliers are making unmeritorious consumer guarantee claims.

Amount of penalty

When it came to the amount of any penalty, ACL regulators and academics recommended that maximum civil pecuniary penalty amounts be aligned with other key ACL contraventions. Consumer advocacy groups called for significant maximum penalties to provide a strong deterrent effect, noting that litigation would only be used in serious cases.

These stakeholders shared the view that it is unnecessary to set different penalty amounts based on the monetary value of the goods and services. They noted the potential confusion it would cause for consumers, suppliers and manufacturers and submitted that the level of harm and deterrence required will not turn on the value of the related goods or services.

ACL regulators considered that penalties should not be limited to high-value products, nor should there be different maximum penalty amounts for goods and services based on a monetary threshold. They posited that consumer guarantee failures for low-value goods can still cause significant detriment to consumers. The ACCC noted that courts are well-versed at determining the appropriate penalty to set in any particular case following consideration of well-established factors.

Some industry groups provided an alternative viewpoint and considered that penalties must be proportionate to the value of the goods or services involved. The Australian Retailers Association stated that where penalties are warranted, they should only apply to cases involving high-value goods or services with clear evidence of consumer detriment to minimise enforcement actions for lower-value items. CESA considered that higher penalties for high-value goods and services would serve as a stronger deterrent, and that setting different maximum penalties based on a monetary threshold would allow for a more tailored enforcement mechanism.

For reference, the maximum civil pecuniary penalty set for other key general protections in the ACL such as false or misleading representations and unconscionable conduct is set out in section 224 of the ACL. For a corporation, the maximum pecuniary penalty would be the greater of $50 million, or if the court can determine the value of the benefits reasonably attributable to the contravention, 3 times that value. If the court cannot determine the value of the benefits, it is 30 per cent of the company's adjusted turnover during the breach period for the relevant contravention. For an individual, the maximum pecuniary penalty is $2.5 million.

Infringement notices and other enforcement options

The ACCC and consumer advocacy groups considered that regulators should have the full range of compliance and enforcement powers available and that the prospect of receiving a fine may have a deterrent effect without having to proceed to court.

Around one-third of stakeholders including academics, ACL regulators, industry groups and the AADA, submitted that the ACCC should be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy.

Industry and retail groups including CESA and the Australian Retailers Association supported the use of infringement notices as a lower level alternative to court-imposed pecuniary penalties if penalties are implemented.

Stakeholders typically advocated for infringement notice penalty amounts to be aligned with other key general protections in the ACL, such as false or misleading representations and unconscionable conduct. Others supported infringement notice penalties which were commensurate with the value of the good or service, or the severity of the breach.

Some stakeholders such as the FCAI and the Australian Travel Industry Association posited that disputes between consumers and businesses are often not straightforward and are therefore not appropriate for an infringement notice scheme. It was further argued that alleged failures to provide a remedy do not form a proper basis to issue infringement notices and that it would not be reasonable to expose suppliers and manufacturers to the risk of pecuniary penalties for failing to apply concepts over which reasonable minds may differ.

The penalties that may be specified in an infringement notice for alleged contravention of a civil penalty provision in the ACL are generally lower than the maximum pecuniary penalty that may be imposed by a court for contravention of the related civil penalty provision and are regularly indexed.[22] There is no legal obligation on a party to pay an infringement notice penalty, but non-payment may expose them to the prospect of proceedings arising from the ACL regulator's concerns that the party may have contravened the ACL. The payment of an infringement notice penalty is not an admission of guilt or reflect a court sanction.

Under section 134C of the *Competition and Consumer Act 2010* the ACCC must issue a penalty notice for penalty units equal to the amount specified by the legislation. This aligns with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which outlines the officer issuing the notice should not have discretion as to the amount that may be specified in the notice.

For reference, in many cases, the penalty amount to be specified in an infringement notice in relation to an alleged contravention of the ACL, for example for making false or misleading representations, is:

- $19,800 (60 penalty units) for corporations
- $198,000 (600 penalty units) for listed corporations
- $3,960 (12 penalty units) for individuals.

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of enabling enforcement action to be taken against suppliers who do not provide a remedy for a consumer guarantee failure when required under the law. This option would enable ACL regulators to use the full range of their existing ACL enforcement powers and compliance tools for other key general protections to address alleged contraventions of the consumer guarantees. This would include court action seeking penalties and/or other orders such as injunctions, issuing infringement notices,

22 Penalty amounts for infringement notices are calculated by reference to the value of a penalty unit prescribed by the *Crimes Act 1914*. The current value of a penalty unit is $330 for offences or contraventions committed on or after 7 November 2024.

accepting enforceable undertakings, reaching administrative resolutions, cautions to businesses to act, or refrain from acting, in a certain way.

The 2021 analysis proposed that businesses would be more likely to comply with the consumer guarantees under this option and estimated that the proportion of consumers receiving a remedy would increase by one per cent per year from 71 per cent in 2020-21 to 81 per cent in 2030-31.

The total benefits to consumers for this option was estimated by Deloitte to be $5.8 billion in NPV terms over 10 years to 2031 (see Table 3 for updated NPV to 2035). This is primarily from consumers receiving the benefit of a good or service that was not functioning. Deloitte based these benefits on the willingness to pay/price of the good and equates to $3.1 billion of the total benefits. The benefits to consumers also included spending less time and resources pursuing remedies. See Table 3 for updated 2025 Treasury figures.

The total costs to businesses were estimated to be $1.2 billion in NPV terms over the same period (see Table 3 for updated NPV to 2035). This includes increased costs for businesses associated with providing more remedies to consumers and regulatory costs. The regulatory cost to business was estimated at $44.8 million in the first year, with no ongoing costs. This cost was calculated by assuming every retail employee would be required to undergo 30 minutes of training, at the expense of the suppliers, to understand the new regulatory requirements. Where businesses do not fulfil their consumer guarantee obligations – i.e. where no remedy is provided – business would potentially face a fine or penalty. The Deloitte analysis included this as a cost to business, estimated at $33 million, with this amount also forming revenue to government. Thus, this is a transfer from business to government.

The analysis found the total costs would be fully offset by the total benefits with a net benefit of $4.6 billion in NPV terms over 10 years to 2031 if applied economy wide (see Table 3 for updated NPV to 2035).[23] It estimated a benefit to cost ratio of 4.7. This benefit is largely derived from more consumers being likely to receive the remedies they are entitled to (the benefit of a functioning good or a refund) and consumers spending less time and resources pursuing remedies because of improvements to business compliance.

There is a risk that costs associated with penalties could be passed on to consumers via increased prices for goods and services. However, such costs are small relative to the total benefits received from consumers. Currently, consumers are already absorbing the loss of welfare from faulty goods they cannot use when they cannot obtain a remedy. Increased quality of goods and services and better consumer perceptions that businesses are providing remedies can also benefit businesses through improved consumer confidence and increase the likelihood of further sales.

Penalties and associated enforcement powers will give ACL regulators a means to drive greater compliance with less reliance on consumers incurring time and cost in enforcing their consumer rights. It will also create a fair playing field for businesses, helping to ensure non-compliant businesses do not gain a competitive advantage by avoiding compliance costs and undercutting their competitors.

Table 2: Regulatory burden estimate[24] table for Part A, Option 3

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$4.48	-	-	$4.48

23 For more information on how these benefits and costs were calculated, please refer to pages 43-48 of the 2021 Consultation RIS, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

24 Note: the regulatory burden measure has been estimated across whole-of-economy. The regulatory burden is anticipated to be less if applied to new motor vehicles only.

Table 3: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

		Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Economy wide			
Benefits	Consumers*	5755	6681
	Government Revenue	33.5	38.8
	Total	5788.4	6720
Costs	Businesses	1221.2	1417.7
Net benefit		4567	5302.2
Benefit to Cost ratio		4.7	4.7

**This includes the benefit to consumers for the good (willingness to pay,) which was estimated by Deloitte at $3.1 billion in NPV terms for 2021-2031 (which is $3.6 billion in NPV terms for 2025-2035). Note: sums may not add to totals due to rounding adjustments.*

Economy wide or for new motor vehicles only

Overview

The 2021 Consultation RIS noted the high incidence of consumer complaints relating to new motor vehicles evident in the *2016 Australian Consumer Survey,* and the volume of consumers contacting the ACCC in relation to concerns about new motor vehicles. As a result, the 2021 Consultation RIS and the 2024 consultation sought stakeholder views on the net benefit of civil prohibitions and penalties which applied both economy wide and for new motor vehicles only.

Statistics provided by the ACCC indicate that there were 28,684 consumer guarantee related contacts to the ACCC in 2023. Of these, there were 6,760 consumer guarantee related contacts (24 per cent) related to the automotive industry, with a similar number of contacts (6,232 contacts; 22 per cent) received in relation to electronics and consumer whitegoods. The ACCC noted that consumers experience issues exercising their consumer guarantee rights across a broad range of industries and that the issues are not confined to new motor vehicles only.

Stakeholder views

Stakeholders including academics, legal centres and ACL regulators supported the introduction of civil penalties which apply economy wide rather than in relation to new motor vehicles only. It was submitted that non-compliance with consumer guarantees is observed across the economy, and that restricting penalties to motor vehicles will address only a part of the wider problem, while sending an improper signal to industries who are already reluctant to provide a remedy. Emeritus Professor Philip H Clarke raised concern that such restriction would undermine ACL's universality and purpose of ensuring consistent protections, obligations and responsibilities, across the economy.

Stakeholders from the automotive industry largely opposed penalties entirely. They considered that there was a lack of evidence for any alleged problems in the new motor vehicle industry and considered that more onerous regulation than other industries was unwarranted. CESA supported the application penalties to new motor vehicles in the first instance, to determine the effectiveness of the new regime before it is expanded economy wide.

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of enabling enforcement action to be taken against suppliers who do not provide a remedy for a consumer guarantee failure economy-wide and to the new motor vehicle industry only.[25]

The 2021 analysis indicates that the net benefit and benefit cost ratio are significantly higher for the introduction of civil penalties for consumer guarantees economy wide, compared to new motor vehicles only. Economy-wide was estimated to create a net benefit of $4.6 billion in NPV terms over the 10 years to 2031, compared to $413 million over the same period for new motor vehicles only (see Table 4 for updated NPV to 2035). The benefit to cost ratio for economy-wide civil penalties was estimated to be 4.7 compared to 2.8 for new motor vehicles only. A table setting out the net benefits and benefit cost ratio for proposed options can be found at Appendix D.

The difficulties in suppliers obtaining indemnification in the new motor vehicle industry indicate that civil penalties would have a pronounced impact in this industry compared to the rest of the economy. This sentiment is reflected in feedback received by motor dealer stakeholders who indicated that obtaining indemnification is particularly difficult for independent dealers, including small to medium dealerships that may not have the resources to navigate manufacturer requirements for indemnification. The issue of indemnification is discussed further in Part B.

Table 4: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

	Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Motor Vehicle Only		
Benefits	643.4	746.9
Costs	230.6	267.7
Net benefit	412.8	479.2
Benefit to cost ratio	2.8	2.8

Note: sums may not add to totals due to rounding adjustments.

High-value vs low-value goods and services

Overview

The value of goods and services can influence the impact on consumers of any consumer guarantees failures, as well as a consumer's inclination to seek a remedy. As raised by the ACCC, there is a widespread failure of low--value goods which do not get remedied. While the cost to individuals may be relatively low, the aggregate cost to consumers and the economy can be significant, and noncompliant businesses are likely to receive a windfall gain by not providing a remedy for low-value goods and services which consumers are unlikely to pursue. Businesses who do not comply may also have a competitive advantage over other businesses who provide consumers with the appropriate remedies-.

Stakeholder views

Responses to the 2024 consultation indicated that the ACL should prohibit suppliers from failing to provide a consumer guarantees remedy in relation to all goods and services, and not just goods and services above a specified value. Stakeholders including consumer advocacy groups, academics, ACL regulators and industry groups considered that limiting the application of CGSI penalties to high-value goods and services would create two separate regimes, further complicate the law and risk leaving consumers on low incomes with less protections when they experience a failure with a good or service. It was noted that the application of penalties to all goods and services would make the regime

25 For more information on how these benefits and costs were calculated, please refer to pages 37-48, 59-73 of the 2021 Consultation RIS, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

easier to understand and ensure that even low-value goods are safe and are of acceptable quality. A concern was also raised that introducing a value threshold would be arbitrary, given that the value of a specific good or service is relative for individual consumers.

Some industry groups recommended that where penalties are warranted, there should be a focus on high-value goods, while a number of stakeholders from the automotive industry noted that there is no need to have larger penalties for high-value goods and services as consumers are already more likely to pursue consumer guarantees remedies for these goods and services. The MTAA stated that the ACL is working as intended and that what needs to be considered is a higher penalty regime for repeatedly non-compliant manufacturers and litigants who "look to game the system".

Impact analysis

A consequence of manufacturers and suppliers not complying with their CGSI obligations is the transfer of costs to consumers and small businesses. The time, energy and associated costs involved in pursuing action in a court or tribunal means that consumers are less likely to enforce their rights for low-cost items. This leaves consumers who are entitled to a remedy to bear the cost of the failure.

The *2023 Australian Consumer Survey*[26] showed that more than half of those surveyed (58 per cent) would be more likely to make a complaint if the value of the product or service was significant, with $389 or more considered the average significant amount. The survey also showed that consumers spent an average of 13 hours resolving their problem – which likely drives the result that consumers are more likely to take action for high value goods. While 72 per cent of consumers took action to resolve their problems, of the 28 per cent who did not take action, the majority said it was not worth the effort (36 per cent) or time involved (30 per cent), with the remainder citing a lack of confidence that taking action would solve the problem (27 per cent) or that it was not worth the cost involved (22 per cent).[27]

Restricting regulator action to high-value items would perpetuate this observed trend that consumers are less likely to seek consumer guarantees remedies for low-value goods. This is even though a single 'low value' good may be quite significant to an individual in the context of their personal spending capacity and it may represent a high overall percentage of spending for many individuals. Businesses that sell large volumes of low-value goods may also be benefiting at-scale from not providing remedies for breaches of consumer guarantee requirements.

The impact on suppliers and the value threshold of goods is discussed in the section on supplier indemnification below.

Improvements to the law to support the introduction of penalties and enforcement options

Major failures

Overview

When a good or service does not meet one or more of the ACL's consumer guarantees, the remedy available to the consumer depends on whether there has been a major or a non-major failure. For goods that suffer a major failure, consumers are entitled to their choice of a refund, replacement or repair. For non-major failures, businesses are entitled to their choice of providing consumers a refund, replacement or repair. For services, consumers are entitled to cancel the services and get a refund for

26 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 38, Australian Consumer Law website.
27 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 65, Australian Consumer Law website.

the part of the service not already provided or consumed or keep the contract and get compensation for the difference in value.

Section 260 of the ACL defines when a failure to comply with a guarantee is a major failure for a good. The corresponding provision for services is section 268. In summary, a major failure is one where a reasonable consumer, fully acquainted with the nature and extent of the failure, would not have acquired the goods, the goods are unsafe, the goods are substantially unfit for purpose and cannot be made fit in a reasonable time, or the goods depart significantly from the demonstration model or sample. Section 268 provides a similar definition of major failure for services.

Stakeholder views

A key concern for stakeholders is the difficulty in determining when a failure to comply with a consumer guarantee is a major failure, due to uncertainty about how to interpret and apply the criteria in section 260. A range of stakeholders shared this concern, particularly in the context of the government potentially introducing pecuniary penalties for businesses who do not provide consumers a remedy when required. Out of 31 submissions, around half supported either amendments to the ACL or introducing further guidance to clarify the meaning of a major failure.

The ACL regulators submitted that there are many misinterpretations on the meaning of major failure. The ACCC for example noted that many businesses determine whether there has been a major failure by considering whether the fault is repairable, which is not consistent with the ACL.

Consumer advocates submitted that determining whether there has been a major failure is a key cause of disagreement between consumers and businesses, to the detriment of consumers. CHOICE and other advocacy groups supported industry-specific guidance on what constitutes a major failure, as many businesses set the standard for what constitutes a major failure too high. National Legal Aid similarly supported further guidance to provide greater clarity, as businesses can take advantage of their power imbalance with consumers to either not provide the entitled remedy or repeatedly offer a repair.

Most legal stakeholders pointed out that determining whether a major failure has occurred is inherently uncertain and subjective, with submissions providing suggestions to improve clarity. Care Consumer Law proposed clarifying that a reasonable consumer was an objective test. The Law Council of Australia support adding a section to the ACL with criteria or examples of major failure, similar to the ACL's unfair contract terms section which sets out examples of the kinds of terms within a consumer or small business contract that may be unfair. Alternatively, the legislation could set out the matters a court may have regard when making a decision, consistent with the provisions relating to unconscionable conduct.

Many industry stakeholders have similarly expressed support for either legislative amendment to the meaning of major failure or further guidance for businesses and consumers. The AADA noted that amending the ACL to clarify the definition of major failure, which is central to the consumer guarantees process, could reduce supplier uncertainty and improve consumer outcomes.

While many stakeholders submitted that the definition of a major failure is ambiguous or confusing, some stakeholders specifically identified section 260(1)(a) as a key source of uncertainty. Section 260(1)(a) states that a failure to comply with a consumer guarantee that applies to a supply of goods is a major failure if 'the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure'. There is also an equivalent provision in section 268(1)(a) for services however most stakeholder feedback was focused on section 260(1)(a) relating to goods.

For example, the AADA identified section 260(1)(a) as the key criteria that causes greatest issue, stating that its potential broad interpretation means that 'consumers could claim that almost any defect, even minor ones, constitutes a major failure'. Similar sentiment was expressed by various stakeholders, including the Law Council of Australia, Consumer Care Australia, the FCAI and CESA (and

others), who all suggested section 260(1)(a) can be difficult for consumers or business to understand and apply.

As Professor Jeannie Paterson and Eleanor Twomey from the University of Melbourne note in their submission, "on one view, consumers would never choose to acquire defective goods even if the defect was minor in nature (undermining the purpose of the major failure criteria)". To alleviate uncertainty for consumers and suppliers, Professor Paterson and Ms Twomey noted this criterion could be removed.

Impact analysis

Removing some uncertainty from the definition of major failure

The consumer guarantees under the ACL are principles-based obligations and provide for general obligations across markets that can be applied flexibly to a range of industries and products, and can adapt to new technology and evolving markets.

Principles based standards are used in many parts of the ACL, many of which attract penalties for non-compliance. For example, provisions within the ACL that protect against misleading or deceptive conduct and unfair contract terms provide for principles-based rules that can be interpreted and applied flexibly, and which are subject to penalties for non-compliance.

A level of uncertainty is inherent in principles-based laws, with the alternative approach being prescriptive laws that set out specific obligations and duties. This more prescriptive approach may provide for additional certainty for a time. However, its inflexibility may mean the law does not necessarily respond to market and societal developments, potentially resulting in outcomes that may not fully capture the intention of the regulation or that may be perceived as undesirable or unjust.

While it isn't possible for all uncertainty to be removed from the major failure provisions, legislative reform could simplify and clarify section 260(1)(a) and section 268(1)(a) to mitigate a significant source of uncertainty in determining whether there has been a major failure. As some stakeholders suggested, section 260(1)(a) can cause uncertainty because a common interpretation of this criterion can be that a reasonable consumer would not purchase any product with a known fault at full price where another, similar product is available. As such, it is possible that some consumers may interpret that any fault is considered major under this definition. Business stakeholders have also reported there can be uncertainty on how to interpret this provision and can find it challenging in determining what their obligations are as a result. Inconsistent interpretation and application of this provision can lead to inconsistent consumer outcomes. For example, one business may offer to repair a product as they do not consider the failure to be major, even if a consumer asks for a refund or replacement in the belief it is major. A different business may offer a refund or replacement as they are uncertain about what they are required to do under the ACL. While some businesses may offer a refund or replacement for reasons outside of the consumer guarantees, inconsistent application of statutory rights is not a good outcome for consumers.

Treasury considers the economic impact of clarifying when a major failure has occurred is relatively smaller and difficult to isolate or quantify when considered against the backdrop of more substantial structural shifts in relation to introducing penalties and enforcement options discussed above. As such, the economic impact on behaviour, costs, or benefits were not quantified. Alternatively, a qualitative description of the expected impacts is outlined below.

Amending these provisions may result in consumers needing to rely on the other criteria in section 260 and 268 to show there has been a major failure. For example, for goods they may particularly rely on section 260(1)(c). Section 260(1)(c) states there is a major failure if 'the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose.' There is an equivalent provision for services in section 268(1)(b).

Amendment to these provisions may therefore place greater emphasis on a failed good's repairability or the ability to remedy a service. This is because as, under the status quo, many consumers can currently claim they would not have purchased the good/service if they were acquainted with the nature and extent of the failure, regardless of whether the good is able to be made fit or service remediable. As amending section 260(1)(a) and section 268(1)(a) may narrow the definition of a major failure, consumers may be more likely to receive a repair rather than a refund or a replacement good when there is a problem with a product.

Placing a greater emphasis on repairing or making fit a product or service may increase the financial, social or emotional burden on consumers who may otherwise have received a refund or replacement product when pursuing a remedy. While the introduction of civil penalties will improve business compliance with consumer guarantee remedy obligations, there will still be circumstances where consumer will need to pursue their own actions to obtain a remedy. Amending section 260(1)(a) and section 268(1)(a) may result in consumers having less grounds to seek a remedy.

There may also be a cumulative impact if other improvements of the law are also introduced, such as depreciation. Thus care will need be taken to account for any cumulative impact if changes are introduced through careful drafting and guidance materials.

The *2023 Australian Consumer Survey* found that in dealing with issues related to the provision of remedies to consumers, the estimated cost to businesses in terms of the value of time spent was $3.12 billion per year (this estimate does not reflect the direct costs incurred by businesses such as costs to repair, replace or refund or legal costs).[28] Making it easier to determine whether a good or service has suffered a major failure by removing the uncertainty in the text caused by section 260(1)(a) and section 268(1)(a) will likely lead to fewer disputes between businesses and consumers. This would mean lower compliance costs for businesses from seeking legal advice for disputes and potentially having to provide consumers with fewer refunds and replacements for faulty goods.

Placing a greater emphasis on repairing or otherwise making fit products may also have added benefits for the environment by supporting the repair of products in line with the government's circular economy framework.[29] For services they may also be more likely to obtain remediation of the service rather than a refund. Consumers will benefit from greater clarity in the ACL and will still receive a repair/remediation remedy if a good or service does not meet one of the consumer guarantees but does not meet the criteria for a major failure. Consumers with goods that meet the criteria for a major failure will still receive a refund or replacement good or the equivalent remediation for a service.

Clarifying that there is a major failure where the goods are unfit for any purpose the supplier represents that they are reasonably fit

Section 260(1)(d) states that a major failure occurs where goods are unfit for a purpose made known to a supplier, presumably by the consumer. Section 260(1)(d) does not clearly apply to situations where the goods are unfit for a purpose that was made known to the consumer, for example by advertising or other claims made by the manufacturer or supplier (for example, statements made by a sales representative), unless the goods are unfit for a purpose for which such goods are 'commonly supplied'. An equivalent lack of clarity also exists in the equivalent limbs of the major failure definition for services under section 268(1).

Clarifying that there is a major failure where the goods/services are unfit for any purpose for which the supplier represents that they are reasonably fit will help ensure that goods/services perform as

28 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 114, Australian Consumer Law website.

29 DCCEEW (2024), *Australia's Circular Economy Framework*, p 4, the Department of Climate Change, Energy, the Environment and Water website.

described by suppliers. This proposed amendment is consistent with criteria in section 260(1)(b) that goods match their description and any sample or demonstration model. This clarification is expected to benefit from consumers who rely on claims made by manufacturers or suppliers when making a purchasing decision but later discover the good or service is not fit for that purpose. It is expected to cost suppliers that make claims that are not supported by the actual performance of the good or service in terms of providing increased remedies to consumers. While this impact is not expected to be large, it is expected to promote greater consistency within the major failures definition and lead to fairer outcomes for consumers.

Depreciation

Overview

Where there is a major failure with a good, consumers are entitled to their choice of a replacement, repair or a refund of the original purchase price, even when the consumer has had trouble-free use of the product for many months or years.

Business stakeholders, particularly those from the automotive industry, raised concerns that this is unfair as the quantum of remedy that a consumer is entitled to does not consider a consumer's use of the good, its general condition and its depreciated value over time. Business stakeholders have advocated for the usage of a good to be factored in when determining the refund amount provided to a consumer when they reject a good and seek a refund as the remedy.

Several overseas jurisdictions allow for the consideration of the usage or depreciation of a good when determining a reimbursement amount when a consumer is entitled to a refund, though with differing terminology. For example, section 24 of the *Consumer Rights Act* 2015 (UK) allows businesses to reduce the amount refunded to a consumer, to account for the consumer's use of the good after 6 months. The EU's consumer protection legislation (Directive 2019/771), allows for a partial refund if a good cannot easily be repaired or replaced, proportionate to the decrease in value of the goods.

Stakeholder views

The 2024 consultation sought feedback on whether the ACL should be amended to permit businesses to deduct an amount from a consumer guarantees refund following a major failure, to account for a consumer's trouble-free use of the good. It asked stakeholders whether they considered it appropriate to factor in depreciation when determining an appropriate refund amount when a major failure has occurred. It also asked, if depreciation was to be introduced, what circumstances would be appropriate to factor into depreciation and how a refund would be calculated.

Some industry stakeholders support the inclusion of depreciation to determine refund amounts. They suggested that depreciation recognised the benefit obtained by a consumer's use of a product over time and created a fair balance between protecting consumer rights and maintaining the economic viability of businesses.

This view is particularly prevalent amongst motor vehicle industry representatives, including the AADA, the MTAA and the FCAI. They further suggest that the current regime is unfair to suppliers and manufacturers who are required to provide a full refund, or a new replacement vehicle, for a rejected vehicle even if it has had significant use, or substantial wear and tear. This point was highlighted by one motor industry stakeholder that provided several case studies where motor vehicles were rejected after 4+ years of trouble-free use.

The view of ACL regulators and legal stakeholders is more mixed, with some supporting the introduction of depreciation, while others opposed. For example, Mills Oakley submitted that the status quo is unfair to suppliers and that without considering depreciation there can be, in some circumstances, unjustly enriched consumers who end up in a better position than if no failure had occurred.

The ACCC submitted that consumers who already face difficulties in exercising their consumer guarantee rights, will face additional uncertainty and unfairness if depreciation is introduced. The ACCC observed that in its experience, it is uncommon for consumers to report a consumer guarantee failure after an extended period of a good's trouble-free use, particularly considering the period the good should be reasonably durable. It considered that due to the front-loaded nature of depreciation, linking a reduction in refund amount to a good's depreciated value would not accurately reflect the value the consumer obtained from the good in any trouble-free period. Submissions also noted that depreciation may also exacerbate existing power imbalances and information asymmetries between consumers and businesses and potentially lead to consumers accepting a depreciated amount in circumstances when they are entitled to a full refund or replacement. The introduction of formal penalties and enforcement options may reduce overall non-compliance by giving businesses stronger incentives to meet their obligations. However, as regulators typically focus compliance and enforcement on matters with broader systematic implications, in most circumstances consumers will need to pursue their own remedies and consider whether to accept the depreciated refund amount proposed by the supplier.

Consumer advocacy groups including CHOICE, the CALC and the CPRC, did not support introducing depreciation, stating in many cases it will leave consumers financially worse off, through no fault of their own. For example, depreciation would not take into consideration the inconvenience of trying to obtain a remedy for a faulty good. The consumer advocacy groups further suggested however that if a decision is made to amend the law to consider depreciation, it should ensure it is done conservatively.

For those submissions that support introducing depreciation, different methods were proposed. For example, CESA advocated for a 'straight line' depreciation method, and the FCAI suggested the depreciated good's value be calculated by existing market indices for motor vehicles.

Jeannie Paterson and Eleanor Twomey from the University of Melbourne reference the UK's principles-based approach under s24 of the Consumer Rights Act (UK):

> *'If the consumer exercises the final right to reject, any refund to the consumer may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered, but this is subject to subsections (9) and (10).'*

Impact analysis

The economic effects of introducing depreciation is expected to be relatively smaller and difficult to isolate or quantify when considered against the backdrop of more substantial structural shifts of introducing penalties and enforcement options discussed above. Given the many variables involved with designing a depreciation regime, such as whether it would be principles-based or utilise an existing depreciation method, the economic impact on behaviour, costs, or benefits were not quantified. Alternatively, a qualitative description of the expected impacts is outlined below.

Introducing depreciation

It is expected that introducing depreciation would encourage more engagement from suppliers who may be more willing to provide a remedy that they feel is fairer and more economically viable. Under the status quo, suppliers can be resistant when consumers claim their good has suffered a major failure after significant use, as businesses do not want to wear the cost of a full refund or replacement. However, if the supplier can provide a partial refund to consumers who have had a period of trouble--free use of the good, it may encourage suppliers to accept the good has suffered a major failure. As a result of this some consumers with goods that suffer major failures after periods of trouble-free use may receive remedies of less value compared to the status quo. However, other consumers may benefit as they would receive remedies they may not have otherwise been able to successfully claim or face reduced time trying to engage with a supplier who is reluctant to provide a full refund or replacement.

The motor industry is expected to face a greater impact relative to broader consumer products given the expense and longevity of motor vehicles. For example, currently consumers are entitled to a full replacement or refund if a motor vehicle suffers a major failure even after some years of use. Depending on the circumstances, motor vehicle stakeholders have claimed this providing a full refund or replacement can impose significant costs on businesses, this can be unfair.

Where depreciation is applied to a consumer guarantee claim, it is expected both parties may spend additional time as part of the process of determining the depreciated amount. For example, suppliers will incur additional time and resources determining if depreciation is appropriate and then calculating a depreciated amount. Consumers will also likely spend additional time understanding the depreciated amount being proposed by the supplier. It also may take additional time to finalise a claim to receiving a refund or replacement. However, consumers may spend less time engaging with a supplier if the supplier is less reluctant to provide a remedy knowing the proposed remedy would be fairer.

Trouble-free use

Acknowledging the impact of introducing depreciation above, consideration was given to introducing a depreciation-free period before suppliers can provide consumers with reduced refund amount. This would ensure suppliers cannot provide a partial refund where a consumer has had a very limited period of trouble-free use. To ensure fairness to consumers while also achieving the purpose of the reforms, the period considered was between 6-12 months.

Enabling a period of trouble-free use prior to depreciation applying is expected to reduce the impact both on suppliers and consumers. The *2023 Australian Consumer Survey* states that consumers typically recognise that there is a problem with a good or service very quickly after supply. Approximately 37 per cent of consumers surveyed who experienced a problem indicated that issues had become apparent within 24 hours of purchase, a further 17 per cent within one week, a further 18 per cent within a month and a further 15 per cent within 6 months. Overall, 89 per cent of consumers first became aware of the problem with their product within 6 months and 93 per cent of consumers within 12 months. Therefore, applying depreciation to consumer guarantees for major failures would apply to a proportionately small number of goods, but would provide fairer outcomes in relation to these goods. Thus, if a trouble-free use period is applied, depreciation is only expected to impact around 7 per cent of products or services that experience a problem. The actual number however is likely to be less as not all problems with a product or service would be a major failure and entitle a consumer to a refund or replacement.

While a period of trouble-free use prior to depreciation would apply economy wide, it is expected the impact would be greater for certain products and services that have longer life-span or are more likely to experience failures after 12 months. For example, according to the *2023 Australian Consumer Survey*, the products most likely to fail after 6 months include electrical appliances, motor vehicles, and internet services.[30] Thus while the impact may be small and difficult to quantify, it is expected it would result in significant additional fairness for both consumers and suppliers, particularly for goods and services that are of higher value and/or have a longer expected lifespan.

Method of calculating depreciation

The impact of depreciation would also be impacted by the method of calculation. The government considered several methods including the straight-line depreciation method proposed by CESA,

30 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 64, Australian Consumer Law website.

reference to existing industry or taxation information for depreciating goods, and a principles-based system.

As the ACL is designed to apply across the Australian economy, many of its key provisions, including the consumer guarantees, are principles-based. While some stakeholders have expressed concern that this leads to uncertainty in its application, it also allows for the law to be flexible when considering the significant range of consumer and small business transactions that it regulates. By contrast, a straight-line depreciation method based on the purchase price of the good would be simple to apply, but too inflexible for the breadth of consumer transactions covered by the consumer guarantees. Similarly, while it is possible to use existing formulae for assessing depreciation, or for the government to make specific determinations for the purposes of the ACL, this would also be inflexible potentially leading to unfair outcomes.

Although it is possible that it may increase uncertainty in the ACL, since any depreciation system will similarly apply to many kinds of goods, and many periods of time post purchased, it is likely a principles-based method of calculation would achieve more equitable outcomes for both businesses and consumers.

If a principles-based approach is introduced, to avoid creating too much uncertainty, it is expected that suppliers would need to justify any proposed depreciated amounts considering factors set out in law such as such as the type and intended use of the good, the goods' age, the extent and intensity of use and/or trouble-free use and its expected lifespan. It is noted that any principles introducing depreciation would require careful drafting to strike the right balance between promoting fairness with providing guidance and being flexible enough to apply across varying circumstances.

It is also acknowledged that for some industries it may be appropriate to also provide a tailored product category or industry-specific approach if a certain threshold is met. For example, for the motor vehicle industry, it is recognised vehicles lose a significant proportion of their value very soon after being purchased by consumers. Providing additional clarity around depreciation for motor vehicles could work to ensure any depreciated amount reflects the use that the consumer has had, rather than merely the second-hand value of the good as this issue was discussed by motor vehicle stakeholders.[31]

In terms of impact, applying a principles-based method of depreciation is expected to increase the time and effort it takes both suppliers and consumers to finalise a depreciated amount. Consumer stakeholders and regulators have noted that introducing a new element – such as depreciation – into the existing framework will likely create an additional source of potential disputes between consumers and businesses. This could increase the time it takes to resolve a consumer guarantee claim between a consumer and a supplier.

Early life failures

Overview

Currently, when a consumer seeks a remedy under the ACL's existing consumer guarantees framework the onus is on the consumer to establish that a consumer guarantee failure has occurred. This is the case for both major- and non-major failures. If there is disagreement between a business and a consumer about a failure, and the subsequent remedy, consumers pursuing a claim through a court or tribunal will typically bear the burden of proving the failure. This is in spite of the high

31 This reflects the UK system. See Consumer Rights Act: Goods - Guidance for Business.

likelihood that products with evident problems shortly after purchase, had those problems when they were provided to the consumer.

Further, consumers can face a power imbalance and information asymmetry, with businesses generally having access to more resources and expertise and more information about the product in question and why a fault may arise.

Faced with these barriers and the significant time and cost involved, many consumers give up their pursuit and do not obtain the remedy that they may be entitled to under the ACL.

In jurisdictions such as the United Kingdom, Singapore and the European Union, if a product is found to be faulty within a set time, it is assumed that the fault was present at the time of supply, though the remedies may vary.

In the United Kingdom, under the C*onsumer Rights Act 2015* (UK), consumers have a 30 day 'short--term right to reject' period, commencing on the date the goods are delivered. This provides them with a legal right to reject goods that are faulty (i.e. not of satisfactory quality, unfit for purpose or not as described) and obtain a full refund. After the initial 30-day period, if the consumer discovers a product fault within 6 months of the date of a good being delivered, a business has one opportunity to either repair or replace the product. If this attempt at repair or replacement is unsuccessful, the consumer can then reject the good and claim a refund. During this 6-month period, it is assumed that the fault was present at the time of supply, meaning that if the business does not wish to provide a remedy, it must prove that the fault was not present at the time the product was bought. If, however, a fault is discovered after 6 months, the burden of proof switches, meaning that the consumer must prove that the product was faulty if they wish to seek a remedy.

Singapore's consumer law (the C*onsumer Protection (Fair Trading) Act 2003)* also includes a 6 month period after delivery, which, if a defect arises, there is a reversal of the onus of proof. Under this legislation if a good is faulty it is presumed that the defect existed at the time of delivery unless a supplier can prove otherwise. During this period the consumer can seek a repair or replacement of the good. If the supplier fails to provide either a repair or replacement within a reasonable time or without significant consumer inconvenience, or it is not possible to do so, the consumer is entitled to either keep the good and receive a reduction in price or return the good and receive a refund.

In Europe, under the *Sales of Goods Directive (EU) 2019/771*, consumers generally have a two-year minimum guarantee period during business must repair or replace a faulty product. If a repair or replacement is not possible or cannot be provided within a reasonable time and without significant consumer inconvenience, the consumer is entitled to a full or partial refund. If a fault becomes apparent within one year of delivery of the product it is presumed that the fault existed at the time of product delivery, unless proved otherwise by the business.

Stakeholder views

Consumer advocates including CHOICE, the CALC and the CPRC recommended legislative reform to provide a presumption that a product failure shortly after purchase is covered by consumer guarantee rights, unless the business can demonstrate otherwise.

The consumer advocates suggested placing the onus of proof on a consumer for failures occurring very soon after purchase is not reasonable, with research across sectors indicating many consumers do not pursue complaints due to being overwhelmed, being time constrained or lacking relevant knowledge.

In their submission to the 2024 consultation, Professor Jeannie Paterson and Eleanor Twomey advocated for the introduction of an ACL provision to provide that if a product fault is discovered within 6 months of purchase, it is to be presumed the fault existed at the time of supply. They stated that shifting the burden of proof to the manufacturer or supplier, recognises that a fault that appears so soon after purchase is likely to have been present at the time of supply and also establishes a clear

framework for resolving disputes related to faulty goods, and favours consumers where the evidence is unclear.

This proposal is included in the Decision RIS as it was raised by stakeholders during consultations and is directly relevant to the problems identified and options being considered. In 2018 the government considered whether to specify that a consumer is entitled to a refund or replacement without needing to provide a major failure if the failure occurred within 30 days.[32] At the time, the key reason it was not recommended was that the expected costs, also estimated by Deloitte, were estimated to outweigh the benefits. Updated impact analysis by Deloitte is provided below.

Impact analysis

Findings from the *2023 Australian Consumer Survey* show that approximately 72 per cent of problems are discovered by consumers within the first month following purchase. This suggests that consumers would benefit if a 30-day time limited reversal of the burden of proof was introduced.[33]

While not specifically consulted on, in analysis undertaken for the 2021 consultation, Deloitte estimated that a time limited reversal of the burden of proof of 30 days would lead to benefits of $936 million in NPV terms for consumers (see Table 5 for updated NPV to 2035). This comprised of reduced time and funds spent resolving issues and receiving the benefit (approximated to the average value of goods or services) earlier than they otherwise would. The proposal was also estimated to increase costs to businesses by $625 million in NPV terms over 10 years to 2031 (see Table 5 for updated NPV to 2035), in the form of increased pay-outs of remedies and infringement notices. This option was estimated to result in a net benefit of $312 million in NPV terms over 10 years to 2031 and a benefit cost ratio of 1.5 (see Table 5 for updated NPV to 2035). It is noted this is a different outcome to the 2018 analysis that estimated the costs at the time would outweigh the benefits.

Providing an assumption that a failure existed at the time of supply if a problem becomes apparent within a 30-day period would have the potential to greatly assist consumers in accessing their remedy rights. This may be particularly helpful when a failure occurs with a high value complex good, such as an electronic appliance or motor vehicle, where it may be difficult and costly for a consumer to obtain and provide expert evidence or technical reports to support their claim.

As referenced elsewhere, many consumers who experience a failure with a low-value good do not pursue a remedy as they perceive it would be too costly and time consuming in relative terms to the cost of the good. Making it easier to access to a remedy within a 30-day period will likely increase the willingness of consumers to seek a refund for 'low value' goods.

This may also improve consumer confidence to participate in the market and purchase goods as they have easier access to a remedy should a fault occur and less chance for a dispute.

Businesses would also have incentives to have good quality assurance and effective repair processes in place to ensure that any repairs are undertaken in a reasonable timeframe to avoid a non-major failure becoming a major failure if a repair is not provided within a reasonable time.

The proposal would represent a regulatory cost to businesses who would potentially have to spend more on initial assessment of the good, and if required, produce reports or other evidence establishing that a good was not faulty at the time of supply.

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32 The Australian Government the Treasury (2018), *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework*, the Office of Impact Analysis website.

33 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 63, Australian Consumer Law website.

Fewer non-compliant businesses will enjoy a competitive advantage arising from non-compliance and the savings in costs associated with not providing a remedy. Conversely, compliant businesses may see an increase in revenue resulting from being able to compete on a more equitable basis.

Changes in this aspect of the consumer guarantee regime may also raise concerns from suppliers and manufacturers that there may be an increase in illegitimate or vexatious claims. For example, consumers may take advantage of the initial 30-day period to seek a repair, refund or replacement which they may not be entitled to. However, the reversal would only provide for an assumption that a failure was present at the time of supply and businesses would still retain the right to reject claims if the evidence and reporting indicates that a failure to meet a guarantee has not occurred.

Table 5: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

	Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Economy wide		
Benefits	936.2	1086.9
Costs	624.7	725.2
Net benefit	311.5	361.7
Benefit to cost ratio	1.5	1.5

Note: sums may not add to totals due to rounding adjustments

Part B: Supplier indemnification

The ACL requires suppliers to provide consumers with a repair, replacement or refund when there has been a failure to meet the consumer guarantees. It also provides that manufacturers are liable for indemnifying (reimbursing) suppliers for the cost of providing the consumer with a remedy where the manufacturer is responsible for the consumer guarantees failure.[34] This applies to the consumer guarantees relating to:

- acceptable quality
- descriptions applied to goods, by or with the consent of, manufacturers
- fitness for purpose, that a consumer makes known to a manufacturer either directly or through a supplier.

If a manufacturer does not voluntarily indemnify a supplier, a supplier can commence an action against the manufacturer in court to seek the same legal or equitable relief they would have been entitled to under a contract of indemnity. The court may order a manufacturer to reimburse the supplier for the cost of providing the consumer guarantees remedy and any compensation the supplier paid to the consumer for reasonably foreseeable consequential losses. Manufacturers cannot contract out of these obligations but may limit their liability in relation to goods which are not ordinarily acquired for personal, domestic, or household use.

The consultation on this matter explored barriers to obtaining supplier indemnifications and impacts of introducing civil penalties and enforcement options in addressing these issues. These options were discussed in the 2021 and 2024 consultations.

Policy Options, Stakeholder Views and Impact Analysis

Option 1: Status quo

Overview

Maintaining the status quo would not provide any improvements to the current arrangements for supplier indemnification. Under this option where a manufacturer fails to indemnify a supplier who has provided a remedy to a consumer, the supplier would continue to need to initiate litigation to obtain the indemnity. The manufacturer would also continue to face no penalty or other sanction. If a manufacturer retaliates against a supplier for requesting indemnification, the manufacturer would not face a penalty or other sanction.

Stakeholder views

The 2021 Consultation RIS sought stakeholder views on options to improve the CGSI provisions, including the introduction of civil prohibitions and penalties for not indemnifying suppliers. Feedback on the design of proposed new civil prohibitions and penalties was also sought in the 2024 consultation. Not all submissions commented on the supplier indemnification elements of the consultation as they were more focused on consumer guarantee issues. Despite this, of stakeholder who commented on supplier indemnification, most did not support the current regime.

Impact analysis

This option would not impose any additional regulatory costs. There would be no impact on businesses or consumers thus the problems identified above with the existing system, such as suppliers facing difficulties and uncertainty in securing reimbursement from manufacturers would

34 Where the manufacturer of a good does not have a place of business in Australia, s 7 of the ACL defines the term 'manufacturer' to include a person who imports goods into Australia. A reference to 'manufacturer' in this Decision RIS should be read as including 'importer'.

remain. This could in turn continue to disincentivise suppliers from providing remedies to consumers who are entitled to them or leave suppliers inappropriately bearing the cost of providing those remedies. As noted in the identified problem section above, while there have been reforms to the Franchising Code of Conduct and UCTs which may help some businesses in their dealings with manufacturers, these are not expected to adequately address the issue of supplier indemnification in relation to consumer guarantees.

Option 2: Education and guidance

Overview

This non-regulatory option would see the development and delivery of a 3-month education and guidance campaign targeting suppliers and manufacturers. The campaign would be targeted at suppliers, manufacturers and importers and seek to raise awareness about the existing rights, obligations and responsibilities under the supplier indemnification provisions in the ACL.

The guidance would clarify the existing law, with the aim of reducing the number of instances where manufacturers do not provide indemnification.

To achieve this, updated and strengthened guidance and education materials would be provided by ACL regulators.

Stakeholder views

Feedback from small business stakeholders indicated that some suppliers and manufacturers do not have a sufficient awareness of the supplier indemnification provisions under the ACL. In particular, small businesses tended to be more likely to be unaware of these provisions or are faced with additional manufacturer imposed requirements to access indemnification.

Small business stakeholders, such as ASBEFO and the South Australia Small Business Commissioner also indicated the importance of education and guidance if penalties are introduced. Emphasising ACL regulators should take a supportive approach that focuses on guidance and education to raise awareness for both suppliers and manufacturers around the application of the ACL.

This feedback aligns with results from the *2016 Australian Consumer Survey* found that 80 per cent of businesses believed they had a moderate or better understanding of their obligations and responsibilities under the ACL, with 11 percent having some understanding and 9 per cent indicating minimal or no understanding.[35]

The *2023 Australian Consumer Survey* indicates that awareness has improved overall, but there remains a lack of awareness for small businesses. Compared to 2016, businesses have a deeper level of understanding of their obligations and responsibilities. Significantly, more businesses say they have an extremely good understanding (up 7 percentage points, from 7 per cent in 2016 to 14 per cent in 2023). At the other extreme, only 6 per cent of businesses feel they have very little to no understanding at all and 16 per cent have some understanding.[36]

However, a closer look at businesses that self-reported a lower understanding of obligations and responsibilities (this is those that responded some/minimal/no understanding) indicated an over-representation of:

- businesses with an annual turnover of less than $100,000 (31 per cent)
- businesses who provide services (25 per cent)

35 The Australian Government the Treasury and EY Sweeney (2016) *Australian Consumer Survey 2016*, p 71, Australian Consumer Law website.
36 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 93, Australian Consumer Law website.

- non-franchised businesses (23 per cent).[37]

This would indicate that, should an education and guidance campaign progress, there would be a benefit in targeting the above groups.

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of an economy-wide supplier indemnification education and guidance campaign without regulatory change. The total benefit of such a campaign was estimated to be $197 million in NPV terms over 10 years to 2031 (see Table 6 for updated NPV to 2035). Net benefits to suppliers of $33.5 million in NPV terms result from bearing a smaller share of the cost of providing remedies (refunds, replacements and/or repairs) to consumers. Some benefit is passed on to consumers estimated at $148 million in NPV terms from accessing a working version of the good purchased (approximated to the average value of goods).

In terms of costs, this option was estimated to increase costs by $110 million in NPV terms over the same period (see Table 6 for updated NPV to 2035). This was estimated to be from increase costs for manufacturers who are not meeting their obligations under the status quo - $95 million in NPV terms over the 10 years to 2031. This cost increase also includes the additional remedies that would be provided as suppliers pass on an increased number of remedies to consumers.[38]

This option was estimated to result in a net benefit of $87 million in NPV terms over 10 years to 2031 and a benefit cost ratio of 1.8 (see Table 6 for updated NPV to 2035). Noting that in conducting this analysis Deloitte acknowledged that an education campaign is unlikely to have a significant impact on the target audience as those not complying may continue to do so. Based on the improved business awareness indicated in the *2023 Australian Consumer Survey*, the net benefit may also not be as significant as measured in 2021, but would likely still provide a benefit to consumers, suppliers and manufacturers.

Table 6: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

		Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Benefits	Consumers	148	171.8
	Suppliers	49.1	57
	Total	197.1	228.8
Costs	Suppliers	15.6	18.1
	Manufacturers	94.8	110
	Government	0.06	0.07
	Total	110.4	128.2
Net benefit		86.6	100.6
Benefit to cost ratio		1.8	1.8

Note: sums may not add to totals due to rounding adjustments.

37 The Australian Government the Treasury and Kantar Public Australia Pty Ltd. (2023), *Australian Consumer Survey 2023 Final Report*, p 93, Australian Consumer Law website.

38 For more information on how these benefits and costs were calculated, please refer to pages 62-64 of the 2021 Consultation RIS, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

Option 3: Civil pecuniary penalties and enforcement options for not indemnifying suppliers

Overview

This option will amend the ACL to introduce a civil pecuniary penalty and enforcement options if manufacturers do not indemnify suppliers when required under the law. This will allow:

- courts to impose a civil pecuniary penalty and/or make other orders such as granting an injunction to require a manufacturer to act, or refrain from acting, in a certain way if the ACL regulators pursue litigation
- the ACCC (and potentially state and territory regulators) to exercise the full range of their existing ACL enforcement powers and compliance tools for other key general protections such as false or misleading representations, to address alleged contraventions, including accepting enforceable undertakings and issuing infringement notices.

This option was considered both economy wide and in relation to new motor vehicles only.

As noted above, the ACL provides that manufacturers are liable for indemnifying suppliers for the cost of providing the consumer with a remedy where the manufacturer is responsible for the consumer guarantees failure, and for any compensation the supplier paid to the consumer for reasonably foreseeable consequential losses. Manufacturers that fail to indemnify suppliers do not face any enforcement consequences under the current law, and therefore, the courts and the ACL regulators have limited ability to address non-compliance.

Stakeholder views

Civil pecuniary penalties

There was support for civil penalties from around one-third of stakeholders including the ACL regulators, academics, consumer advocacy groups and some automotive groups. These stakeholders typically submitted that civil penalties should apply to all failures by a manufacturer to indemnify a supplier when required, noting that this would incentivise manufacturers to comply in a way that mirrored the proposed consumer guarantees provisions. The AADA suggested that civil penalties would likely discourage outright rejection of supplier indemnification from manufacturers. The Australian Retailers Association submitted that manufacturers' refusals to indemnify suppliers remains a significant issue and supported measures that would ensure manufacturers met their obligations without imposing undue burdens on suppliers.

Introducing a civil penalty provision was also expected by some to assist in holding manufacturers more accountable for the quality and safety of their products. It was also noted that suppliers' requests for indemnification and the need to direct manufacturers to their obligations under the ACL may reduce as a result of a civil penalty provision.

Mills Oakley and a small number of stakeholders (less than 5) considered that the introduction of civil penalty provisions would increase manufacturers' potential exposure to losses and that any reforms would need to clarify the appropriate steps needed before an entitlement to indemnification arises. The FCAI and a confidential stakeholder from the automotive industry supported maintaining the status quo stating that suppliers already have an incentive to seek indemnification and claimed there is no evidence-based justification for manufacturers to be subject to a penalties regime.

Of those who commented on supplier indemnification penalties, stakeholders largely recommended that the maximum civil pecuniary penalty amount that a court could impose should be consistent and aligned with other key general protections in the ACL. Others noted that in establishing the amount for the maximum penalty, consideration must be given to achieving a balance between deterrence and proportionality, and consistent with the status quo, matters of indemnity are best administered

between the supplier and manufacturers. The AADA submitted that in the case of motor vehicles, the penalty should be at the highest end of the scale, consistent with the value of the goods concerned.

Infringement notices and other enforcement options

Some stakeholders from industry groups, the automotive industry and the ACL regulators, agreed that infringement notices provide an efficient and low-cost compliance tool and can be effectively utilised for minor breaches as an alternative to court-imposed pecuniary penalties. The FCAI and a confidential stakeholder did not support the ACCC being given the authority to issue infringement notices. They asserted that an alleged failure to indemnify a supplier does not form a proper basis to issue an infringement notice, as they claim that an assessment of when a supplier is entitled to indemnification is not straightforward.

In terms of the penalty amount for an infringement notice, there was support from ACL regulators and a number of academics for aligning the penalty amounts with other key general protections in the ACL.

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of introducing civil penalties and enforcement options to deter non-compliance with the supplier indemnification provisions and create greater incentives for manufacturers to comply with their obligations.

The 2021 analysis estimated this option would increase the rate at which suppliers are indemnified by 0.5 per cent per year, from 80 per cent in 2020-21 to 85 per cent by 2030-31.

The total benefits to the economy for this option was estimated by Deloitte to be $565 million in NPV terms over the 10 years to 2031 (see Table 8 for updated NPV to 2035). Manufacturers appropriately indemnifying suppliers would shift the costs from suppliers to manufacturers. Suppliers would benefit an estimated $66 million in NPV terms as they would be less likely to bear the full cost of providing the consumer with a remedy for the consumer guarantees failure and would spend less time pursuing indemnification. There would also be some benefit passed on to consumers ($401 million in NPV terms over 10 years) from accessing a working version of the good (approximated to the average value of goods) if implemented economy wide. The total costs to the economy were estimated to be $371 million in NPV terms over the same period (see Table 8 for updated NPV to 2035). This includes increased cost for manufacturers who are not meeting their obligations under the status quo associated with providing more remedies as suppliers pass on an increased number of remedies to consumers. It also includes increased costs for suppliers including additional time spent pursuing indemnification they would not otherwise and providing additional remedies to consumers. Where businesses do not fulfil their supplier indemnification obligations – i.e. where no indemnification is provided – businesses would potentially face a fine or penalty. The Deloitte analysis included this as a cost to business, estimated at $37.4 million, with this amount also forming revenue to government. Thus, this is a transfer from business to government.

The regulatory burden incurred by manufacturers and suppliers was estimated to be $44.8 million in the first year with no ongoing costs. This burden was calculated by assuming 30 minutes of one-off training for staff to raise awareness of the new regulatory requirements. The increased compliance by manufacturers was expected to result in a saving of time and resources by suppliers, with suppliers expected to save one hour in time negotiating with manufacturers in each case indemnification is required.

The analysis found the total costs would be fully offset by the total benefits with a net benefit of $194 million in NPV terms over the 10 years to 2031. It estimated a benefit to cost ratio of 1.5 (see Table 8 for updated NPV to 2035).

Table 7: Regulatory burden estimate[39] table for Part B, Option 3

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$4.48	-	-	$4.48

Table 8: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

		Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Economy wide			
Benefits	Consumers	400.6	465
	Suppliers	126.9	147.3
	Government	37.4	43.4
	Total	564.8	655.7
Costs	Suppliers	61	70.8
	Manufacturer	310.1	360
	Total	371.1	430.9
Net benefit		193.7	224.8
Benefit to Cost ratio		1.5	1.5

Note: sums may not add to totals due to rounding adjustments.

Economy wide or for new motor vehicles only

Overview

As with Part A, the 2021 Consultation RIS and the 2024 consultation sought stakeholder views on the remit of the introduction of a civil pecuniary penalty provision for failing to indemnify suppliers. The Consultation RIS compared the net benefit of introducing penalties for all consumers products or for new motor vehicles only, noting the high incidence of consumer complaints relating to new motor vehicles in the *2016 Australian Consumer Survey* and the volume of consumers contacting the ACCC.

Stakeholder views

Stakeholder feedback largely focussed on the application of penalties for non-compliance with consumer guarantee obligations. Of the feedback that did discuss supplier indemnification, there was general support for civil penalties for non-compliance to provide consistency with changes proposed for consumer guarantees. However, feedback on whether it should apply to all consumer products or for new motor vehicles only was scarce.

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the cost and benefits of introducing civil penalties and enforcement options for failing to indemnify suppliers, economy-wide or to the new motor vehicle industry only.[40] Based on this cost benefit analysis, the introduction of civil penalties for

39 Note: the regulatory burden measure has been estimated across whole-of-economy. The regulatory burden is anticipated to be less if applied to new motor vehicles only.

40 For more information on how these benefits and costs were calculated, please refer to pages 37-48, 59-73 of the 2021 Consultation RIS, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

failing to indemnify suppliers has a higher net benefit when applied economy wide. Economy-wide created a net benefit of $193.7 million in NPV terms over the 10 years to 2031 compared to $184.4 million over the same period for new motor vehicles only (see Table 9 for updated NPV to 2035).[41] The benefit to cost ratio for economy-wide civil penalties was estimated to be 1.5 compared to 2.2 for new motor vehicles only. While the benefit to cost ratio is higher for new motor vehicles only, economy-wide reform provides a greater overall economic benefit. A table setting out the net benefits and benefit cost ratio can be found at Appendix D.

The difficulties in obtaining indemnification in the new motor vehicle industry indicate that civil penalties would have a pronounced impact in this industry compared to the rest of the economy. This sentiment is reflected in feedback received by motor dealer stakeholders. They indicated that obtaining indemnification is particularly difficult for independent dealers, including small to medium dealerships that may not have the resources to navigate manufacturer requirements for indemnification.

Table 9: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

	Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Motor Vehicle only		
Benefits	334	387.8
Costs	149.6	173.7
Net benefit	184.4	214.1
Benefit to cost ratio	2.2	2.2

Note: sums may not add to totals due to rounding adjustments

Option 4: Civil pecuniary penalties and enforcement options for retaliating against suppliers

Overview

This option considered amending the ACL to introduce a civil pecuniary penalty and enforcement options if a manufacturer retaliates against a supplier for seeking indemnification for a consumer guarantee failure and allowing:

- courts to impose a civil pecuniary penalty and/or make other orders such as grating an injunction to require a manufacturer to act, or refrain from acting, in a certain way if the ACCC (and potentially state and territory ACL regulators) pursue litigation
- the ACCC (and potentially state and territory regulators) to exercise the full range of their existing ACL enforcement powers and compliance tools for other key general protections such as false or misleading representations, to address alleged contraventions, including accepting enforceable undertakings and issuing infringement notices.

This option considered application either economy wide or to new motor vehicles only.

The 2021 Consultation RIS acknowledged that the power imbalance between suppliers and manufacturers can be a significant impediment to indemnification requests, including where a supplier has a fear of retaliation for seeking indemnification. However, it noted that a limitation of this option is that it would not solve the problem of manufacturers simply refusing to reimburse suppliers,

41 For more information on how these benefits and costs were calculated, please refer to pages 64-68 of the 2021 Consultation RIS, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*.

making the process difficult or having a lack of awareness of their obligations. Retaliation by manufacturers is also considered an extreme consequence.

Stakeholder views

Previous consultation generated mixed views on the introduction of civil penalties for manufacturers who engaged in retaliation against suppliers who sought indemnification.

The 2024 consultation sought more evidence of retaliation and examples of retaliatory behaviours, however most submissions to the consultation did not provide feedback on this issue.

The Australian Retailers Association and AADA were among the few stakeholders to provide comment. They provided some general examples of retaliatory behaviour, such as contract termination or unfavourable terms, but were not able to provide evidence of the nature, frequency and consequences of this type of behaviour.

The MTAA also pointed to pre-emptive and restrictive practices which aimed to prevent suppliers from enforcing their rights. Examples included:

- Prohibiting motor dealer networks from making admissions of liability without prior approval of a manufacturer
- Introducing complicated and long-winded avenues for the dealer to submit a claim for warranty work and then deferring reimbursement if the administrative process was not followed.
- Threatening dealers with the loss of their right of indemnity if they did not adhere to such manufacturer instructions.

Manufacturer representatives disagreed with the introduction of penalties, specifically the use of a presumptive test as a basis for penalties. They also cited the lack of evidence of retaliatory conduct and the existence of other laws that regulate the relationship between a supplier and manufacturer (for example, the *Competition and Consumer (Industry Codes--Franchising) Regulations 2024*).

Impact analysis

The 2021 Consultation RIS utilised analysis by Deloitte to estimate the costs and benefits of making it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification for a consumer guarantee failure.

The 2021 analysis estimated total benefits of $956 million over 10 years to 2031 in NPV terms (see Table 11 for updated NPV to 2035). This included benefits to suppliers of $130 million in NPV terms from no longer bearing the full cost of providing refunds, replacements and/or repairs to consumers. Benefits to suppliers included pursuing more remedies than otherwise because of the lower risk of retribution, and as a result, a lower number of instances where a supplier provides a remedy and is not compensated. Suppliers would also save time negotiating indemnification with manufacturers. Some benefit is assumed to be passed on to consumers, who are estimated to receive a total benefit of $697 million in NPV terms from accessing a working version of the good purchased or refund (approximated to the average value of the relevant good).

The total costs to the economy for manufacturers and suppliers were estimated to be $587 million over the same period in NPV terms (see Table 11 for updated NPV to 2035). This includes increased costs for indemnifying suppliers who pursue indemnification they may not otherwise. Where businesses do not fulfil their obligations – business would potentially face a fine or penalty. The Deloitte analysis included this as a cost to business and corresponding revenue to government. Thus, this is a transfer only from business to government.

The analysis found the total costs would be fully offset by the total benefits with a net benefit of $368 million in NPV terms over 10 years to 2031 with a benefit cost ratio of 1.6 if implemented economy wide (see Table 11 for updated NPV to 2035).

As with Part B, Option 3, new penalties would also represent increased compliance cost for manufacturers which could be passed on to consumers as higher prices. The 2021 Consultation RIS estimated a regulatory burden of $44.8 million in the first year with no ongoing costs, with the cost incurred based on an assumption of training costs to ensure that retail employees understand the new regulatory requirements.

Table 10: Regulatory burden estimate[42] table for Part B, Option 4

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$4.48	-	-	$4.48

Table 11: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

		Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Economy wide			
Benefits	Consumers	697.3	809.6
	Suppliers	220.9	256.4
	Government	37.4	43.4
	Total	955.6	1109.4
Costs	Suppliers	90.7	105.3
	Manufacturer	469.7	576.6
	Total	587.4	681.9
Net benefit		368.2	427.4
Benefit to cost ratio		1.6	1.6

Note: sums may not add to totals due to rounding adjustments

Economy wide or for new motor vehicles only

The 2021 analysis also indicated the net benefit was higher when applied economy wide, compared to new motor vehicles only. For new motor vehicles only, the net benefit was estimated to be $320 million in NPV terms over the 10 years to 2031 (see Table 12 for updated NPV to 2035). It estimated a benefit to cost ratio of 2.3. While applying to motor vehicles only is a higher benefit to cost ratio compared to economy-wide reforms, the total benefits for economy-wide reforms remain higher.

Benefits were estimated to be $581 million in NPV terms over the same period (see Table 12 for updated NPV to 2035). The analysis estimated that consumers would benefit by $455 million, as they receive more remedies. This is because suppliers would be more inclined to provide remedies if the risk of retribution/not being indemnified is lower. Where businesses do not fulfil their obligations business would potentially face a fine or penalty. The Deloitte analysis included this as revenue to government, thus this is a transfer from business to government.

In relation to costs, the analysis estimated manufacturers and suppliers bearing an estimated $257.1 million in costs associated with staff training, additional provision of remedies and the payment of potential fines or penalties (see Table 12 for updated NPV to 2035). Suppliers would also

42 Note: the regulatory burden measure has been estimated across whole-of-economy. The regulatory burden is anticipated to be less if applied to new motor vehicles only.

bear additional costs for remedy provision and staff training but benefit overall due to increased indemnification relative to the status quo, as they would be better able to enforce their rights.

Table 12: Estimated NPVs for 2021-2031 and 2025-2035 ($m)

		Deloitte CBA Estimates (2021-2031)	Treasury Adjusted Estimates (2025-2035)
Motor Vehicles			
Benefits	Consumers	455.5	528.8
	Suppliers	124.9	145
	Government	0.6	0.7
	Total	581	674.5
Costs	Suppliers	5	5.8
	Manufacturer	252.1	292.7
	Total	257.1	298.5
Net benefit		323.9	376.0
Benefit to cost ratio		2.3	2.3

Note: sums may not add to totals due to rounding adjustments

Limitation of analysis for this option

While the 2021 Consultation RIS found that there was a net benefit for prohibiting retaliation, the cost benefit analysis was based on assumptions related to an increase in suppliers seeking indemnification due to a reduction in retaliation. While penalties for retaliation would likely lead to a reduction in retaliatory behaviour, there remains questions about what retaliatory behaviours are and how often they are occurring. Both previous consultations have sought evidence from stakeholders to help define what retaliatory behaviour may look like, and to test the assumptions used to calculate the NPV and benefit cost ratio across all consumer products and in the new motor vehicle industry.

It is noted that there may be difficulties in demonstrating retaliatory action as it is often difficult to prove a business's reasoning for action unless it specifically documents its reasoning, and a supplier or regulator can obtain such documentary evidence. However, without this evidence base it is difficult to identify and define retaliatory conduct in relation to supplier indemnification and assess the impact of attempts to prevent it. For these reasons it is not clear how effective any penalties would be.

Recommended policy options

There was wide-spread stakeholder support for Government taking action to improve the current consumer guarantee and supplier indemnification regime and creating greater incentives for suppliers and manufacturers to comply with their obligations to provide consumer guarantees remedies and supplier indemnification when required. A summary of the costs and benefits of recommended options is provided in Table 13 below.

Consumer Guarantees (Part A)

Policy options

Introducing civil penalty provisions and additional enforcement options into the consumer guarantees framework is recommended (Option 3). This option was supported by stakeholders as it will provide a stronger incentive for suppliers to provide a remedy for a consumer guarantee failure when required under the law. It will also enable the ACCC (and other ACL regulators where applicable) to exercise a full range of compliance and enforcement powers to respond to alleged non-compliance. This will include the ability to issue infringement notices where the ACCC (and potentially state and territory regulators) have reasonable grounds to believe a supplier has contravened the law. Noting regulators will be responsible for making decisions as to how and when to progress enforcement action according with their compliance and enforcements priorities. If a regulator takes action in court and a court determines that a contravention of a civil penalty provision has occurred, the court will have the power to impose a civil pecuniary penalty up to the maximum level set. The court will also have the power to make orders such as granting an injunction to require manufacturers to act, or refrain from acting, in a certain way.

The civil penalty provisions and additional enforcement options should be introduced economy wide. This approach was supported by stakeholders as it provided the greatest benefit and would ensure the changes address issues prevalent across a broad range of industries in a consistent manner and prevent stakeholder confusion. It is also in line with the *2017 Australian Consumer Law Review Final Report* which noted that where reforms to the consumer guarantees are needed, an economy-wide approach is preferred to maintain consistency and avoid bespoke or industry-specific variations.[43]

It is recommended civil penalties and enforcement options should not include a value threshold for the goods or services involved beyond what is already set for consumer goods and services under the ACL. This was also supported by stakeholders and provided the greatest net benefit. This will allow the ACL regulators to pursue systemic non-compliance regardless of the value of the goods and services involved. It is expected there would be an increased incentive for suppliers and manufacturers to provide remedies to consumers which would result in greater protection for consumers and businesses. It would also help ensure businesses that sell large volumes of low-value goods do not benefit at-scale from not providing remedies when required by law.

The quantum of maximum civil pecuniary penalties and infringement notice amounts should align with other key general protections in the ACL such as false or misleading representations and unconscionable conduct. Noting, in determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including the nature and extent of the act or omission, any loss or damage suffered as a result of the act or omission, circumstances of the contravention and any court findings as to prior similar conduct.[44]

43 Consumer Affairs Australia and New Zealand (2017), *Australian Consumer Law Review Final Report*, p 16, Australian Consumer Law website.
44 Section 224(2) of the ACL.

This option is recommended as the expected net benefits outweigh the costs, and it was supported by the majority of stakeholders, with consumers finding it easier to receive remedies from businesses who comply with their consumer guarantee obligations.

Subject to government budget priorities and processes, additional education and guidance material could be considered as a complement to the introduction of civil penalties and enforcement options to help suppliers and manufacturers understand and meet their obligations (Option 2). This was strongly supported by many stakeholders to ensure the recommended reforms are implemented effectively, consumers understand their rights and suppliers understand their obligations. Government action could include ACL regulators collaborating to review, update and strengthen existing education and guidance material on the consumer guarantees regime with a particular focus on the concepts of 'acceptable quality' and 'durability'. This option provided a net benefit and was also supported by stakeholders.

Improvements to the law

It is also recommended to make improvements to the law to support the introduction of penalties and enforcement options including for major failures, depreciation and early life failures. The impact analysis found these improvements were difficult to quantify in terms of economic net benefit for major failures and depreciation noting, however, they were expected to be relatively small in scale when compared to the broader impacts of the other recommended reforms and thus unlikely to materially affect the overall cost-benefit assessment. However, they are recommended as they were generally supported by stakeholders and reflected feedback that there is opportunity to increase the fairness in the current regime.

Major failures

It is recommended to clarify the criteria for when a failure to meet a consumer guarantee constitutes a major failure for both goods and services. This may be achieved by removing the text that creates uncertainty around the criterion that failure to comply with a guarantee is a major failure if the goods/service would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure. The government will also clarify that there is a major failure where the goods/services are unfit for any purpose for which the supplier represents that they are reasonably fit. Clarification of the definition of major failure was supported by stakeholders, as a means to reduce uncertainty concerning business obligations and consumer rights, with a key benefit being a potential reduction in business/consumer disputes over whether a faulty good or service has suffered a major failure or not. Consultation on draft provisions will be undertaken on the best method to remove this uncertainty.

Depreciation

It is recommended depreciation be included into the CGSI regime to determine the appropriate reimbursement amount when a consumer is entitled to a consumer guarantees refund, to account for a consumer's trouble-free use of a good. To protect consumers from suppliers who may attempt to provide a partial refund where there has only been limited use of a good, depreciation will not be permitted until the consumer has had the good for 12 months of cumulative trouble-free use.

For these claims, it would represent a benefit to suppliers and manufacturers and a decreased benefit to consumers. However, this would result in a fairer outcome that considers the benefits the consumer has already derived from use of the good.

While not all stakeholders supported depreciation for reasons including it may provide a disadvantage to consumers and introduce further complexity into the consumer guarantees regime, it is an important reform to improve the overall fairness of the provisions.

It is recommended that an initial principles-based approach applies economy wide. While support for depreciation was strongest from motor stakeholders – it is recommended to apply economy-wide to maintain consistency with other aspects of the consumer guarantees regime and the ACL which do not typically have different rules for different sectors.

To provide more certainty with a principles-based depreciation approach, it is recommended that, a supplier must justify any proposed depreciation amount considering factors such as the type and intended use of the good, the good's age, the extent and intensity of use and/or trouble-free use, and its expected lifespan. To support this, it is recommended the responsible Minister be given the power to set specific depreciation rules and/or product category/industry-based methods of depreciation to incorporate any industry specific variables (for example, for motor vehicles or whitegoods). This should include any clarification that is required relevant to the calculation of depreciation such as the expected lifespan of the product. Consideration will be given to whether the exercise of the proposed Ministerial power would need to be triggered by the passing of a certain threshold. It is also noted the design of the overall depreciation approach will need to be carefully considered and framed to ensure it achieves the desired outcome of a fairer system for consumers and businesses. Any specific depreciation method would be designed in consultation with industry and consumer stakeholders to ensure that any methodology is fair and balanced.

Early life failures

It is recommended to introduce a 30-day rule into the consumer guarantees framework to ensure if a problem with a good arises within the first 30 days after receipt, consumers will not be required to prove that a product has failed to meet a consumer guarantee nor the reasons why it has failed.

Feedback from some stakeholder supported providing a presumption that a product failure shortly after purchase is covered by consumer guarantee rights, unless a business can demonstrate otherwise. While previous cost benefit analysis in 2018 found the costs would outweigh the benefits, updated analysis in 2021 found an overall net benefit.

Under this approach, courts and tribunals would assume that a product that experiences a consumer guarantees failure within the first 30 days following its receipt did so because a consumer guarantee was not complied with at the time of supply. This reflects the high likelihood that any product faults that are discovered in the first 30 days are likely to have been present at the time of supply.

Consumers are not exercising their consumer guarantee rights for as many goods as they may be entitled to. This is particularly the case for claims that may require complex technical assessment to substantiate or where consumers do not consider the product expensive enough to warrant the time and effort required to prove the fault was present when supplied.

Where a consumer is seeking a remedy for a consumer guarantees failure within the first 30 days from receipt of the good, businesses would not be obliged to provide a refund by default. If the business is seeking to deny the claim, they would be required to undertake an assessment of the product and provide evidence proving that the fault was not present at the time of supply.

This ACL adjustment would address consumer concerns about the power imbalance and information asymmetry between the supplier and the consumer in determining why a failure has occurred.

Following the initial 30-day period, if a fault arises, consumers would be entitled to seek a remedy using the existing consumer guarantee framework.

Noting this change did not form part of the formal 2021 or 2024 consultations, implementation should include consultation with stakeholders, for example as part of the legislative drafting process.

Supplier Indemnification (Part B)

Supplier Indemnification

Introducing civil penalty provisions and additional enforcement options to deter manufacturers from not indemnifying suppliers when required under the law is recommended (Option 3). The introduction of civil penalties will create a stronger incentive for manufacturers to comply with their supplier indemnification obligations. It is expected that increased compliance by manufacturers will result in a greater number of suppliers receiving indemnification. This in turn will help ensure suppliers are not inappropriately wearing the cost of providing consumer guarantee remedies and more remedies being provided to consumers when they are legally entitled to them. Manufacturers will still be able to dispute supplier claims for indemnification on their merits if they consider that there has not been a manufacturer fault.

Civil penalty provisions and additional enforcement options should be introduced economy-wide for supplier indemnification. This approach was supported by stakeholders as it provided the greatest benefits and would ensure consistency with the arrangements for consumer guarantees.

As with consumer guarantees, this recommendation will enable the ACCC (and other ACL regulators where applicable) to exercise a full range of compliance and enforcement powers to respond to alleged non-compliance, such as issuing infringement notices. Noting regulators will be responsible for making decisions as to how and when to progress enforcement action according with their compliance and enforcements priorities.

If a regulator takes action in court and a court determines that a contravention of a civil penalty provision has occurred, the court will have the power to impose a civil pecuniary penalty up to the maximum level set. The court will also have the power to make orders such as granting an injunction to require manufacturers to at, or refrain from acting, in a certain way.

The quantum of maximum civil pecuniary penalties and infringement notice amounts should align with those set for consumer guarantees. This will also ensure it aligns with other key general protections in the ACL such as false or misleading representations and unconscionable conduct.

This option is recommended as the expected net benefits outweigh the costs, and it was supported by the majority of stakeholders as suppliers will find it easier to receive indemnification from manufacturers. This is expected to have flow-through benefits for consumers who experience a consumer guarantee failure.

Subject to government budget priorities and processes, additional education and guidance material could be considered as a complement to this recommendation to help suppliers and manufacturers understand and meet their obligations (Option 2). Government action could include ACL regulators collaborating to review, update and strengthen existing education and guidance material taking into consideration stakeholder feedback and *2023 Australian Consumer Survey* findings. It could particularly consider targeting activities to small businesses. This option provided a net benefit and was also supported by stakeholders.

Retaliation

Civil penalties for manufacturers retaliating against suppliers who request indemnification are not recommended at this time. The Deloitte analysis did present a net benefit on the assumption that there would be an increase in suppliers seeking indemnification due to a reduction in retaliation. However, consultations failed to provide sufficient evidence that retaliation is occurring to a sufficient degree to justify government action.

Depending on the specific conduct, there may be other legislative provisions regulating the interaction of suppliers and manufacturers which may be relevant to any alleged retaliatory action. For example, unfair contract terms or unconscionable conduct under the ACL, or industry specific legislation such as

the *Competition and Consumer (Industry Codes--Franchising) Regulations 2024* may apply, depending on the circumstances.

Table 13: Summary of recommended options– Adjusted to 2025-2035 ($m)

Option	Benefit	Cost	Net benefit	Benefit cost ratio
Part A – Consumer guarantees				
Option 3: Civil penalties for failing to provide a consumer guarantee remedy	6,720	1,418	5,302	4.7
Major failures	*	*	*	*
Depreciation	*	*	*	*
Early life failures	1,087	725	362	1.5
Part B – Supplier indemnification				
Option 3: Civil penalties for failing to indemnify suppliers	656	431	225	1.5
Subject to government budget priorities and processes				
Part A – Consumer guarantees Option 2: Education and guidance campaign	48	27	21	1.8
Part B – Supplier indemnification Option 2: Education and guidance campaign	229	128	101	1.8

* Qualitative analysis only. Economic costs and benefits were not quantified.

Implementation and evaluation

Implementation of this proposal will require legislative amendments to the ACL. Under the *Intergovernmental Agreement for the Australian Consumer Law,* the Commonwealth Minister must undertake formal consultation with states and territories on the proposal and secure the agreement of at least four other jurisdictions (including three states) before introducing legislation.

Implementation of this proposal should include education and guidance to raise awareness of the changes. This could also include a dedicated education and guidance campaign, subject to government budget priorities and processes. To implement education and guidance, the Commonwealth will work closely with representatives from state, territory and Commonwealth regulators to develop guidance material and raise awareness about the changes using existing channels.

Implementation will also be informed by the findings of the Review of Artificial Intelligence and the ACL which made 6 findings in relation to AI-enabled goods and services. Broadly, the Review found that while opportunities for refinement and clarification exist, when considered in combination with other relevant legal frameworks the ACL, including consumer guarantees, is capable of adapting effectively to AI-enabled goods and services.

Transition period

A suitable transition period will be determined in consultation with stakeholders. This will ensure that businesses have an opportunity to be informed of the changes and make any necessary updates to their processes and procedures.

Monitoring and Evaluation

Evaluation of the effectiveness of the civil penalties and enforcement options will be reviewed internally by Treasury.

The government should undertake an implementation review to evaluate the outcomes of the implemented reform proposal. Treasury would be best placed to undertake such a review, in consultation with ACL regulators. States and territories have their own operational and monitoring processes which would complement the Commonwealth's evaluation activities. The Consumer Ministers Network also offers an additional forum to coordinate evaluation.

The effectiveness of the implemented reform proposal will be measured through the consideration and analysis of:

- quantitative and qualitative data relating to CGSI complaints and contacts received by the ACCC and ACL regulators. This data will be used to assess whether the reforms have had a positive effect on consumer and business outcomes through key metrics that may include the:
  - volume and nature of CGSI related complaints and queries
  - any reported feedback about increased provision of consumer guarantee remedies and supplier indemnification or knowledge of CGSI rights and obligations, for example feedback obtained through State and Territory ACL regulator dispute resolution services
- results arising from any future Australian Consumer Surveys undertaken by the Commonwealth, State and Territory governments, with the design of the survey to consider incorporation of CGSI focussed questions to assess areas such as:
  - remedy outcomes when consumer guarantee and supplier indemnification claims are made
  - the proportion of consumers and suppliers who do not pursue a consumer guarantee remedy or indemnification and the reasons why they have not been pursued (for example,

the difficulty of participating in the remedy or indemnification process; value of good or service in question etc)

  - the levels of awareness and knowledge of the consumer rights and business obligations under the CGSI framework

- enforcement actions, including court proceedings, taken by the ACCC and state and territory ACL regulators to assess how the CGSI penalty provisions (and other changes) are being interpreted and applied and how they may be enhanced over time
- ongoing liaison with various stakeholders, including industry, government and consumer advocates, to evaluate the effectiveness of the reforms and their impact on consumers and markets more broadly.

In relation to timing, a fixed review period is not recommended at this time to provide flexibility to enable a review to occur when there is sufficient new information on which to base an assessment of the recommended reform option's effectiveness and to align with other priorities as set by Consumer Ministers. This may include the timing of any future Australian Consumer Survey or the need to respond to any emerging issues or market developments prioritised by the Consumer Ministers Network. Instead, ongoing collection of data from ACL regulators and engagement with stakeholders on priority consumer issues will be used to inform the timing of the review as well as consultation with Consumer Ministers.

At a minimum however, any review should occur at least 3-5 years after implementation to allow time for judicial consideration of the new law, to properly observe how the revised settings are functioning.

Appendix A - Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth)
CCA	*Competition and Consumer Act 2010* (Cth)
CGSI	Consumer Guarantees and Supplier Indemnification
Consultation RIS	Consultation Regulation Impact Statement
Decision RIS	Decision Regulation Impact Statement
NPV	Net present value

Appendix B - List of stakeholders who provided a submission

Below is a list of stakeholders who provided a written submission to the *Consumer guarantees and supplier indemnification under the Australian Consumer Law: Consultation on the design of proposed new civil prohibitions and penalties*. This list does not include stakeholders who marked their submission as 'confidential'.

Australian Automotive Dealer Association (AADA)

Australian Competition and Consumer Commission (ACCC)

Australian Chamber of Commerce and Industry (ACCI)

Australian Retailers Association (ARA)

Australian Small Business and Family Enterprise Ombudsman (ASBFEO)

Australian Travel Industry Association (ATIA)

BWLaw

Caravan Industry Association of Australia (CIAA)

Care Consumer Law

Consumer Electronics Suppliers Association (CESA)

Council of Small Business Organisations Australia (COSBOA)

Duane Sewell

Dr Kanchana Kariyawasam

Emeritus Professor Philip H Clarke

Federal Chamber of Automotive Industries (FCAI)

Joint submission from CHOICE, Indigenous Consumer Assistance Network, Consumer Policy Research Centre, Westjustice, Consumer Action Law Centre, LawRight, Redfern Legal Centre, Consumer Credit Legal Service (WA) Inc., WA Consumer Advocacy Network

Law Council of Australia (Competition and Consumer Law Committee of the Business Law Section)

Master Electricians Australia (MEA)

Mills Oakley

Motor Trades Association of Australia (MTAA)

National Legal Aid

NSW Small Business Commissioner

Professor Jeannie Marie Paterson and Eleanor Twomey

Professor Leanne Wiseman

Professor Luke Nottage

South Australia Small Business Commissioner

Telecommunications Industry Ombudsman

Appendix C - Assumptions

In assessing the potential regulatory burden of each option, this Decision RIS has been informed by analysis undertaken by Deloitte Access Economics for the 2021 Consultation RIS. It is also guided by the requirements of the Office of Impact Analysis: Regulatory Burden Measurement Framework.

Framework for the analysis

Some impacts have not been analysed for the purpose of this analysis due to a lack of evidence to support an assessment of the likelihood or magnitude of the impacts including:

- changes in demand for goods and services that may result from increased trust in product quality
- improvements in production quality, or a reduction in the number of product failures
- changes in the price of goods due to the cost of failure being passed on from producers to consumers
- changes in economic growth or industry activity due to economic downturn
- the ability for businesses who do comply with the current legislation to compete on a level playing field with those businesses who do not comply.

Assumptions and sources

Four primary data sources inform the calculations in the modelling of the cost benefit analysis:

- Deloitte Access Economics Business Outlook and Retail Forecasts publications and forecasts
- The *2016 Australian Consumer Survey*
- Australian Bureau of Statistics historical data on wages, consumer price index, household expenditure and dwelling construction activity
- The 2018 cost benefit analysis conducted for the Department of the Treasury by Deloitte Access Economics in relation to options to four proposed changes to the Australian Consumer Law.

The impacts of each option is measured as a change relative to the status quo.

The status quo assumed conditions from 2020-21 to 2030-31. Problems with goods and services are assumed to increase in line with growth in the related industries.

Assumptions are provided in Table 14: Summary of assumptions, status quo. Some of these figures are sourced from the 2018 Deloitte cost benefit analysis of four proposed changes to the Australian Consumer Law, prepared for the Commonwealth Treasury. Others were derived for the purpose of this analysis. The following assumptions remain consistent across all options and problems:

- Assumptions for prices of goods and services
- Assumptions for likelihood of an issue occurring
- Share of products where multiple failures equal a major failure
- Share of total products between $40k and $100k
- Percentage of remedies that are provided as refunds/replacements.

Table 14: Summary of assumptions, status quo

Sector	Value	Source
Assumptions for prices of goods and services		
Motor vehicles	$38,903	2018 Deloitte CBA
Food retailing	$5	Deloitte analysis
Household goods retailing	$679	2018 Deloitte CBA
Clothing, footwear and personal accessory retailing	$61	2018 Deloitte CBA
Department stores	$97	2018 Deloitte CBA
Other retailing	$99	2018 Deloitte CBA
Services	$166	Deloitte analysis
Construction (building, renovations etc)	$151,740	Deloitte analysis
Assumptions for likelihood of an issue occurring		
Motor vehicles	3.4%	2016 Australian Consumer Survey and Deloitte/Treasury assumptions
Food retailing	6.6%	
Household goods retailing	4.8%	
Clothing, footwear and personal accessory retailing	5.3%	
Department stores	4.3%	
Other retailing	2.7%	
Services	3.9%	
Construction (building, renovations etc)	7.2%	
General assumptions		
Proportion of consumers who experience an issue and address the problem (for every 100 consumer guarantee issues, consumers will attempt to address 82 of them)	82%	2016 Australian Consumer Survey
Proportion of consumers who address a problem and access a remedy to their satisfaction, or are in the process of doing so (for every 100 problems that are addressed by consumers, 71 are resolved to the satisfaction of the consumer)	71%	2016 Australian Consumer Survey and Deloitte/Treasury assumption

Sector	Value	Source
Rates of refund/replacement with multiple failures		
Three failures	90%	2018 Deloitte CBA
Share of total products between $40k and $100k		
Motor vehicles	50.00%	2018 Deloitte CBA
Food retailing	0.00%	Deloitte assumption
Household goods retailing	0.23%	2018 Deloitte CBA
Clothing, footwear and personal accessory retailing	0.00%	2018 Deloitte CBA
Department stores	0.01%	2018 Deloitte CBA
Other retailing	0.01%	2018 Deloitte CBA
Services	0.01%	Deloitte assumption
Construction (building, renovations etc.)	50.00%	Deloitte assumption
Manufacturer indemnification and retaliation assumptions		
Likelihood of manufacturer retaliation where indemnification is requested	10%	Deloitte assumption
Resulting likelihood that a supplier seeks indemnification	90%	Deloitte assumption
Propensity for manufacturer to indemnify supplier	80%	Deloitte assumption
Resulting likelihood indemnification for each remedy	72%	Deloitte assumption
Likelihood for suppliers to provide remedies as refunds/replacements		
Motor vehicles	10%	Deloitte assumption
Food retailing	100%	Deloitte assumption
Household goods retailing	60%	Deloitte assumption
Clothing, footwear and personal accessory retailing	60%	Deloitte assumption
Department stores	60%	Deloitte assumption
Other retailing	60%	Deloitte assumption

Sector	Value	Source
Services	60%	Deloitte assumption
Construction (building, renovations etc.)	0%	Deloitte assumption

Methodology and assumptions of the regulatory cost

It is anticipated that Part A, Option 3 and Part B, Options 3 and 4, will have an average compliance cost impact, averaged over 10 years of $4.48 million to business.[45] The cost relates to one-off staff training on the new regulatory requirements. While the underlying obligation has not changed, it has been assumed staff undergo training on the consequences of non-compliance to support the change in behaviour. It is the same for all options where training is required.

The cost estimate is based on the following assumptions:

- Deloitte Access Economics forecasts for sectoral employment for retail trade have been used to understand the number of employees affected by any change and who would subsequently require some training. This is estimated to be approximately 1.227 million retail staff.
- 30 minutes of one-off training required by every retail employee, at the expense of the business.
- A work-related labour cost (including on-costs) of $73.05 per hour is applied to the time required for this training.

45 Note: the regulatory burden measure was estimated across whole-of-economy. The regulatory burden is anticipated to be less if applied to new motor vehicles only.

Appendix D – Adjusted costs and benefits

The cost benefit analysis, conducted by Deloitte Access Economics in December 2020, estimates the net present value (NPV) of the costs and benefits of different reform options for the period 2021-2031. To support policy-decision making, the original NPVs have been adjusted by an inflation factor, to illustrate the financial impacts over the next 10 years (2025-2035). The Reserve Bank of Australia estimates that the cumulative inflation rate between 2021 and 2024 was 16.1 per cent, equating to an average annual inflation rate of approximately 5.1 per cent.[46] The table below reflects the NPVs for the policy options considered, adjusted by a factor of 16.1 per cent. This methodology assumes that all parameters set by Deloitte in the CBA report remain the same.

Table 15: Part A - Receiving remedies under the consumer guarantees ($m)

Policy Option	NPV Benefits (2021 - 2031)	NPV Benefits (2025 - 2035)	NPV Costs (2021 - 2031)	NPV Costs (2025 - 2035)	Net benefit (2021-2031)	Net benefit (2025-2035)	Benefit cost ratio
Option 2: Education and Guidance	41.1	47.7	22.9	26.6	**18.1**	**21.0**	1.8
Option 3: Civil penalties for not providing a remedy (Economy Wide)	5,788	6,720	1,221	1,418	**4,567**	**5,302**	4.7
Option 3: Civil penalties for not providing a remedy (Motor Vehicles only)	643.4	746.9	230.6	267.7	**412.8**	**479.2**	2.8
Option 4: Early Life failures	936.2	1,087	624.7	725.2	**311.5**	**361.7**	1.5

Table 16: Part B - Supplier Indemnification ($m)

Policy Option	NPV Benefits (2021 - 2031)	NPV Benefits (2025 - 2035)	NPV Costs (2021 - 2031)	NPV Costs (2025 - 2035)	Net benefit (2021-2031)	Net benefit (2025-2035)	Benefit cost ratio
Option 2: Education and Guidance	197.1	228.8	110.4	128.2	**86.6**	**100.6**	1.8
Option 3: Civil penalties (Economy Wide)	564.8	655.7	371.1	430.9	**193.7**	**224.8**	1.5
Option 3: Civil penalties (Motor Vehicles only)	334.0	387.8	149.6	173.7	**184.4**	**214.1**	2.2
Option 4: Civil penalties for supplier retaliation (Economy Wide)	955.6	1,109	587.4	681.9	**368.2**	**427.4**	1.6
Option 4: Civil penalties for supplier retaliation (Motor Vehicles only)	581.0	674.5	257.1	298.5	**323.9**	**376**	2.3

Note: Note: sums may not add to totals due to rounding adjustments.

[46] Inflation Calculator, Inflation Calculator | RBA, The Reserve Bank of Australia website. Treasury considers the 2024 inflation rate to be a reasonable proxy for expected inflation in 2025.