



Australian Government
The Treasury

TSY/AU

Consultation Regulation Impact Statement

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

Department of the Treasury on behalf of

Consumer Senior Officials

December 2021

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Consultation Process

A public consultation process is being undertaken to reach a range of stakeholders. It will be important to assess whether any changes to the law would improve outcomes in practice and the extent of any compliance obligations.

Once the consultation process has concluded, a final (or decision-making) Regulatory Impact Statement (RIS) will be developed to outline the evidence gathered and the preferred policy option for each of the problems. Both this Consultation RIS and the subsequent decision-making RIS will be published by the Office of Best Practice Regulation on the Department of the Prime Minister and Cabinet website.

Request for submissions

Commonwealth and State and Territory Consumer Senior Officials (Consumer Senior Officials) welcome formal written submissions on this Consultation RIS.

Views are sought on the problems identified, further data that can support more accurate modelling, and the robustness of assumptions made. Views are also sought on the costs and benefits of each policy option and any other options that could address the identified problems. In writing your submission, several focus questions have been included in this Consultation RIS as a guide. There is no obligation to answer any or all the questions. There is no limit to the length of submissions. For accessibility reasons, please upload submissions in a Word, RTF, or PDF format.

All submissions to the consultation process will be published, unless authors have indicated they would like all or part of their submission to remain confidential. Specifically, all information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all, or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Anyone who would like part of their submission to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

This Consultation RIS has been developed with reference to consultation on similar matters¹ in 2018 for the Decision RIS: *Australian Consumer Law Review: Clarification, simplification, and modernisation of the consumer guarantee framework*. However, specific questions are likely to arise from this document which may not have been considered at the time of drafting and the Commonwealth Treasury on behalf of Consumer Senior Officials may undertake further targeted consultation with key stakeholders if necessary.

This RIS does not consider issues related to COVID-19 cancellations and the role of the consumer guarantees in these circumstances. Consumer Senior Officials are separately considering how the Australian Consumer Law (ACL) has operated in response to consumer issues that have arisen during the COVID-19 pandemic.

Closing date for submissions

Closing date **Close of Business: Friday, 11 February 2022**

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Note: The options outlined in this paper have not received Government approval and are not yet law. This paper is merely a guide as to how the options might operate.

¹ This CRIS builds on past reports on similar matters such as the [2009 Consumer rights: reforming statutory implied conditions and warranties](#), final report by the former Commonwealth Consumer Affairs Advisory Council.

Glossary of terms

AAA Australian Automobile Association

ARA Australian Retailers Association

ACCC Australian Competition and Consumer Commission

ACL Australian Consumer Law

Ai Group Australian Industry Group

ARA Australian Retailers Association

ASIC Australian Securities and Investments Commission

BCR Benefit-cost ratio

CAANZ Consumer Affairs Australia and New Zealand

MTAA Motor Trades Association of Australia

NPV Net present value

RIS Regulation Impact Statement

Introduction

Purpose

This Consultation RIS has been prepared by Consumer Senior Officials (formerly Consumer Affairs Australia and New Zealand (CAANZ)) following a request of Australia's Consumer Affairs Ministers at their meeting in August 2019. Ministers noted there were ongoing difficulties for consumers seeking remedies for goods that fail to meet the consumer guarantees and requested a regulatory impact assessment be undertaken on:

- options to ensure businesses comply with the consumer guarantees and consumers can access the remedies to which they are entitled. This includes consideration of a proposed civil prohibition for failure to provide a consumer guarantees remedy and
- options to prohibit manufacturers from failing to indemnify suppliers and prohibit retribution by manufacturers against suppliers who seek indemnification.

Ministers agreed to consider the costs and benefits of applying those options in two ways:

- across all sectors of the economy and
- to new motor vehicles only.

While the 2017 ACL Review expressed a preference for amendments to apply economy-wide to maintain clearer standards and more consistent messages about rights and responsibilities,² the decision to assess new motor vehicle-specific options was informed by the high instance of unresolved problems with new motor vehicles found by the 2016 Australian Consumer Survey³ and by an ongoing high number of complaints received by the state and territory ACL regulators and the Australian Competition and Consumer Commission (ACCC).

A Consultation RIS presumes there *may* be scope for the Government to take action to address identified problems. The purpose of this Consultation RIS, therefore, is to canvass the regulatory options under consideration, to determine the relative costs and benefits of those options. The costs and benefits of each option set out in this Consultation RIS are assessed individually.

² Consumer Affairs Australia and New Zealand 2017, *Australian Consumer Law Review (ACL Review) – Final Report*, p.16.

³ The 2016 Australian Consumer Survey revealed that consumers experience problems with new motor vehicles in approximately 8 per cent of new motor vehicle purchases. Further, in 45 per cent of these instances, consumer problems had either not been resolved or were resolved but not to their satisfaction. See: EY Sweeney, *Australian Consumer Survey 2016*, pp. 40 and 50.

In assessing the potential costs and benefits of each option, this Consultation RIS includes indicative costings. This analysis is provided to inform the consultation process and to help compare the possible net benefit to the economy of each option in quantitative terms. However, costs and benefits will fall unevenly across suppliers, manufacturers, and consumers. The assumptions used to calculate the indicative cost benefit analysis are at **Appendix A – Assumptions**. Feedback received through consultation on this Consultation RIS will help to refine this analysis and inform the Decision RIS.

Summary of identified problems & policy options presented in the Consultation RIS

	Part A Receiving remedies	Part B Supplier indemnification
Problem	Consumers are not always given the remedies they are entitled to	Manufacturers often fail to indemnify suppliers
Options	1. Status quo	1. Status quo
	2. Consumer, supplier and manufacturer education and guidance campaign a. whole of economy b. new motor vehicles only	2. Supplier and manufacturer education and guidance campaign a. whole of economy b. new motor vehicles only
	3. Civil prohibition for failing to provide a consumer guarantee remedy: a. whole of economy b. new motor vehicles only	3. Civil prohibition for failing to indemnify suppliers where a consumer guarantee failure falls within the responsibility of a manufacturer or importer: a. whole of economy b. new motor vehicles only
		4. Civil prohibition on manufacturers or importers retaliating against suppliers for seeking to enforce their indemnification rights: a. whole of economy b. new motor vehicles only

Key questions

PART A: Receiving remedies

1. Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled?
2. Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested, and the prevalence of such requests.
3. Do you have any information or data to support the view consumers are 'gaming' the system to obtain replacement new motor vehicles or refunds?
4. Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase *increases* in value be factored in? Please detail reasons for your position.
5. For new motor dealer representatives, please provide any relevant information or data on how providing remedies has impacted your business.
6. Are there any other benefits associated with maintaining the status quo?
7. If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?
8. What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.
9. What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.
10. What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?

For consumers:

11. Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services, and how the trader dealt with your issue?
12. If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a major failure:
 - a. What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?
 - b. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?
 - c. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicles)?

For businesses:

13. Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?

For everyone:

14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?
15. Please provide any relevant information or data on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

PART B: Supplier indemnification

16. Suppliers: to what extent are you able to enforce your indemnification rights?
17. What are the barriers to seeking indemnification?
18. Has your business been subject to retribution when you have sought indemnification? If yes, what form did it take?
19. Please provide any relevant information or data you have that quantifies the extent of manufacturers not indemnifying suppliers, or making it difficult for suppliers to obtain indemnification?
20. Please provide any relevant information or data you have that quantifies the proportion of suppliers that do not seek indemnification?
21. Please provide any relevant information or data you have that quantifies the proportion of consumer claims that suppliers refuse or do not consider due to the inability or difficulty in obtaining indemnification, or due to fear of retribution?

For suppliers:

22. Have you sought indemnification from manufacturers under the existing law? If not, please provide details.
23. Have you experienced difficulties getting indemnified from manufacturers? If so, please provide details.
24. Would your inclination to seek an indemnification change if a civil prohibition was introduced?
25. Would your approach to providing consumer guarantee remedies to consumers change if a civil prohibition was introduced? If so, how?

For manufacturers:

26. How (if at all) would a civil prohibition change your response to requests for indemnification?
27. What other issues might a civil prohibition create?

For retailers:

28. Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.
29. Would your inclination to seek indemnification change if a civil prohibition on retaliation was introduced?

30. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?

For manufacturers:

31. How (if at all) would a civil prohibition on retribution change your response to requests for indemnification?

For everyone:

32. If a civil prohibition was created to address manufacturer retribution:
- a. what form should it take? (e.g. effective models in other laws)
 - b. should presumptive tests apply? If so, what presumptions should be included?
33. What penalties or sanctions should be available to deter or compensate for retribution?

Background

The Consumer Guarantees

The ACL⁴ aims to:

- improve consumer wellbeing through empowerment and protection
- foster effective competition
- enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

Consistent with these objectives, the ACL includes automatic legal rights relating to certain goods and services to ensure consumers get what they pay for. These rights are called consumer guarantees.⁵ Where consumers have confidence in what they buy and any problems they encounter will be efficiently addressed, this can increase overall demand for goods and services.

The protections provided by the consumer guarantees are available to ‘consumers.’⁶ A purchaser will be a consumer for the purpose of the transaction if they purchase goods and services for personal, domestic, or household use.⁷ 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).⁸

Goods and services must meet certain standards

For goods, the consumer guarantees require that products:

- are of acceptable quality, which includes they are fit for all the purposes for which that kind of good is commonly supplied; acceptable in appearance and finish; free from defect; safe; and durable (allowing for normal wear and tear over time)
- match descriptions made by the salesperson, on packaging and labels, and in promotions or advertising
- match any demonstration model or sample on which the consumer made their decision

⁴ The ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

⁵ Part 3-2 of the ACL.

⁶ The full criteria for the term ‘consumer’ is set out in section 3 of the ACL.

⁷ Or because the good being acquired is a vehicle or trailer acquired for use principally in the transport of goods on public roads.

⁸ 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. Recent changes to the ACL meant that from 1 July 2021 the threshold increased from \$40,000 to \$100,000.

- are fit for the purpose the supplier told the consumer it would be fit for, and for any purpose that the consumer made known to the supplier before purchasing
- come with full title and ownership
- not carry any hidden debts or extra charges
- come with undisturbed possession, so no one has a right to take the goods away or prevent the consumer from using them
- meet any extra promises (warranties) made about performance, condition and quality, like lifetime guarantees, and money back offers
- have spare parts and repair facilities available for a reasonable time after purchase (unless the consumer is told otherwise prior to purchase).

For services, the consumer guarantees require the service:

- is provided with due care and skill
- is fit for its purpose (or any purpose the consumer and supplier had agreed to) and
- is delivered within a reasonable time (when there is no agreed time or method for determining when the service will be delivered).

When a good or service fails to comply with a consumer guarantee, consumers have the right to a remedy

If a good or service does not comply with one of these standards (which is known as a 'failure') then the consumer may take action against the supplier of the goods or services to remedy the failure.⁹

While the obligation is on the trader to provide the remedy, the ACL does not currently provide any disincentive if they fail to do so.¹⁰ The ACL does, however, provide that a consumer can seek to enforce their right for a remedy through a court or tribunal.

The ACL also currently provides that a consumer may recover damages for any loss or damage suffered because of a failure to comply with a guarantee. It must have been reasonably foreseeable that the consumer would suffer such loss or damage as a result of the failure.¹¹

⁹ Consumers can also seek a remedy directly from the manufacturer or importer in certain circumstances.

¹⁰ ACL, section 15.

¹¹ Section 259 of the ACL.

The types of remedies available depend on the nature of the failure

The type of remedy a consumer is entitled to will depend on whether the failure is a ‘major failure’.

Table 1 sets out the criteria used to determine whether a failure is a ‘major failure’. If the failure is major, consumers have the right to reject the goods within a reasonable timeframe and choose a remedy, either a replacement or a refund. If the failure is not major, the supplier has the right to choose the remedy, which can be a repair, replacement, or refund.

On 17 December 2020, the ACL was updated to clarify that a series of non-major failures can amount to a major failure. The consumer guarantees now provide that there is a major failure if the good has multiple guarantee failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the good.¹²

Table 1: Major failure criteria

Goods	Services
<p>A major failure occurs if one or more of the following apply:</p> <ul style="list-style-type: none"> • a reasonable consumer fully acquainted with the nature and extent of the failure would not have bought the good • the good has multiple guarantee failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the good • the good is significantly different from the sample or description • the good is substantially unfit for its common purpose and can’t easily be fixed to make it fit for its purpose within a reasonable time • the good doesn’t do what the consumer asked for and can’t easily be fixed to meet that purpose within a reasonable time • the good is unsafe 	<p>A major failure occurs if one or more of the following apply:</p> <ul style="list-style-type: none"> • a reasonable consumer fully acquainted with the nature and extent of the failure would not have bought the service • the service has multiple guarantee failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the service • the service is substantially unfit for its common purpose and can’t easily be changed to make it fit for its purpose within a reasonable time • the service does not meet the specific purpose the consumer asked for and cannot easily be changed to meet that purpose within a reasonable time • the service creates an unsafe situation

¹² Treasury Laws Amendment (2020 Measures No. 6) Act 2020.

Who is responsible for providing a remedy?

The ACL details that suppliers are primarily responsible for providing remedies to consumers for failures to comply with consumer guarantees, even where fault more properly lies with a manufacturer (or importer).¹³ An exception is where the failure relates to spare parts or repair facilities, or where a remedy relates to an express warranty offered by a manufacturer. Suppliers are not able to exclude, restrict or modify the application of the consumer guarantees by any agreement, contract, or warranty (e.g. a new motor vehicle warranty).¹⁴

The consumer guarantees apply regardless of whether a good is covered by a manufacturer's warranty, an express warranty, or an extended warranty, and may continue to provide protections after warranties have expired. This means where a supplier or manufacturer offer a warranty on their goods or services, that warranty will provide rights alongside, and in addition to, the consumer guarantee protections provided by the ACL.

Other relevant protections

The ACL also prohibits traders from making false or misleading representations concerning:

- the existence, exclusion or effect of any consumer guarantees or remedy or
- a requirement to pay for a contractual right wholly or partly equivalent to a consumer guarantee.¹⁵

The ACL also prohibits traders from engaging in unconscionable conduct.

Measures which have already been considered

CAANZ (now Consumer Senior Officials) previously considered options for reform in the Decision RIS *Australian Consumer Law Review: Clarification, simplification, and modernisation of the consumer guarantee framework* (2018 Decision RIS). These included:

- Specifying a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure of the consumer guarantees – applying across the economy or limited to high-value goods (such as motor vehicles).

¹³ Where the manufacturer of a good does not have a place of business in Australia, section 7 of the ACL defines the term 'manufacturer' to include a person who imports goods into Australia. A reference to "manufacturer" in this Consultation RIS should be read as including "importer".

¹⁴ Section 64 of the ACL ensures such provisions are void.

¹⁵ These prohibitions are set out in sections 29(1)(m) and (n) of the ACL.

Improving the effectiveness of the consumer guarantee and supplier indemnification provisions

- The consumer benefits of such reforms were assessed to be significantly outweighed by the costs to businesses. Some concerns were also raised that separate arrangements for high-value goods would add complexity to the law. In the latter regard, the 2017 ACL Review Final Report expressed a preference for economy-wide application of consumer guarantee reforms to maintain consistency and avoid bespoke or industry-specific variations, noting this had helped to provide clearer standards for traders and consistent messaging about rights and responsibilities ¹⁶
- Clarifying multiple non-major failures of the consumer guarantees (e.g. a collection of smaller problems) can amount to a major failure, entitling the consumer to a refund or replacement. ¹⁷

This clarification option was assessed to have the greatest net benefit and was implemented on 17 December 2020.

Other relevant government reforms underway

Other reforms are underway to improve consumer and small business outcomes, including:

- Enhancements to the unfair contract terms protections in the ACL.
- The Motor Vehicle Service and Repair Information Sharing Scheme, which will allow consumers to have greater choice of repairers who are able to repair their vehicles safely and effectively.
- Changes to the Franchising Code of Conduct and a range of other reforms to benefit new car retailers.
 - On 1 June 2021, the Government amended the Franchising Code, including mandating the automotive best practice principles and explicitly recognising dealers operating as a manufacturer's agent in relation to new vehicle sales. These reforms took effect from 1 July 2021.

Other reforms will also benefit new car retailers and include:

- Code amendments in response to the Fairness in Franchising report, which was released on 20 August 2020. These include doubling the maximum financial penalties and introducing voluntary binding arbitration.

¹⁶ ACL Review, p16.

¹⁷ The test for this clarification also requires a 'reasonable consumer' would not have acquired the good at the time of supply if they were aware of the nature and extent of the failures - taken as a whole.

- Increasing available penalties under the Franchising Code to up to \$10 million to strengthen penalties for wilful, egregious, and systemic breaches of the Franchising Code.
- Changes to collective bargaining requirements, to allow franchisees to collectively negotiate with their franchisors without first having to seek ACCC approval.

Supplier Indemnification

While the ACL provides suppliers are liable for providing remedies to consumers for consumer guarantee failures, it also provides manufacturers are liable for indemnifying (reimbursing) suppliers for the cost of providing that remedy, where the manufacturer is at fault for the consumer guarantee failure.¹⁸ This applies to the consumer guarantees of:

- acceptable quality¹⁹ (e.g., where a good contains a design flaw that makes it unsafe)
- descriptions applied to goods by, or with the consent of, manufacturers²⁰
- fitness for a purpose that a consumer makes known to a manufacturer, either directly or through a supplier²¹ (e.g., where a good doesn't do what the manufacturer claims it does).

The amount a manufacturer is liable to pay can include any compensation the supplier paid to the consumer for reasonably foreseeable consequential losses.²²

The ACL prevents a manufacturer from contracting out of the indemnification provisions by providing that a contract term is void to the extent it purports to exclude, restrict, or modify a supplier's indemnification right.²³ The ACL does however provide that a manufacturer can limit their liability in the case of goods not ordinarily acquired for personal, domestic, or household use (i.e., certain commercial goods), to the lowest cost out of the following:

- replacing the goods
- obtaining equivalent goods
- repairing the goods.²⁴

¹⁸ ACL, s 274.

¹⁹ ACL, s 54.

²⁰ ACL, s 56.

²¹ ACL, s 55.

²² ACL, s 274(1).

²³ ACL, s 276. However, a term of a contract is not taken to do so unless the term does this expressly or the term is inconsistent with a provision in Part 5-4 of the ACL (ss 276(2)).

²⁴ ACL, s 276A.

This limitation on liability does not apply if a supplier establishes it would not be fair or reasonable to do so.

A manufacturer's liability to a supplier remains for three years after the supplier has provided a consumer with a remedy, or three years after the day on which proceedings were first commenced by a consumer against the supplier, whichever is earliest.²⁵

²⁵ ACL, ss. 274(4).

Part A: Receiving remedies

The problem: consumers are not always given the remedies they are entitled to

The success of the framework depends in part on parties being well informed and acting in good faith: with consumers understanding and asserting their rights and suppliers and manufacturers meeting their obligations. Disagreement between the parties is not in and of itself an issue, as parties may reasonably disagree about the merits of a consumer's claims. However, many consumers claim they are finding it difficult to obtain remedies from suppliers for consumer guarantee failures. Where a business 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 the remedy, meaning there are limited incentives for suppliers and manufacturers to comply with their obligations.

Why is this a problem?

Consumers are likely to experience at least some level of inconvenience for a consumer guarantee failure. However, some consumers may suffer loss as a direct result of the failure (e.g. where a poorly installed toilet leaks and causes damage to carpets) or additional costs in pursuing a remedy. Some customers may also experience delays and loss by purchasing a product that doesn't work as it is supposed to, or needing to pay for additional services to rectify a service failure. This may lead to consumers having less confidence in purchasing goods and services, which may reduce aggregate demand and result in a collective cost to the economy.

What is the extent of the problem?

The 2016 Australian Consumer Survey (2016 Consumer Survey) indicates that most individuals seek to deal with consumer guarantee failures themselves, but only 36 per cent of consumers who reach a resolution can do so in the first contact.²⁶ On average, the 2016 Consumer Survey suggests Australian consumers spent 22.6 hours, equivalent to \$655 per year resolving their consumer guarantee problems. This is in addition to out-of-pocket costs such as travel, legal or technical advice which cost the average consumer around \$299 per year.²⁷

Where consumers are not satisfied with a supplier response, they can decide whether to pursue the matter further through private action (i.e., seeking the intervention of a Tribunal or Court) to compel suppliers to meet their obligations. However, this process can be costly and act as a barrier to

²⁶ EY Sweeney, Australian Consumer Survey 2016.

²⁷ EY Sweeney, Australian Consumer Survey 2016, page 65 (Table 4). Cost of time calculated using Australian Government default non work-related labour rates based on ABS average weekly earnings data (\$29.00 per hour).

consumers enforcing their ACL remedy rights. For example, Court/Tribunal application fees,²⁸ private expert legal opinions²⁹ (beyond the guidance and advice provided by ACL regulators) and expert technical reports about the condition of a good or the cause of a fault, may be required to make a compelling case. ACL regulators note cases where Courts/Tribunals required consumers to obtain expert reports for their case.

The value of the transaction is also relevant to how businesses and consumers approach consumer guarantee claims. For example, consumers are less likely to complain to a business, or take their claim to a Court/Tribunal, for low value goods (such as a toaster) or services, and are more likely to wear the costs of any failure by a supplier or manufacturer to comply with the consumer guarantees.

Conversely, where a consumer does make a claim about a low value good or service, the suppliers and manufacturers are more likely to wear those costs, as it may be more cost effective to provide a remedy up front without any closer examination. Suppliers and manufacturers have more incentive to closely examine, and dispute consumer guarantee claims where high value goods or services are involved. For example, Legal Aid Queensland has previously noted for goods that fail shortly after purchase:

Traders are more likely to agree to a refund for small value goods such as small appliances (toasters, microwaves) and other small consumer goods (phones, small value tools). However, with higher value goods such as cars and major appliances, traders will almost never agree to a refund and will insist on trying to repair the goods even when the failure is a significant one.³⁰

Data from the 2016 Australian Consumer Survey has been used as a basis for modelling in this Consultation RIS. Consumers who experience a consumer guarantee failure are assumed to take

²⁸ For example, the Victorian Civil and Administrative Tribunal charges application fees of \$66.30 for claims below \$3,000, \$220.90 for claims between \$3,001 and \$15,000 and \$494.50 for claims between \$15,001 and \$100,000. See the Tribunal's website: <https://www.vcat.vic.gov.au/fees> [accessed 9 November 2021].

²⁹ Choice's [submission to the 2018 consultation](#) (pp. 3-4) noted 'In a surprising number of everyday disputes, we see frustrated consumers seeking support from experts including consumer advocates, lawyers, public servants and various specialists such as electricians, mechanics and computer technicians.'

³⁰ Legal Aid Queensland, [submission to the 2018 consultation](#), p. 6.

action 82 per cent of the time.³¹ Similarly, for consumers who seek a remedy, 55 per cent are assumed to obtain remedies to their satisfaction.³²

For the remaining 45 per cent of consumers who do not obtain remedies, the Survey data does not provide any further insights into how many of these consumers may be entitled to a remedy.³³ For the purposes of this Consultation RIS and in the absence of any further evidence, it is assumed half (22.5 per cent) are entitled to a remedy and the remainder (22.5 per cent) are not.³⁴ Therefore, the likelihood of a consumer who requests a remedy but does not receive a remedy when entitled is assumed to be 29 per cent.³⁵

Focus question:

1. Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled?

2018 consultation on the consumer guarantee framework

Previous consultation undertaken by Treasury in 2018, on behalf of CAANZ (now Consumer Senior Officials), for the RIS: *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework* suggested consumers are experiencing widespread problems enforcing their existing entitlement to a refund or replacement, particular for goods considered to have ‘major failures’.

For example, the Caravan Council of Australia noted ‘many aggrieved caravan owners had major problems in having Suppliers and Manufacturers admit to, and rectify, defects...’.³⁶ Similarly, a submission made by consumer representative organisation CHOICE noted:

³¹ As 18 per cent of consumers in the 2016 Australian Consumer Survey advised they did not seek a remedy, they are not included in the analysis as having been denied one. However, there are numerous reasons why a consumer may not seek a remedy even when entitled, for example past experiences with suppliers not providing remedies.

³² Consistent with the 2016 Australian Consumer Survey, 55 per cent of consumers who had sought a remedy indicated they were either satisfied the problem was resolved or were in the process of resolving the issue. The latter group (8 per cent) may overstate compliance levels.

³³ It should be noted the Australian Consumer Survey only captures data for consumer behaviour and not consumer entitlements.

³⁴ Consistent with the 2016 Australian Consumer Survey, 45 per cent of consumers indicated the problem was resolved but not to their satisfaction or the problem was unresolved or unlikely to be resolved. In the absence of more reliable data, in this Consultation RIS half of these consumers are assumed to have genuine consumer guarantee failures entitling them to remedies.

³⁵ This figure is derived by dividing the percentage who don’t receive a remedy by the total percentage entitled to a remedy: 22.5 per cent / (55 per cent + 22.5 per cent).

³⁶ Caravan Council of Australia, [Submission to the 2018 consultation](#), p. 2.

*We have received hundreds of contacts over the last month from individuals who are frustrated with how much time and effort they needed to expend to convince businesses to provide them with remedies they are legally entitled to.*³⁷

The 2018 submissions set out various situations where consumers have experienced problems obtaining remedies:

- suppliers referring consumers to manufacturers
- suppliers being unwilling to provide any particular remedy unless and until the manufacturer directs them on what to do
- suppliers extensively delaying or ignoring requests for a remedy and
- consumers having to obtain expert advice or other interventions to obtain remedies.

Some illustrative case studies from the 2018 consultation and ACL regulators are summarised below.

Case Study 1: Padma

Padma purchased a new motor vehicle. A few years later, rough idle issues caused the vehicle to go into limp mode while she was driving it, on more than 40 occasions. Dealers for the car's manufacturer attempted to repair the motor vehicle but the rough idle issues persisted. Padma requested a replacement motor vehicle, but this request was refused.

Padma commenced action in a tribunal seeking a refund. The tribunal member told Padma it was unreasonable for her to ask for a full refund because she had received fair use of the vehicle for four years and the most she could receive would be the motor vehicle's current market value. The tribunal member also told Padma the inspection report provided by a well-known and experienced independent national repair company would not be accepted, and rather a more comprehensive inspection report was required. This new report would cost around \$1500-2000.

Case Study 2: Rod³⁸

Rod bought a pair of running glasses with prescription inserts costing over \$600. The inserts rubbed the sunglasses film off within a month. Despite an optometrist writing a letter stating the product was faulty, the supplier did not provide a remedy.

³⁷ CHOICE, [Submission to the 2018 consultation](#), 23 April 2018, p.3. The submission made by Choice was based on stories submitted to their dispute resolution and information services in the previous month.

³⁸ Choice, [Submission to the 2018 consultation](#), 23 April 2018, p.5.

Case Study 3: Peter³⁹

Peter bought a wooden outdoor lounge chair for \$1,000. Peter had made it known to the retailer he wanted a low maintenance product as the chair would be in full sun and uncovered. Peter was assured, the chair recommended by the retailer was made with high quality materials, required no maintenance and would last in the conditions Peter had described. Within one month of purchase the chair had developed black marks, the wood had started to disintegrate, and the appearance was so poor Peter put a cover over it. Peter spent 12 months attempting to resolve the matter, with the retailer confirming the chair could not be repaired. The refund sought from the retailer was refused, and eventually Peter took the matter to the Tribunal.

Case Study 4: Omar

Omar purchased a new laptop costing around \$1000. When he opened the packaging, he discovered the laptop had a cracked screen. He returned it to the retailer who advised him they would repair it. The retailer had the laptop for almost a month before deciding they would replace it instead. The retailer replaced it with a refurbished unit. The refurbished unit had a line running across the screen display. Omar decided not to raise this issue with the retailer to avoid the hassle experienced the first time.

Are consumers approaching regulators with concerns and what can they do?

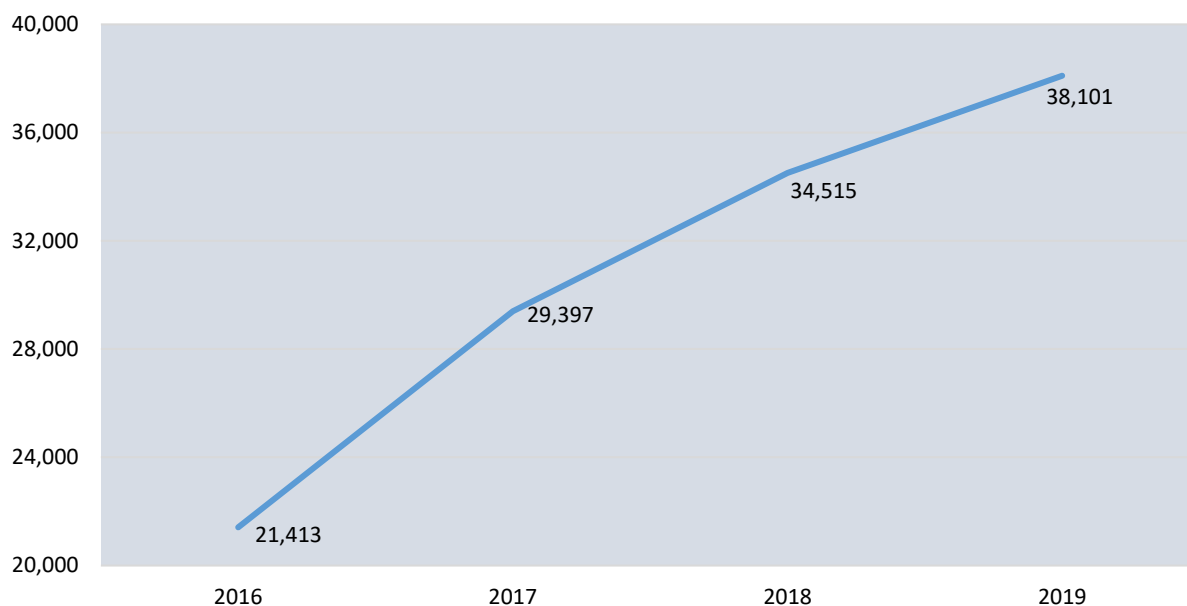
The extent to which consumers contact regulators on the consumer guarantees may be another indicator of non-compliance. More than 38,000 people contacted the ACCC on the consumer guarantees in 2019 (**Figure 1**), an increase of 78 per cent over 2016. ACCC consumer guarantees data for 2020-21 have been affected by the COVID-19 pandemic and have therefore not been included. A large number of consumers have also contacted state and territory ACL regulators (at least another 100,000)⁴⁰ and consumer representative organisations⁴¹.

³⁹ Legal Aid New South Wales, [Submission to the 2018 consultation](#), April 2018, p. 4.

⁴⁰ Data was not available from all states and territories, but there were at least another 100,000 contracts to state and territory ACL regulators in the year to October 2019.

⁴¹ For example, the Consumer Action Law Centre's [submission to the 2018 consultation](#), noted it had received 926 calls to its legal advice line between April 2017 and April 2018 where 'Consumer Guarantees Breach' was flagged as an issue.

Figure 1: Consumer guarantee issues reported to the ACCC



Stakeholder feedback suggests an increasing number of consumers are finding it difficult to resolve consumer guarantee issues. This could reflect increasing non-compliance, growth in the supply of goods/services generally (or of defective goods) or other factors. This increase could also reflect consumers attempting to pursue their rights but not being successful in resolving their consumer guarantee issues. Not all consumers who experience issues obtaining remedies for legitimate consumer guarantee claims necessarily contact a regulator or a consumer representative organisation about their issue.

The options available to regulators in responding to complaints are limited. While regulators have the power to undertake representative legal action on behalf of individual consumers in certain circumstances, this can be costly. Specifically, if a trader refuses to provide the remedy required by the ACL, that refusal is not a contravention of the ACL. A key criterion for regulators in assessing the merits of such actions is whether they will drive greater compliance by traders across the economy or at least a broader subset of the economy than just the individual trader who is the subject of the action.

Given that refusing to provide a remedy for a consumer guarantee failure is not a contravention of the ACL, and does not attract a penalty, regulators are unlikely to take representative actions as they would not achieve significant industry-wide change or benefits for a large group of consumers. A representative action involving consumer guarantee failures can only reinforce the existing obligation for the trader to provide the applicable remedy to the consumer (i.e. a refund, repair, or replacement) and is highly likely to be settled after a time-consuming and costly investigation without any outcome other than the original remedy sought by the consumer.

As the court decisions in such cases tend to relate to the specific circumstances of the case, the outcome of court action is also likely to have a limited impact on compliance with the consumer guarantee provisions more broadly.

In limited circumstances, ACL regulators may take legal action where it suspects a trader may have breached one of the other protections provided by the ACL. For example, those relating to unconscionable conduct, or misleading conduct or false representations.⁴² Where a trader misleads consumers on their consumer guarantee rights, the regulator could commence an action claiming misleading or deceptive conduct and ask a court to impose penalties as a future disincentive.⁴³ However, regulators' enforcement actions cannot deal with consumer guarantee non-compliance that consumers commonly face. For example, regulators cannot take action under the misleading conduct or false representation provisions where a trader simply does not respond to a customer's consumer guarantee complaint. Further, a trader's refusal to provide a particular consumer guarantee remedy will rarely meet the legal requirements to constitute unconscionable conduct.

The additional roles of state and territory ACL regulators

The roles of each ACL regulator can differ. The ACCC does not typically become involved in resolving individual complaints but does provide extensive guidance. For their part, state and territory ACL regulators provide information to consumers and small business about their rights and obligations and possible courses of action. They also publish guidance and engage with suppliers about their responsibilities and specific consumer concerns raised. Despite this, the growth in the volume of people contacting ACL regulators suggests there is ongoing non-compliance with consumer guarantee provisions.

Where a consumer has been unsuccessful in resolving a complaint, state and territory ACL regulators can also play an important role in negotiating with business to resolve these. In New South Wales, the ACL Regulator (NSW Fair Trading) has the power to make 'Consumer Guarantee Directions' if a consumer and business are unable to resolve a dispute. This power can be used to direct a business to provide a repair, replacement good or refund of the purchase price. Where a business fails to comply with such a direction, the consumer may register the direction in a Local Court as a

⁴² See for example: ACCC Media Release 71/18, [Court orders Ford to pay \\$10 million penalty for unconscionable conduct](#), 26 April 2018.

⁴³ See for example: ACCC Media Release 182/17, [MSY Technology ordered to pay penalties of \\$750,000 for consumer guarantee misrepresentations](#), 25 October 2017.

judgement debt and apply to have it enforced.⁴⁴ However, it is noted this power to issue a direction is limited in scope and is not replicated in other jurisdictions.

Existing education and guidance

ACL regulators provide education and guidance to businesses and consumers on the consumer guarantees, through their websites, telephone enquiry lines, social media and industry engagement. For example, the ACCC's [Repair, replace, refund](#) website received 105,614 page views in the June 2020 quarter.⁴⁵

Similarly, joint education campaigns have been funded by all Australian jurisdictions since the adoption of a nationally consistent set of consumer guarantee requirements in the ACL in 2010. The most enduring of these initiatives has been the development of the Australian Consumer Law website (www.consumerlaw.gov.au), which contains guides for businesses and legal practitioners on the consumer guarantees, including:

- a comprehensive guide written in simple language covering the whole of the [consumer guarantee framework](#) and tailored towards supplier, manufacturer and importer responsibilities⁴⁶
- more specific guides interpreting common issues with the acceptable quality guarantee relating to the [durability](#) of goods and whether they are [safe](#).

Education campaigns have also targeted specific consumer groups or special interest areas. For example, campaigns have produced and disseminated information about rights and obligations to culturally and linguistically diverse groups;⁴⁷ to the aged care services sector;⁴⁸ for consumers and businesses in the sharing economy;⁴⁹ and on other contemporary matters.⁵⁰

⁴⁴ See further: <https://www.fairtrading.nsw.gov.au/about-fair-trading/our-services/consumer-guarantee-directions>. The direction power has a limited scope. For example, it only applies to certain consumer guarantee failures relating to goods, certain goods purchased within 6 months of a consumer making a complaint to NSW Fair Trading, and to goods with a purchase price between \$25 and \$3,000 (excluding GST).

⁴⁵ ACCCount, 1 April to 30 June 2020, available from <https://www.accc.gov.au/publications/acccount>.

⁴⁶ This guide was published in 2016 and is currently in the process of being reviewed and updated.

⁴⁷ For example, the [My Consumer Rights Campaign](#) includes a set of animated videos on YouTube discussing rights and responsibilities when buying goods and services, including consumer guarantees. Similarly, the [Be Smart – Buy Smart](#) campaign provided tips and information about shopping rights and responsibilities focusing on issues relevant to Indigenous Australians.

⁴⁸ This included [guides](#) developed for both consumers and aged care providers.

⁴⁹ The [Making Share Fair](#) campaign includes YouTube videos and links to guides.

⁵⁰ For example, guidance for consumers purchasing tickets to [music festivals](#).

The availability of regulator advice, educational resources and periodic campaigns helps to build a base of knowledge among consumers, suppliers and manufacturers, or at least provide an easy point of reference when issues arise. However, there is little evidence to suggest they have significantly increased knowledge or compliance.

What drives suppliers to provide remedies?

In general, traders have an incentive to meet the expectations of their customers to maintain long term good will and encourage repeat purchasing. In this regard, some retailers adopt policies such as 'no questions asked' refunds. There are also disincentives for traders to choose to make it difficult for consumers to access a consumer guarantee remedy, including that future sales can be jeopardised if consumers publicly call out non-compliance, as sometimes occurs through online reviews and social media.

The time cost of dealing with individual complaints may also act as a disincentive for producing or stocking poor-quality goods and making the remedy process difficult to navigate. In many instances, a trader may see providing a remedy as the most cost-effective solution to the issue.

However, there are also shorter-term incentives. Some suppliers and manufacturers may avoid the time cost of dealing with individual complaints by simply refusing claims for particular remedies, or any remedies at all. There may be more incentive to refuse particular remedies in high-value transactions or to insist upon one form of remedy, such as a repair, when that is the least-cost option.

Obtaining remedies relating to new motor vehicles

For many consumers, the purchase of a new motor vehicle is likely to be one of the largest purchases they will ever make (perhaps second only to a home) and could be their primary means of transportation each day. Problems with new motor vehicles can create significant disruption, including potential safety risks (to the user, passengers and other road users) and additional costs (e.g. costs associated with use of alternative transport, hiring a replacement vehicle and organising a remedy).

The 2016 Australian Consumer Survey revealed consumers experience problems with new motor vehicles in approximately 8 per cent of new motor vehicle purchases⁵¹ and, in 45 per cent of these instances, the problem had either not been resolved or was resolved but not to the consumer's

⁵¹ EY Sweeney, Australian Consumer Survey 2016, p. 40.

satisfaction.⁵² Further indications of consumers experiencing issues with obtaining a remedy for a failure relating to new motor vehicles can be seen in the volume of consumers contacting the ACCC. Contacts about the automotive industry have consistently been one of the largest contact categories in recent years, making up a quarter of all ACCC contacts about consumer guarantees in the year to September 2021 (and approximately the same in the two preceding years).

The CHOICE and Australian Automobile Association (AAA) submissions to the 2018 consultation provided further data on this issue from surveys conducted in 2016.⁵³ For example, a CHOICE survey⁵⁴ found:

- two thirds of all new car buyers experienced problems of some sort with their car in the first five years of ownership
- 14 per cent of all survey respondents experienced major problems, defined as ‘problems that seriously impaired the car’s operation or outright stopped it working’
- the total average cost of fixing a problem with a new car was \$1,295, comprised of \$858 in direct costs and \$437 in lost wages⁵⁵
- on average, people spent 31 hours attempting to seek a resolution to the problem.

Consumer advocate groups argue there is significant non-compliance in the new motor vehicle sector and/or the existing law is not necessarily fit for purpose for the sector.⁵⁶ In doing so, several case studies of consumer problems with obtaining remedies were provided in submissions to Treasury’s 2018 consultations on consumer guarantees. Two examples of these are below.

Case Study 1: Joanne⁵⁷

Joanne experienced a major fault with the transmission of her new motor vehicle less than 30 days after purchase. Instead of being offered a refund or replacement, Joanne was left \$4,000 out of pocket and spent 30 hours away from work trying to seek a remedy through the court system. The matter was eventually resolved with the court ordering a refund after the car was deemed unsafe.

⁵² EY Sweeney, Australian Consumer Survey 2016, p. 50.

⁵³ See CHOICE [submission to the 2018 consultation](#), pp. 10-11; and AAA, [submission to the 2018 consultation](#), p. 4-12.

⁵⁴ 15 March 2016, CHOICE, ‘Turning lemons into lemonade: consumer experiences in the new car market’.

⁵⁵ By comparison, the AAA’s [submission to the 2018 consultation](#) (p. 5) cites a cost of \$1 970.

⁵⁶ For example, the AAA’s [submission to the 2018 consultation](#) (p. 2) notes member clubs often cite where favourable outcomes are only provided by manufacturers or dealers after third party advocacy and, often by this stage, significant resources have already been expended by the consumer.

⁵⁷ AAA, [submission to the 2018 consultation](#), April 2018, p. 4.

Case Study 2: Shantell ⁵⁸

Shantell experienced multiple failures within 60 days of purchasing a new demonstrator car. The first fault was discovered before the car was due for its 3,000km service. According to Shantell, the dealership did not rectify the issue. Shantell then experienced eight additional faults, which caused her on many occasions to be without a car. Shantell had to hire a car for more than three months, experienced loss of business, fell behind on finance due to cost-of-living constraints, loss of car registration, and required tow trucks on multiple occasions when her vehicle experienced faults on road. In addition, Shantell suffered emotionally from the stress. Unfortunately, the manufacturer failed to offer a satisfactory remedy, leaving Shantell out of pocket tens of thousands of dollars.

Independent repairers also submitted observations on the difficulty consumers face when they try to enforce their warranty rights (noting that meeting warranty commitments is an ACL consumer guarantee):

...we hear of many instances directly from consumers regarding their inability to enforce their statutory rights where a warrantable defect has been identified...

The volume of consumer complaints that we receive from our members' customers regarding their dissatisfaction with a new car purchase would indicate that increased attention and scrutiny is required because there is a significant power imbalance between a consumer and the large global vehicle manufacturers that are reluctant to admit fault due to the commercial implications.

The high volume of community concern should provide enough evidence there are sections of our law that are subject to 'creative compliance' rather than compliance with the letter and the spirit of the law. Our concern arises from systemic failures in aftersales service, because at some point in time, these consumers arrive at the door of the independent (non-dealer) aligned auto repair businesses. ⁵⁹

The commercial arrangements between vehicle manufacturers and suppliers and how they approach problems with new motor vehicles appear to be contributing factors to consumer remedy outcomes. These issues are explained in a market study into the motor vehicle retail sector undertaken by the

⁵⁸ AAA, [submission to the 2018 consultation](#), April 2018, p. 5.

⁵⁹ Australian Automotive Aftermarket Association, [submission to the 2018 consultation](#), April 2018, pp. 2-3.

ACCC in 2017.⁶⁰ The market study highlights that a ‘culture of repair’ exists in the motor vehicle industry which underpins how defects and failures are dealt with.

This includes complex internal complaints handling procedures that have not accounted for consumer guarantee rights and instead focused on warranties provided by manufacturers. Examples of this were also noted by the AADA in 2018. This included agreements:

- prohibit dealers from making admissions of liability without prior approval of a manufacturer
- require dealers to obey manufacturer instructions in relation to a consumer’s request, complaint, claim or legal proceeding
- state dealers will lose their right of indemnity if they did not adhere to such manufacturer instructions.⁶¹

The resulting experience for consumers noted by the Consumer Law Centre of the ACT in its 2018 submission, was they had ‘found it common for suppliers in the motor vehicle industry to purposely ignore or challenge the existence and application of their [clients’] consumer rights under the ACL’.⁶²

In considering the known extent of the problem, the ACCC’s market study suggests there are certain practices and policies that can create additional barriers for consumers to receive the remedy they are entitled to, leaving consumers in failed repair attempts, even where known significant and systemic mechanical failures would entitle a consumer to a replacement or refund remedy. It also makes it challenging for policy makers and regulators to assess the full extent of problems in the sector. For example, the widespread use of non-disclosure agreements when resolving consumer complaints may indicate that suppliers or manufacturers are telling consumers they are not entitled to their consumer guarantee and warranty rights unless a non-disclosure agreement is signed when this is not the case.⁶³

⁶⁰ ACCC, New car retailing industry market study: <https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>.

⁶¹ Australian Automotive Dealers Association, *submission to the 2018 consultation*, p. 16.

⁶² Consumer Law Centre of the ACT, *submission to the 2018 consultation*, p. 5.

⁶³ ACCC, New car retailing industry market study: <https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>, p. 7.

Case Study 3: Sonia ⁶⁴

Sonia purchased a new motor vehicle that encountered a major mechanical failure. Rather than a refund or replacement the manufacturer offered a trade-in or buy-back. Sonia was asked to sign a confidentiality agreement after she had surrendered her old faulty vehicle and paid the trade-in difference. Sonia would have preferred the manufacturer “offered immediate and total refunds to all its customers as well as compensation for the ongoing stress and inconvenience of having to negotiate their way out of driving a 100 per cent unsafe vehicle.”

Under the broader ACL framework of protections, regulators can address some limited breaches such as misleading or unconscionable conduct by motor vehicle suppliers. The ACCC has sought to address such non-compliance in the sector with current regulatory tools. One approach has been to accept enforceable undertakings from a range of motor vehicle manufacturers to strengthen their compliance with the ACL and consumer guarantees as set out below.

Manufacturer	Nature or the issues leading to an enforceable undertaking
<p>11 September 2015</p> <p>Chrysler undertakes to remedy customer service complaints following ACCC investigation</p>	<p>Fiat Chrysler Australia (Chrysler) provided an administrative undertaking to the ACCC to deal with concerns regarding vehicle faults and complaint handling by Chrysler and its dealers, including delays in sourcing spare parts and failing to adequately deal with consumer complaints.</p>
<p>2 August 2017</p> <p>GM Holden Ltd – s.87B undertaking</p>	<p>The ACCC accepted a court enforceable undertaking from Holden in relation to alleged misrepresentation to consumers and Holden dealers about their rights and obligations under the consumer guarantee provisions of the ACL.</p> <p>This included representations to consumers that Holden had discretion to determine whether, and to what extent, a remedy should be provided, or would provide no or limited remedies in cases whether the vehicle had not been serviced by a Holden dealer or it was purchased second hand, as well as representations to dealers they would only be indemnified by Holden if they obtained prior approval to provide an ACL remedy.</p> <p>Holden undertook to refrain from making such representations, upgrade its consumer law compliance program and complaints handling systems, and implement policy to provide a remedy to consumers if they experience a defect in their new vehicle within 60 days which caused it to become immobile and no longer driveable.</p>

⁶⁴ Australian Automobile Association, [submission to the 2018 consultation](#), April 2018, p. 9.

Manufacturer	Nature or the issues leading to an enforceable undertaking
<p>6 February 2018</p> <p>Hyundai Motor Company Australia Pty Ltd - s.87B undertaking</p>	<p>The ACCC accepted a court enforceable undertaking from Hyundai in response to the ACCC’s concerns their policies and procedures, including complaint handling systems and compliance programs, may not have provided a balanced focus on consumers’ entitlements arising from the consumer guarantees under the ACL, compared to entitlements arising from the Manufacturer’s Warranties. This may have resulted in misleading representations made to consumers about their rights under the ACL, making it difficult for consumers to enforce their rights if they experience problems with their vehicle.</p> <p>Hyundai undertook to engage an independent expert to review complaints from the previous 12 months as well as review its complaint handling system to ensure it complies with the ACL.</p>
<p>6 September 2018</p> <p>Volkswagen Group Australia Pty Ltd</p>	<p>The ACCC accepted court enforceable undertaking from Volkswagen following similar concerns as the 2018 Hyundai matter (above).</p> <p>Volkswagen undertook to engage an independent expert to review complaints from the previous 12 months, its complaint handling system, its consumer law compliance program, its dealer training material and Dealer Warranty Handbook. Volkswagen also undertook to provide consumers with information on their consumer guarantee rights, implement policy to provide a remedy to consumers if they experience a defect in their new vehicle within 60 days which causes it to become immobile and no longer driveable, as well as various compliance monitoring activities.</p>
<p>2 December 2020</p> <p>Toyota Motor Corporation Australia Limited – s.87B undertaking</p>	<p>Between 2016 and 2018, many consumers experienced issues with the Diesel Particulate Filter (DPF) in their vehicles. This included the emission of white smoke from the vehicle and soot accumulation in the DPF resulting in the display of warning messages and some vehicles entering ‘limp mode’ to encourage the driver to seek assistance.</p> <p>Consumers were instructed to take their vehicles to a Toyota dealer for repair under warranty but the ACCC received complaints about vehicles being repaired on multiple occasions without remedying the DPF issues.</p> <p>Toyota acknowledged the ACCC’s concerns that failure to inform consumers regarding mechanical issues with their vehicles (or issues with repairs) may be misleading.</p> <p>Toyota undertook to review and improve its systems and procedures for dealing with consumer complaints in relation to the ACL consumer guarantees to ensure consumers can access remedies. Toyota also undertook to engage an independent expert to review its systems and procedures, as well as various compliance monitoring activities.</p>

There is presently little evidence on whether, or the extent to which, the changes these manufacturers undertook are improving access to remedies across the broader motor vehicle sector. Despite the COVID-19 pandemic, the ACCC continued to receive a high volume of complaints about motor vehicle consumer guarantee issues in 2020.

The ACCC has also taken court proceedings against motor vehicle manufacturers. For example, in April 2018, the Federal Court declared, by consent, Ford Motor Company of Australia Limited (Ford) engaged in unconscionable conduct in the way it dealt with complaints about PowerShift transmission cars and ordered Ford to pay \$10 million in penalties. In that instance, the ACCC noted Ford was aware of quality issues with its motor vehicles but frequently told customers shuddering was the result of the customer's driving style and refused to provide a refund or no-cost replacement vehicle even after multiple unsuccessful repairs.⁶⁵ A similar case involving Mazda Australia Pty Ltd was decided by the Federal Court in November 2021, finding the company had made 49 separate false and misleading representations relating to 9 customers about their consumer guarantees rights. Specifically, the court found Mazda misled these consumers by representing they were only entitled to have their vehicles repaired under the consumer guarantees, even though a consumer's rights under the ACL also include a refund or replacement when there is a major failure. The Court will decide on penalties at a later date.⁶⁶

Views previously expressed by dealers and manufacturers about consumer guarantee remedies

Stakeholders representing the new motor vehicle sector have raised concerns about how the consumer guarantee framework applies in their sector and related incentives in dealing with remedy claims. For example, the Australian Automotive Dealer Association argued in the 2018 consultation:

A refund or replacement of a high value item such as a motor vehicle can have significant effects on profitability in a dealership particularly if a negative public model evaluation report or the prospect of a newer model entices consumers to seek a refund without a valid reason. A dealer already operating on thin margins is faced with the prospect of managing customer relationships, unrecoverable costs of administration, managing cash flow, disposal and loss of thousands of dollars of a used vehicle, devaluation of existing stock and with little prospect of a refund, compensation or genuine consideration from the brand manufacturer despite the

⁶⁵ ACCC Media Release, [Court orders Ford to pay \\$10 million penalty for unconscionable conduct](#), 26 April 2018.

⁶⁶ ACCC Media Release, [Mazda misled consumers about their rights over refund or replacement for faulty cars](#), 30 November 2021.

limited protection of section 274 of the ACL [i.e., indemnification]. In respect of the purchase of a motor vehicle this option is open to opportunistic behaviour and gaming of the system.⁶⁷

While the sector has some concerns about potential ‘gaming’ of the consumer guarantees, the ACCC has advised it has received little evidence to support this claim or that it is a widespread issue.

Additionally, parts of the sector have a specific concern about the fairness of the consumer guarantees. For example, the Federal Chamber of Automotive Industries (FCAI) submission to the ACL Review in 2016 argued:

“...a major failure of a motor vehicle to comply with a consumer guarantee entitles the consumer to a full refund, notwithstanding the consumer has had use of the vehicle, particularly when up to that point the vehicle may well have been trouble-free for months or even years. FCAI considers this is an unfair windfall gain to the consumer and seems inherently unfair. FCAI is of the view if the consumer is entitled to a “refund”, an appropriate allowance should be made to take into account the consumer’s use of the vehicle, its condition and its depreciation in value because of that use or passage of time (since the vehicle was purchased). Whilst the ACCC has published some guidance material at <https://www.accc.gov.au/consumers/consumer-rights-guarantees/repair-replace-refund> suggesting suppliers may take into account how much time has passed since the consumer bought the product and consider factors such as the type of product or how a consumer is likely to use the product, these matters remain unclear when applied to motor vehicles and it is not uncommon for consumers to seek full refunds several years after delivery.”⁶⁸

Supplier scepticism about the motives of consumers who claim refunds after a few years of using their vehicle may be contributing factors to reluctance on the part of some in the industry to provide remedies. This may especially be the case where the remedy would entitle the consumer to a full refund.

Potential limitations to a sector-specific approach

In general, protections under the ACL apply economy-wide, rather than to specific industries or sectors. Inserting industry-specific measures into the ACL has the potential to create additional complexity and confusion for consumers to understand their rights and increase red tape for businesses to meet their obligations.

⁶⁷ Australian Automotive Dealer Association, [submission to the 2018 consultation](#), p. 12.

⁶⁸ Federal Chamber of Automotive Industries, submission to the ACL Review, 2016, p. 6

Focus question:

2. Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested and the prevalence of such requests.
3. Do you have any information or data to support the view consumers are 'gaming' the system to obtain replacement new motor vehicles or refunds?
4. Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase *increases* in value be factored in? Please detail reasons for your position.
5. For new motor dealer representatives, please provide any relevant information or data on how providing remedies has impacted your business.

Policy options for Part A

Part A, Option 1 – status quo

Under the status quo, where a consumer seeks a remedy from the relevant supplier or manufacturer for a good or service that does not meet any one or more of the consumer guarantees, the business would continue to be required to provide an appropriate remedy under the consumer guarantees provisions of the ACL.⁶⁹

Where a business 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 the remedy. Options available to regulators in responding to complaints would continue to be limited.

Part A, Option 2 – an education and guidance campaign

This option involves a 3-month education and guidance campaign on consumer guarantees, targeted towards suppliers, manufacturers and consumers.

For suppliers and manufacturers, the campaign would be aimed at improving their understanding of key consumer guarantees, when these guarantees apply, and the types of remedies to be provided, according to the circumstances.

For consumers, the campaign would be aimed at improving 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 can be applied in one of two ways:

- a) an economy wide campaign
- b) a campaign related to new motor vehicles only.

Part A, Option 3 – a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms

This option would amend the ACL to prohibit suppliers from not providing a remedy for a consumer guarantee failure when requested and required under the law, and allowing:

⁶⁹ Manufacturers have the same obligation where they directly supply goods to consumers. Further, manufacturers have a similar obligation in relation to consumer guarantee failures relating to the availability of repairs and spare parts (section 58) and express warranties (section 59). Specifically, if manufacturers refuse to repair or replace the goods involved or fail to do so within a reasonable time, a consumer can take legal action to recover damages from the manufacturer (subsections 271(5) and (6)).

Improving the effectiveness of the consumer guarantee and supplier indemnification provisions

- courts to impose civil pecuniary penalties, or injunctions to require businesses to act, or refrain from acting, in a certain way
- the ACCC to issue civil penalty notices (infringement notices).

It is proposed this option only apply where a remedy is not provided for a 'major failure' under the consumer guarantees.

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

Impact analysis for Part A

Part A, Option 1 – status quo

Remedies remain hard to obtain

By maintaining the status quo, many consumers would continue to find it difficult to obtain remedies from suppliers for consumer guarantee failures.

Where a consumer guarantee is not met, such as a good not being of acceptable quality, consumers may be unable to use the good or may otherwise obtain a more limited benefit than what they paid for. Where this happens on a large scale, there could be a resulting loss to the economy. Accordingly, despite the existing law intending consumers receive remedies, many consumers would still miss out on remedies.

Where obligations are not met, consumers could continue to seek their own redress, potentially incurring time, travel and legal costs and, in most cases, carrying the full burden of taking any tribunal or court action to compel suppliers to provide a remedy. Given time and cost considerations, many consumers would be unlikely to take legal action to enforce their rights.

Incentives for compliance remain limited

Where consumers take legal action, the maximum consequence for a supplier or manufacturer that has not complied with an ACL requirement to provide a remedy would still only be the eventual provision of that remedy (reinforced via a tribunal/court order). Similarly, ACL regulators would continue to have limited means to drive greater compliance.

The incentives to comply with the law would therefore continue to be limited for the subset of suppliers and manufacturers who do not provide remedies or do not respond to legitimate claims for remedies.

The primary incentive to comply with the law would therefore remain a loss of sales resulting from damage to a supplier or manufacturer's reputation. For example, consumers could take to social media regarding their experience with suppliers which would help to disseminate consumer concerns and may damage reputation.

Non-compliant businesses could get a competitive advantage

The behaviour of non-compliant suppliers/ manufacturers would continue to distort the operation of the market. This distortion is due to the benefit to some suppliers of not incurring the costs of a remedy. These suppliers can offer a lower price for their goods or make a larger profit. Consumers are not necessarily able to correct this distortion through their purchasing practices, as they may lack

the ability to distinguish between low- and high-quality goods due to asymmetric information⁷⁰ (i.e. manufacturers and their distributors are likely to know more about the design, composition, durability and safety of the complex goods they sell than consumers).

Estimated costs and benefits

Table 2: Summary of benefits and costs of Part A, Option 1

Benefits	Costs
<ul style="list-style-type: none"> No additional costs. 	<ul style="list-style-type: none"> A significant proportion of consumers who seek remedies do not receive the consumer guarantee remedy they are entitled to. Consumers continue to incur costs in pursuing remedies, such as time, travel and legal costs. The operation of the market will continue to be distorted by non-compliant businesses.

Focus questions:

- Are there any other benefits associated with maintaining the status quo?
- If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?

Part A, Option 2 – an education and guidance campaign

Option 2 is a non-regulatory approach and involves the development and delivery of a three-month education and guidance campaign targeting suppliers, manufacturers and consumers. The campaign would provide information and guidance on existing rights, obligations and responsibilities under the consumer guarantees framework. Existing guidance material would also be strengthened.

If businesses and consumers have a common understanding of the law and approach each matter on its merits, the level of disputes on consumer guarantee issues might be reduced. Fewer disputes would reduce costs for businesses, consumers, ACL regulators and the tribunals that hear disputes.

⁷⁰ Asymmetric information occurs where market participants do not have access to the same information. This prevents parties from making informed decisions and bargaining on a level playing field.

Helping consumers understand their rights to access remedies more effectively

Consumers who have a problem with a good or service will often approach a supplier or manufacturer about that problem. If they do not fully understand their rights or what suppliers or manufacturers are obliged to do, an education and guidance campaign may assist them to identify how their problem is protected by a consumer guarantee, and what remedies are available in their circumstance.

The 2016 Australian Consumer Survey suggests around 18 per cent of consumers do not agree the government provides adequate information and advice about consumers' rights when purchasing products or services in Australia.⁷¹ By reducing the knowledge barriers some consumers face when dealing with consumer guarantee failures, an education and guidance campaign might also reduce the number of cases where a consumer does not pursue a remedy they are entitled to.

While ACL regulators have produced further and more detailed guidance on the consumer guarantees regime since the 2016 survey, there may still be benefits from targeted education.

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

Addressing gaps in supplier knowledge of guarantee obligations

The 2016 Australian Consumer Survey found 80 per cent of businesses believed they had a moderate or better understanding of their obligations and responsibilities under the ACL, with 11 per cent having some understanding and 9 per cent indicating minimal or no understanding. For suppliers and manufacturers, an education and guidance campaign would be aimed at raising awareness of the ACL and assisting suppliers and manufacturers to recognise 'major failures' where they occur, and assess the appropriate remedy that a consumer is entitled to.

How effective would more education about the consumer guarantees be?

It is apparent education attempts are yet to resolve the difficulties consumers face enforcing their rights to refunds and replacements as identified in Part A and by the 2017 ACL Review Final Report.⁷²

The consumer guarantee framework includes 12 guarantees and various provisions setting out remedy rights and obligations applying in different circumstances. While the framework provides a

⁷¹ EY Sweeney, Australian Consumer Survey 2016.

⁷² ACL Review Final Report, pp. 16-17.

minimum standard of protection, which is flexible to address different problems with the wide variety of goods and services, it is challenging to incorporate more than a few elements of the framework into simple engaging educational messages reaching a broad audience.

In this regard, many consumers may often only be attentive to these messages when they have (or have recently had) a problem. Similarly, most suppliers and manufacturers are busy running their businesses. While they may be attentive to messages about changes to the law, they can be expected to rely on remedy policies they have in place which, for businesses trying to do the right thing, will have involved research of their legal obligations.

A significant body of guidance is already available. Given this, it is likely repetition of similar messages through education may have a limited effect on assisting:

- consumers to better articulate their rights when dealing with suppliers and manufacturers
- those suppliers or manufacturers who have a misinformed view of some part of their obligations, however noting that more recent consumer guarantee guidance for businesses has focused on clarifying how ACL regulators interpret key elements of the law (such as a guide on the meanings of 'safe' and 'durable' in the consumer guarantee of acceptable quality).

Further education will likely not change the behaviour of any business who sees a financial benefit in not complying with the current requirements, particularly in the absence of a sanction for non-compliance.

Estimated cost benefit analysis

This option is premised around the idea that by reducing the knowledge barriers consumers face when dealing with consumer guarantee issues, an education and guidance campaign would reduce the number of cases where a consumer does not pursue a remedy they are entitled to.

Using the 2016 Australian Consumer Survey as a basis, it is assumed of the consumers who experience a problem with a product or service, about 18 per cent of individuals do not take action to resolve a problem. Of these 18 per cent:

- 30 per cent are not confident action would solve the problem
- 15 per cent are unsure where to go for advice
- 12 per cent have tried to resolve problem in the past and have not been successful
- 11 per cent are nervous or embarrassed.

This means about 15 per cent of consumers who take no action could be missing out on remedies they are entitled to under the ACL because of a lack of awareness about where to go to seek advice about a remedy. This group of consumers is seen as the target group for this education and guidance campaign. That is, it is unlikely an education and guidance campaign will address the issues identified by the other consumers who said they would take no action (including past experience or lack of belief an action would solve the problem).

For this cost benefit analysis, it has been assumed an education and guidance campaign would be successful in encouraging the 15 per cent of consumers who currently do not seek a remedy, due to a lack of knowledge about where to go for advice, to seek remedies. However, given the one-off nature of the education and guidance campaign, it is assumed all behavioural changes would be temporary. It is assumed behavioural changes are most substantial in the first year following the campaign where the proportion of consumers who take action for a consumer guarantee failure is estimated to rise from 82 per cent in 2020-21 to 82.4 per cent in 2021-22, with the effect fully exhausted by the end of 2024-25. It is not assumed there is a change in the rate of remedies being provided once a consumer takes action. That is, it is assumed these consumers are just as likely as existing consumers to access a remedy if they start taking action.

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

a) Economy wide approach

An economy wide approach to Option 2, an education and guidance campaign without regulatory change, is estimated to create a net benefit of \$18 million in net present value (NPV) terms over 10 years to 2031 and a benefit cost ratio (BCR) of 1.8.

Total benefits to consumers for this option is estimated to be \$41 million in NPV terms over 10 years from taking action and receiving the benefit (approximated to the average value of goods or services) in instances where they otherwise would not have.

In terms of costs, this option is estimated to increase costs by \$23 million in NPV terms over the 10 years to 2031. This includes costs to consumers of time spent pursuing additional remedies they would otherwise not have pursued, which comes at an opportunity cost of their time. Given the relatively low prior knowledge on consumer guarantees, it is assumed these consumers would not make any time or cost saving relative to the existing average when pursuing a remedy. That is, the time and direct costs incurred are in line with existing average costs.

Other fees include increased costs for businesses associated with providing more remedies, spending additional time addressing consumer issues and, ensuring compliance if more consumers take action. Also included is the cost to Government to design and administer the education and guidance campaign. The analysis of the economy wide approach also applies to education and guidance that exclusively focuses on educating consumers, suppliers and manufacturers in the new motor vehicle sector.

Table 3: Likely net benefit of an education and guidance campaign for the 10 years to 2031 – economy wide approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Whole economy	\$41 million	\$23 million	\$18 million	1.8

b) New motor vehicles only approach

The economic costs and benefits of an education and guidance campaign for consumers, businesses and manufacturers for the new motor vehicle market are a subset of the economic costs and benefits identified for the economy-wide approach.

For new motor vehicles, Option 2 is estimated to create a net benefit of \$4 million in NPV terms over the 10 years to 2031 and a BCR of 1.8. This reflects costs to business and government of \$3.3 million in NPV terms and benefits to consumers of \$7.3 million in NPV terms over this period.

Given the significance of concerns about consumer guarantee issues in the sector, the ACCC has already produced and published motor vehicle-specific guidance for consumers and the industry.⁷³

An education and guidance campaign would build on the messages in the existing guidance and may have a positive impact if parties are unaware of the existing material.

Table 4: Likely net benefit of an education and guidance campaign over for the 10 years to 2031 – new motor vehicles only approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Motor vehicles	\$7.3 million	\$3.3 million	\$4.0 million	2.2

⁷³ For example, see <https://www.accc.gov.au/publications/just-bought-a-new-car> and <https://www.accc.gov.au/publications/motor-vehicle-sales-repairs-an-industry-guide-to-the-australian-consumer-law>.

Table 5 : Summary of benefits and costs of Part A, Option 2 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> • Removal of knowledge barriers may result in more consumers taking action when they have an issue and fewer consumers missing out on remedies they are entitled to. • Consumers may be more confident about purchasing goods covered by the consumer guarantees. 	<ul style="list-style-type: none"> • Cost to Government of delivering an education and guidance campaign. • Where there is an increase in consumers seeking a remedy for a consumer guarantee failure, or a business starts providing remedies, increased cost to business of providing these remedies.

Part A, Option 3 – a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms

Under this option, the ACL would be amended to prohibit traders from refusing to provide a remedy specified by the consumer for a major failure of the consumer guarantees. The prohibition could be linked to existing requirements under the ACL (e.g. the requirement for a supplier to provide the relevant remedy in accordance with a selection made by a consumer) or through the creation of a new requirements (e.g., a requirement for a supplier of services to provide a refund or replacement for a major failure).

Compared to the status quo, this option would create a stronger incentive for suppliers to provide an applicable consumer guarantees remedy when a consumer requests and is entitled to one under the ACL. Regulators have a range of civil, administrative and criminal enforcement tools that they can use to address contraventions of the ACL.

ACCC Infringement notices

Enabling the ACCC to issue an infringement notice where it has reasonable grounds to believe that a supplier has contravened the law by not providing a consumer guarantees remedy, would provide a timely, cost-efficient enforcement outcome for relatively minor contraventions of the law.⁷⁴ If a party is issued an infringement notice and they pay the amount in the notice, the matter is considered addressed, which prevents the ACCC from taking future court action in relation to the conduct set out in the infringement notice. If a person receives an infringement notice and denies they engaged in the alleged conduct, or feels relevant information has not been considered, they

⁷⁴ If this option were to be progressed, consideration would need to be given to how this might be applied given the different infringement notice regimes in states and territories and the limitations around some of these regimes.

may choose not to pay the infringement notice and the onus will be on the ACCC to decide whether the conduct warrants further enforcement action.

The penalty to be specified in an infringement notice that is to be issued to a person, in relation to an alleged contravention of a provision of the ACL, depends on the contravention. For example, contraventions relating to prescribed requirements for warranties and repairs and contraventions relating to unsolicited consumer agreements, the amount is currently:

- \$13,320 (60 penalty units) if the person is a body corporate; or
- \$2,664 (12 penalty units) if the person is not a body corporate.

Penalties and injunctions

As litigation is costly compared to most other compliance and enforcement actions, a regulator would be more likely to commence legal action in circumstances where alleged breaches are blatant, within a regulator's priority areas, are repeated or would cause significant detriment. While litigation is therefore likely to be limited to those circumstances, the possibility of pecuniary penalties would provide an incentive for suppliers who are not currently meeting their remedy obligations to comply with their legal obligations, and a strong disincentive against not providing a remedy when required to do so under the ACL, and to cooperate with a regulator to address any concerns.

Where a regulator pursues litigation and a court determines a contravention has occurred, the court would have the power to impose a civil pecuniary penalty, if it is satisfied that imposing a penalty is appropriate in the circumstances of the individual case. The court would be able to determine the appropriate penalty amount, up to the maximum set under the law.

The maximum pecuniary penalty payable for a contravention of the ACL depends on the contravention. For example, contraventions relating to prescribed requirements for warranties and repairs and contraventions relating to unsolicited consumer agreements, the maximum penalty is currently:

- \$10,000 for individuals
- \$50,000 for corporations.

For contraventions relating to unconscionable conduct, certain unfair practices, safety of consumer goods and product related services and information standards, the maximum penalty is currently:

- \$500,000 for individuals
- for corporations, the greater of:

- \$10 million
- three times the value of the benefit the company received from the act, or
- if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.⁷⁵

Feedback is sought from stakeholders on what would be considered an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a consumer guarantee when required under the ACL.

Courts would also have the power to issue injunctions to require businesses to act, or refrain from acting, in a certain way in the future. This would support better outcomes for consumers because it would directly address specific supplier actions the court believes have impeded consumers from obtaining a remedy for a consumer guarantee failure.

Focus questions:

8. What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.
9. What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.

To the extent litigation is undertaken, any resulting precedents would enable greater certainty about how the law applies in specific circumstances, which would be reflected in regulator guidance, and could be followed by businesses, courts and tribunals in considering future claims.

Over time, improvements to compliance with the consumer guarantees among traders may result in consumers developing greater confidence in their purchases, increasing the likelihood of further sales and reduce the number of complaints to regulators.

Possible impacts on consumers

There is a risk costs associated with penalties could be passed on to consumers via increased prices for goods and services, but they could also be absorbed by traders in reduced profits. Currently, consumers are already absorbing the loss of welfare from faulty goods they cannot use when they

⁷⁵ ACL, s 224.

cannot obtain a remedy. Increased quality of goods and services and better consumer perceptions that businesses are responsive to product problems by providing remedies, can also benefit businesses through improved consumer confidence and increase the likelihood of further sales.

Major failures versus non-major failures

Stakeholder feedback is sought on the appropriateness of limiting this option to ‘major failure’ only. The problems identified from previous consultation were that consumers faced problems obtaining remedies for major failures and for repeated or multiple non-major failures.⁷⁶ The ACL provides if a supplier refuses or fails to remedy a non-major failure (or does not remedy the failure within a reasonable time), consumers are entitled to reject goods or terminate service contracts, just as they are able to do in the event of a major failure.

Focus Question:

10. What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?

Estimated cost benefit analysis

The desired behaviour change arising from this option is suppliers and manufacturers providing more consumer guarantee remedies when consumers are entitled to them. This option is premised around suppliers and manufacturers being more likely to provide a consumer guarantee remedy if they know they are at risk of a penalty. It is assumed under this option, the proportion of consumers receiving a remedy increases by 1 per cent per year from 71 per cent in 2020-21 to 81 per cent in 2030-31.

Estimated regulatory burden

The regulatory burden for Option 3 is estimated to be \$44.8 million in the first year, with no ongoing costs. The regulatory burden is incurred by businesses who are responsible for complying with the consumer guarantee provisions of the ACL and includes the cost of a one-off incidence of staff training to raise awareness of the new regulatory requirements. This compliance burden is calculated by assuming every retail employee is required to undergo 30 minutes of training. While the underlying obligation has not changed, it is assumed staff undergo training on the consequences of non-compliance to support the behavioural change.

⁷⁶ Decision Regulation Impact Statement, *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework*, 2018, p. 31.

Table 6: Regulatory burden estimate⁷⁷ 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

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

a) Economy wide approach

Applying an economy wide civil prohibition on failing to provide a consumer guarantee remedy is estimated to create a net benefit of \$4.6 billion in NPV terms over the 10 years to 2031 and a BCR of 4.7.

The total benefits to the economy for this option is estimated to be \$5.8 billion in NPV terms over 10 years, with the greatest benefit going to consumers in the form of reduced time and funds spent resolving issues, and in receiving the benefit (approximated to the average value of goods or services) either earlier than they otherwise would, or in instances where they otherwise would not have at all.

The total costs to the economy for this option is estimated to be \$1.2 billion in NPV terms over 10 years. This includes increased costs to businesses who are not meeting their consumer guarantee obligations under the status quo. The increase in cost consists of both increased costs of providing remedies by those who change behaviour, and infringement notices and pecuniary penalties paid by those who do not comply. Other than the modest increased training cost for business to ensure staff have a common understanding of the change, there is no change in costs for businesses who are already complying with consumer guarantee obligations.

Table 7: Likely net benefit of a civil prohibition on failing to provide a consumer guarantees remedy for the 10 years to 2031 – economy wide approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Whole economy	\$5.8 billion	\$1.2 billion	\$4.6 billion	4.7

⁷⁷ 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.

b) New motor vehicles only approach

The economic costs and benefits of a civil prohibition on failing to provide a consumer guarantees remedy for the new motor vehicle market are a subset of the economic costs and benefits identified for the economy wide prohibition.

For new motor vehicles, Option 3 is estimated to create a net benefit of \$413 million in NPV terms over the 10 years to 2031 and a BCR of 2.8. This reflects costs of \$231 million in NPV terms and benefits of \$643 million in NPV terms over this period.

Table 8: Likely net benefit of a civil prohibition on failing to provide a consumer guarantees remedy for the 10 years to 2031 – new motor vehicles only approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Motor vehicles	\$643 million	\$231 million	\$413 million	2.8

Table 9: Summary of benefits and costs of Part A, Option 3 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> • More consumers likely to receive the remedies they are entitled to. • Consumers likely to spend less time and resources pursuing remedies. • Consumers may be more confident about purchasing goods covered by the consumer guarantees. 	<ul style="list-style-type: none"> • Costs associated with providing remedies (where a business is not already providing these). • Costs of non-compliance (infringement notices and pecuniary penalties) (applicable to non-compliant businesses only). • Increased training cost for business to ensure staff have a common understanding of the change. • Increased regulatory cost for governments – enforcement, administration and court proceedings.

Focus Questions:

For consumers:

11. Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services, and how the trader dealt with your issue?
12. If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a major failure:
 - d. What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?
 - e. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?
 - f. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicles)?

For businesses:

13. Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?

For everyone:

14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?
15. Please provide any relevant information or data available on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

Part B: Supplier indemnification

The problem: manufacturers often fail to indemnify suppliers

The ACL provides that suppliers of goods and services have a statutory right to indemnification (reimbursement) from manufacturers when they provide a consumer guarantee remedy to consumers, where the manufacturer of a good is responsible for the consumer guarantee failure ('manufacturer faults'⁷⁸).⁷⁹ This right exists for the guarantees of:

- acceptable quality
- goods corresponding with their descriptions (where descriptions are applied to goods by or on behalf of manufacturers)
- fitness for a purpose that a consumer makes known to a manufacturer either directly or through a supplier. For example, goods with design flaws that make them unsafe and goods that don't do what a manufacturer's label on the product claims.

Despite this statutory right, stakeholders advise manufacturers often fail to reimburse suppliers for the costs the supplier incurs in providing a remedy to a consumer for a manufacturer fault, or make it difficult for suppliers to obtain indemnification.

For example, the Australian Retailers Association (ARA) has previously advised there seems to be continual issues with suppliers and manufacturers refusing to compensate a retailer when a good had clearly failed and this issue was the single biggest issue under the ACL for ARA members when it comes to financial compensation.⁸⁰ The ARA has also suggested difficulties obtaining supplier indemnification are not limited to small business and some larger retailers build in costs because some large manufacturers can be difficult to deal with when replacing products which fail the consumer guarantees.⁸¹

While a consumer's right to a remedy from a supplier is not legally contingent on the supplier receiving indemnification from the manufacturer, the uncertainty around whether a supplier will be reimbursed for a remedy could mean consumers miss out on receiving the remedy they are entitled to. For example, feedback during consultation on consumer guarantees conducted by CAANZ in 2018 indicated suppliers often feel constrained in providing remedies to consumers for manufacturer

⁷⁸ 'Manufacturer faults' is used as a general term throughout the paper to refer to consumer guarantee failures for which the manufacturer would be liable to indemnify a supplier under s 274 of the ACL.

⁷⁹ ACL, section 274.

⁸⁰ Australian Retailers Association, [submission to the 2018 consultation](#), p. 4.

⁸¹ Australian Retailers Association, [submission to the 2018 consultation](#), p. 4.

faults, because of the difficulties suppliers then face in securing reimbursement from the manufacturer.

There may be several reasons why the current statutory right to supplier indemnification for manufacturer faults is ineffective including, for example:

- a lack of incentives for manufacturers to provide indemnification
- possible power imbalances between manufacturers and suppliers
- disagreement on the existence and responsibility for the failure.

Lack of incentives for manufacturers to provide indemnification

While the ACL provides that a manufacturer is liable to compensate a supplier for remedying consumer failures that are due to a manufacturer fault, the ACL does not set out any consequences if the manufacturer fails to provide it. While a supplier can initiate litigation to enforce their right to indemnification, courts do not currently have the power to impose a civil pecuniary penalty as a consequence of non-compliance, if they think the manufacturer has been unreasonable in denying indemnification.

The costs involved in remedying failures for manufacturer faults can be significant, which further creates a disincentive for manufacturers to indemnify suppliers. In addition to the cost of providing a repair, refund or replacement, there may be costs for:

- damages for any reasonably foreseeable losses or damage suffered by the consumer because of the failure to comply with the consumer guarantee ⁸²
- collecting the goods from the consumer – where the failure is significant (a ‘major failure’), and the goods cannot be returned to the supplier without significant cost to the consumer because of the nature of the failure or the size, height, or method of attachment of the goods. ⁸³

Possible power imbalance between manufacturers and suppliers

Stakeholders have suggested suppliers can fear retribution from manufacturers, particularly when dealing with those that face limited competition or hold significant bargaining power due to contractual arrangements. Specifically, suppliers may fear damaging their contractual relationships with manufacturers, possibly leading to termination of a supply contract, or less favourable supply terms. For example, the ARA has suggested very few small retailers know they have supplier

⁸² ACL, s 259(4)

⁸³ ACL, s 263(3)

indemnification rights under the ACL, and those who do, gave examples where they were told if they took the matter further, the manufacturer would cease to supply.⁸⁴

In some instances, retribution could constitute a contravention of the ACL's unconscionable conduct protections.⁸⁵ However, in many instances the conduct would not satisfy the necessary legal tests to meet unconscionable conduct.

Suppliers are unlikely to have uniform experiences, as not all supplier/manufacturer relationships have imbalances in bargaining power. For example, where significant competition exists between manufacturers for shelf space, suppliers can be more selective in what they stock and are unlikely to want to continue dealing with manufacturers who fail to support the resolution of failures.⁸⁶

Disagreement on the existence and responsibility for the failure

There may be several reasons why manufacturers could be reluctant or unwilling to indemnify suppliers. For instance, some manufacturers may have concerns about the accuracy of consumer or supplier claims a good is faulty or suspect that the consumer or another party has caused damage to the good through abnormal usage, transit, or installation.⁸⁷ For example, the Australian Industry Group (Ai Group) has previously noted certain products (e.g. air conditioners, water heaters, solar-battery systems and televisions) require installation or other after-service support by a third party and problems can arise if a good is incorrectly installed or serviced.⁸⁸ For small manufacturers, indemnification of such claims could represent a significant cost that might threaten their viability.

Where a manufacturer failure is a major failure, consumers are entitled to their choice of refund or replacement. In such cases, where the consumer elects to receive a refund or replacement, the manufacturer does not need to be provided with an opportunity to repair the good. Ai Group has

⁸⁴ Australian Retailers Association, [submission to the 2018 consultation](#), p. 4.

⁸⁵ As an example of evidentiary issues that arise in such cases, see the discussion of *ACCC v Woolworths* in:

<https://www.gtlaw.com.au/insights/accv-woolworths-distinguishing-unconscionable-conduct-when-dealing-suppliers>

⁸⁶ For example, the Consumer Electronics Suppliers Association [submission to 2018 consultation](#) (p. 6) noted 'The whitegoods and cooking markets in Australia are very competitive, with 50-75 brands competing in a mature market. Consumer service performance is a long-term brand value proposition, and electrical retailers do not support brands with weak service for long.'

⁸⁷ As an example, ACL regulators have published '[Motor vehicle sales and repairs: An industry guide to the Australian Consumer Law](#)' which explains the difference between damage caused by abnormal use, and gradual deterioration (also called 'wear and tear') caused by a consumer's normal use of a vehicle. It notes 'wear and tear involve the eventual wearing out of parts to the point where they no longer work, as well as such things as scuffing, scratching or discolouration that would predictably occur over time when the vehicle is used normally. Normal wear and tear is not a minor or major failure'. Cited examples of abnormal use include: 1. a soft-top vehicle is left out in the rain with its roof open, resulting in damage to the interior and 2. a two-wheel drive vehicle being consistently driven in lower traction over rough surfaces that are better suited for four-wheel-drive vehicles.

⁸⁸ The Australian Industry Group, [submission to the 2018 consultation](#), 24 April 2018, p. 6.

previously expressed concerns manufacturers sometimes receive little opportunity to inspect goods for manufacturer faults before a remedy is provided by a supplier:

*In practice, upon receiving a returned good from a retailer, the manufacturer may have no practical ability to return the goods to the retailer. This is because some retailers automatically provide the consumer with a replacement, and the manufacturer therefore does not have an opportunity to assess, repair (if there is a failure) and return the good. And where there is a failure that was not due to the manufacturer, it is often not commercially viable to repair returned goods. These returned goods are typically sent to waste, and are a substantial and growing cost for manufacturers.*⁸⁹

In other instances, manufacturers may not be familiar with the ACL's requirements or incorrectly assume the ACL does not apply to them (e.g. as may be the case with some overseas-based manufacturers).⁹⁰

There will also be circumstances where the fault does not sit with manufacturers. In this regard, the effective operation of the indemnification provisions relies on suppliers and manufacturers correctly assessing each good as either:

- a failure on the part of the manufacturer, like a manufacturer fault, for which indemnification should be sought or
- a failure on the part of the supplier, like where an item sold through an online trader's website was listed with an erroneous description of the good, for which indemnification should not be sought from the manufacturer.

A correct assessment of whether a failure exists can also require a degree of expertise in more complex goods. This issue was highlighted by Ai Group in the ACL Review consultation. Ai Group noted a large proportion of electronic and home appliance goods returned to manufacturers do not have a fault or do not have a fault caused by the manufacturer. Ai Group attributed this to a lack of obligation or incentive on suppliers to investigate whether a failure exists.⁹¹ However, if there is no

⁸⁹ The Australian Industry Group, [submission to the 2018 consultation](#), 24 April 2018, p. 6.

⁹⁰ Some comparable jurisdictions rely on contractual arrangements. The New Zealand Commerce Commission advised there is nothing in New Zealand's *Consumer Guarantees Act 1993* that indemnifies a retailer for the cost of faulty goods against a manufacturer. Supplier indemnification is treated as a contractual matter between the manufacturer and supplier. The Canadian Competition Bureau advised under Canada's Constitution, provincial governments are responsible for contractual matters, including consumer protections. The Canadian Competition Bureau advised the consumer laws of provincial governments do not give suppliers indemnification rights. Rather, they take the position this is a private matter for suppliers and manufacturers to address between themselves.

⁹¹ The AI Group, [submission to interim report of the ACL Review](#), 24 April 2018, p. 3.

fault caused by the manufacturer, then there will be no obligation for the manufacturer to indemnify the supplier.

Focus questions:

16. Suppliers: to what extent are you able to enforce your indemnification rights?
17. What are the barriers to seeking indemnification?
18. Has your business been subject to retribution when you have sought indemnification? If yes, what form did it take?

What role can ACL regulators play?

The options available to regulators in responding to complaints are effectively the same as for consumer guarantee failures outlined in Part A of this Consultation RIS. ACL regulators can undertake costly representative legal action on behalf of a supplier in certain circumstances, but there is likely to be limited benefit in doing so (e.g. it may result in one manufacturer providing indemnification to one supplier). Under the current law, there is little capacity for such an action to drive greater compliance by a broader range of traders or across the economy.

Supplier indemnification in the motor vehicle sector

As reflected in the discussion of the ACCC's new car retailing industry market study (outlined in Part A of this Consultation RIS), difficulties with obtaining supplier indemnification appear to be more pronounced in the new motor vehicle industry compared to other industries due to:

- the structure of the industry
- power imbalances
- contractual restrictions
- the need for dealers to preserve relationships with manufacturers.

For example, dealer representatives have emphasised power imbalances between automotive dealers and manufacturers, and the commercial pressures to comply with manufacturers' instructions relating to consumer guarantee failures, given that dealers rely on security of tenure of franchise agreements.⁹²

⁹² AADA submission, [submission to the 2018 consultation](#), p. 16; and Victorian Automobile Chamber of Commerce, [submission to the 2018 consultation](#), p. 10.

In 2018, the Motor Trades Association of Australia (MTAA) observed small and medium enterprises are less likely to have the financial resources to enforce their indemnification rights, and that *'This is both unfair and a source of detriment and financial hardship for MTAA's Members constituents, particularly small and independently-owned vehicle retailers'*.⁹³

The 2017 ACL Review found second-hand car dealers also have trouble securing indemnification from manufacturers if a vehicle is out of the manufacturer's warranty period.⁹⁴

⁹³ Motor Trades Association of Australia, [submission to the 2018 consultation](#), p. 11.

⁹⁴ [Australian Consumer Law Review Final Report](#), March 2017, p. 30.

Policy options for Part B

Part B, Option 1 – status quo

Under the status quo, where a good fails to meet one or more of the consumer guarantees due to a manufacturer fault, a consumer could continue to ask the supplier to provide a remedy and the manufacturer would continue to be liable to indemnify the supplier. However, where the manufacturer fails to indemnify the supplier, the supplier would continue to need to initiate litigation to obtain the indemnity, and the manufacturer would not face any penalty or other sanction. Similarly, in the event a manufacturer retaliates against a supplier as a result of requesting indemnification, the manufacturer would not face a penalty or other sanction.

Part B, Option 2 – education and guidance campaign

This option would involve a three-month education and guidance campaign. It is anticipated ACL regulators would work with industry associations to disseminate information to their members. The information would include messages about supplier and manufacturer rights and responsibilities in relation to indemnification. There is existing guidance on the operation of the supplier indemnification provisions. However, this option assumes the existing material would be strengthened and improved, particularly for sectors experiencing problems accessing and applying the current law, like new motor vehicles.

This option can be applied in one of two ways:

- a) an economy wide campaign
- b) a campaign related to new motor vehicles only.

Part B, Option 3 – a prohibition against not indemnifying suppliers supported by penalties and other enforcement mechanisms

This option would amend the ACL to prohibit manufacturers from not indemnifying suppliers when requested, and enable:

- courts to impose a civil pecuniary penalty or injunctions to require manufacturers to act, or refrain from acting, in a certain way
- the ACCC to issue infringement notices to manufacturers.

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

Part B, Option 4 – a prohibition against manufacturers retaliating against suppliers who request indemnification

This option would amend the ACL to make it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification for a consumer guarantee failure under the ACL and enable:

- courts to impose a civil pecuniary penalty or injunctions to require manufacturers to act, or refrain from acting, in a certain way
- the ACCC to issue infringement notices to manufacturers.

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

Impact analysis for Part B

Part B, Option 1 – status quo

Suppliers experience difficulties in accessing indemnification

Under the status quo, suppliers would continue to experience problems in obtaining indemnification for manufacturer faults once they have provided the consumer with a remedy. Some suppliers, particularly small businesses, or those in sectors with a power imbalance,⁹⁵ would continue to bear the cost of providing remedies, including a refund, the cost of replacing the good, repair costs and compensation for consequential losses.

In the event a manufacturer retaliates against a supplier as a result of requesting indemnification, there would continue to be no viable recourse for suppliers.

For this consultation RIS and in the absence of data sources, suppliers are assumed to only seek indemnification from manufacturers in 90 per cent of instances where they have provided a consumer with a remedy. For suppliers that do seek indemnification, it is assumed appropriate indemnification is provided 80 per cent of the time. As a result, it is assumed 72 per cent of all remedies provided by suppliers are appropriately indemnified by manufacturers.

Costs are borne by non-responsible parties or may reduce consumer access to remedies

Where indemnification is not provided, but suppliers do provide remedies to consumers, the costs of providing those remedies without being indemnified may be passed on to consumers in higher prices or else reduce the supplier's profitability. In some cases, like where a supplier is heavily reliant on one manufacturer for goods, this may make the supplier's business unviable.

However, some suppliers may continue to feel constrained in providing remedies to consumers for manufacturer faults even where they find it difficult to obtain reimbursement from the manufacturer. If enough consumers experience problems in obtaining remedies from the supplier, and make this known in public forums, reputational damage may also undermine the viability of the supplier's operations. Some suppliers may not litigate to enforce their rights because of a lack of financial resources.

⁹⁵ Imperfect competition can occur when there are relatively few manufacturers compared with suppliers in a market, or vice versa. This can result in bargaining power imbalances between the parties and lead to inappropriate costs and risks being shifted to the weaker party. The lack of enforcement or use of this right by suppliers may be attributed to the power imbalance that often exists between manufacturers and suppliers in markets.

Continuing concerns regarding retribution may deter indemnification from being sought

Those suppliers that choose not to litigate because a fear of damaging their contractual relationships (due to a power imbalance) would remain without indemnification. Under the status quo, there is also no viable recourse if a manufacturer retaliates against a supplier for seeking indemnification by, for example, increasing prices or withdrawing supply or introducing less favourable terms and conditions of supply.

Ongoing lack of incentive for manufacturers indemnifying suppliers

To the extent some manufacturers choose not to comply with the indemnification requirements, there is no incentive or disincentive in the status quo that would encourage them to change their behaviour. Some will continue to use contractual arrangements and administrative processes that make it more difficult in practice for suppliers to obtain indemnification. Manufacturers that are not familiar with the ACL’s requirements or assume they do not fall under the ACL’s jurisdiction may also not provide indemnification.

Estimated costs and benefits

Table 10: Summary of benefits and costs of Part B, Option 1 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> • No additional regulatory impact to manufacturers. • No additional costs. 	<ul style="list-style-type: none"> • A significant proportion of remedies provided by suppliers are not being reimbursed by manufacturers. • Consumers do not receive remedies from a supplier to which they are entitled because of concerns the supplier has about being able to receive indemnification from the manufacturer.

Focus Questions:

19. Please provide any relevant information or data you have that quantifies the extent of manufacturers not indemnifying suppliers, or making it difficult for suppliers to obtain indemnification?
20. Please provide any relevant information or data you have that quantifies the proportion of suppliers that do not seek indemnification?
21. Please provide any relevant information or data you have that quantifies the proportion of consumer claims that suppliers refuse or do not consider due to the inability or difficulty in obtaining indemnification, or due to fear of retribution?

Part B, Option 2 – education and guidance campaign

This option aims to improve the knowledge of suppliers and manufacturers about the supplier indemnification obligations, so suppliers are more confident in seeking indemnification for remedies involving genuine manufacturer faults and manufacturers have greater awareness of their obligations to provide that indemnification.

This option would involve enhancing existing education materials,⁹⁶ developing additional guidance and developing a three-month education and guidance campaign for businesses disseminated via industry associations.

The guidance material could include information about the scope of the supplier indemnification provisions, including the costs suppliers can recover from manufacturers and in what circumstances. The guidance could also note retaliatory action by manufacturers may amount to unconscionable conduct.⁹⁷ Different educational and guidance material may be required for manufacturers and for suppliers.

The guidance could clarify a supplier's costs from remedying a faulty product can include labour costs (and not just replacement parts or the refund itself), as was proposed by the Western Australian Small Business Development Corporation.⁹⁸

Education and guidance may raise awareness and encourage manufacturers to improve their compliance of the indemnification provisions. However, it is noted this option alone may have

⁹⁶ Consumer Affairs Australia and New Zealand, *Consumer guarantees: A guide for businesses and legal practitioners*, March 2016, p. 36. Note that this guidance is currently in the process of being reviewed and updated.

⁹⁷ *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15 is an example of how retributory action for claiming indemnification can amount to unconscionable conduct.

⁹⁸ Western Australian Small Business Development Corporation, *submission to ACL Review Interim Report*, December 2016, p. 19.

limited effect in cases where manufacturers are already aware of, or become aware of, the indemnification provision but chose to dismiss and/or retaliate against indemnification requests.

This option can be applied in one of two ways:

- a) economy wide; or
- b) to new motor vehicles only.

Estimated cost and benefit analysis

This option is premised that by reducing the knowledge barriers around supplier indemnification, an education and guidance campaign would increase indemnification from manufacturers to suppliers.

The guidance would clarify the existing law, with the aim of reducing the number of instances where manufacturers do not provide indemnification and where they threaten retaliation. However, the success of the campaign may be limited as there is no change in the law, and those currently not complying may continue not to do so. The cost benefit analysis therefore assumes the education and guidance campaign results in a 15 per cent improvement in both suppliers not being indemnified appropriately and the risk of manufacturer retaliation against suppliers. It is also assumed the effect of education and guidance exhausts itself by 2024-25. That is:

- The likelihood of being indemnified where a supplier seeks indemnification from the manufacturer increases from 80 per cent to 83 per cent in 2021-22, gradually returning to 80 per cent in 2024-25 onwards.
- The likelihood of retaliation against a supplier decreases from 10 per cent to 8.5 per cent in 2021-22, returning gradually to 10 per cent by 2024-25. This increases the rate at which suppliers seek indemnification from 90 per cent to 91.5 per cent in 2021-22, gradually returning to 90 per cent, where it remains from 2024-25 onwards.

Appropriate reimbursement from manufacturers to suppliers represents a slight, time-limited shift in costs from suppliers to manufacturers. The slight, time-limited increase in indemnification provided by manufacturers results in a saving of time by suppliers. It is assumed that suppliers save one hour in time negotiating with manufacturers in each case indemnification is required.

This is expected to provide suppliers with more confidence to provide consumers with remedies. More remedies being provided to consumers increases utility for those consumers who receive a remedy they would not have received under the status quo. However, no time saving is assumed for these consumers in this case, as it is not clear the extent to which this would occur.

a) Economy wide approach

An economy wide approach to Option 2, an education and guidance campaign without regulatory change, is estimated to create a net benefit of \$87 million in NPV terms over the 10 years to 2031, with a BCR of 1.8. This comprises benefits of \$197 million in NPV terms and costs of \$110 million in NPV terms over this period. Net benefits to suppliers of \$33 million in NPV terms result from bearing a smaller share of the cost of providing 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).

Option 2 is also estimated to 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.

Table 11: Likely net benefit of an education and guidance campaign for the 10 years to 2031 – economy wide approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Whole economy	\$197 million	\$110 million	\$87 million	1.8

b) New motor vehicles only approach

The economic costs and benefits of an education and guidance campaign for businesses and manufacturers for the new motor vehicle market are a subset of the economic costs and benefits identified for the economy-wide education and guidance campaign.

For new motor vehicles, Option 2 is estimated to create a net benefit of \$70 million in NPV terms over the 10 years to 2031 and a BCR of 2.3. This comprises benefits of \$124 million in NPV terms and costs of \$54 million in NPV terms over this period. Consumers are not directly impacted by the campaign but are estimated to receive benefits of \$97 million associated with the higher number of remedies provided by retailers. Costs to manufacturers primarily arise from retailers better understanding and enforcing their indemnification rights more successfully. The estimated cost to manufacturers of providing additional remedies is estimated at \$53 million.

Table 12: Likely net benefit of an education and guidance for the 10 years to 2031 – new motor vehicles only approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Motor vehicles	\$124 million	\$54 million	\$70 million	2.3

Table 13: Summary of benefits and costs of Part B, Option 2 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> Removal of knowledge barriers could result in more manufacturers understanding their obligations and not retaliate against suppliers. Suppliers may pursue indemnification for failures within the manufacturer’s responsibility more often than they otherwise would have, because manufacturers are better informed of their indemnification obligations Possible time and resource savings for suppliers in negotiating / discussing individual cases for indemnification with manufacturers. Suppliers may provide more remedies to consumers if there is greater awareness of the indemnification obligations. 	<ul style="list-style-type: none"> Increased cost to manufacturers of indemnifying suppliers for failures within the manufacturer’s responsibility. Cost to Government of delivering an education and guidance campaign.

Part B, Option 3 – a prohibition against not indemnifying suppliers, supported by penalties and other enforcement mechanisms

Increased incentives for indemnifying suppliers through stronger enforcement options

Option 3 would involve creating a stronger incentive for compliance by amending the ACL to prohibit manufacturers from failing to indemnify suppliers for manufacturer faults. Where a manufacturer fails to provide such indemnification, this could constitute a breach of the ACL, for which:

Improving the effectiveness of the consumer guarantee and supplier indemnification provisions

- a court could issue a civil pecuniary penalty and injunctions against a manufacturer for a contravention of the obligation to provide indemnification, which could require the businesses to act, or refrain from acting, in a certain way
- the ACCC would be given the ability to issue infringement notices where they have reasonable grounds to believe that a manufacturer has contravened the obligation to provide indemnification.

As discussed in Part A of this Consultation RIS, these additional tools for regulators and powers for courts would help to improve wider compliance. That is, the possibility of enforcement action by regulators or possibility of receiving a civil pecuniary penalty may incentivise manufacturers to proactively improve compliance with their indemnification obligations. However, this option may not necessarily overcome a concern some businesses have raised that taking action (including through complaints to ACL regulators) would damage contractual relationships.

In general, the threat of a civil pecuniary penalty may discourage non-compliant manufacturers from simply refusing to indemnify suppliers. If these manufacturers approach indemnification requests on their merits, suppliers, especially those unable to litigate to enforce their rights because of a lack of financial resources, would be out of pocket on fewer occasions (and may thus be less reluctant to provide remedies to consumers).

Rebalancing of who bears costs for failures

Where costs of remedies are passed back up the supply chain to manufacturers, they may reflect these costs in the wholesale prices of their products. However, this may not necessarily lead to increased retail prices. Some retail prices paid by consumers are set with reference to suppliers incurring costs in providing consumer guarantees remedies which are not subsequently reimbursed by manufacturers.

By incurring the indemnification cost when failures lie within their responsibility, manufacturers may have a greater incentive to improve the quality of their goods, which could reduce transaction costs for all parties given fewer remedies would be sought/needed. There is a risk some manufacturers will be more cautious in bringing new goods to market until they have a high level of certainty about its quality, which may constrain innovation and product choice. However, increased research and development before a product is released may also increase innovation if solutions are discovered in this process.

Manufacturers could still dispute claims on their merits

This option would not change the fact manufacturers would still be able to dispute supplier claims for indemnification on their merits if the manufacturer considers there has not been a manufacturer fault. Any genuine disagreement would need to be considered by a court or tribunal on its merits.

Estimated cost and benefit analysis

This option is premised that manufacturers are more likely to meet their indemnification obligations if there is a legal and monetary incentive for them to do so. As a result, more indemnification is provided to suppliers for remedies they provide to consumers. Subsequently, suppliers may be less reluctant to provide remedies to consumers because they have increased confidence of being indemnified. As with status quo, suppliers are assumed to only seek indemnification from manufacturers 90 per cent of time where they have provided a consumer with a remedy and do not for the remaining 10 per cent (e.g. fear of retaliation). For suppliers that do seek indemnification, it is assumed appropriate indemnification is provided 80 per cent of the time. As a result, it is assumed 72 per cent of all remedies provided by suppliers are appropriately indemnified by manufacturers.

For the purposes of the consultation RIS, it is assumed the rate at which suppliers are indemnified increases by 0.5 per cent per year from 80 per cent in 2020-21 to 85 per cent by 2030-31. However, it is also assumed the actual rate of suppliers who seek indemnification does not change. While the introduction of civil penalties may give some suppliers more confidence a manufacturer will provide indemnification when requested, it is assumed concerns about retributions from suppliers (which is not the target of this civil prohibition) will continue to prevent some suppliers from seeking indemnification. While the increase in indemnification provides suppliers with more confidence to provide consumers with remedies, the consultation RIS does not assume any time saving for consumers as it is not clear the extent to which this would occur.

Appropriate indemnification from manufacturers to suppliers represents a shift in costs from suppliers to manufacturers. The increased compliance by manufacturers results in a saving of time and resources by suppliers. It is assumed suppliers save one hour in time negotiating with manufacturers in each case indemnification is required.

Estimated regulatory burden

The regulatory burden for Option 3 is estimated to be \$44.8 million in the first year with no ongoing costs. The regulatory burden is incurred by businesses who are responsible for complying with the consumer guarantee provisions of the ACL and includes the cost of one-off staff training to raise awareness of the new regulatory requirements. This compliance burden is calculated by assuming every retail employee is required to undergo 30 minutes of training, at the expense of the business.

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.

Table 14: Regulatory burden estimate⁹⁹ 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

This option can be applied in one of two ways:

- a) economy wide
- b) to new motor vehicles only.

a) Economy wide approach

Creating a civil prohibition on manufacturers failing to indemnify suppliers is estimated to create a net benefit of \$194 million in NPV terms over the 10 years to 2031 and a BCR of 1.5. This option is estimated to generate total benefits of \$565 million and total costs of \$371 million in NPV terms over the 10-year outlook.

Suppliers benefit by no longer bearing the full cost of providing refunds, replacements and/or repairs to consumers. Some benefit is also passed on to consumers – \$401 million in NPV terms over 10 years from accessing a working version of the good purchased (approximated to the average value of goods).

In terms of costs, this option is estimated to increase costs for manufacturers who are not meeting their consumer guarantee obligations under the status quo –\$310 million in NPV terms over the 10 years to 2031. The increase in cost consists of both increased costs of providing remedies by those who change their behaviour, and infringement notices and pecuniary penalties paid by those who do not comply. Other than the modest increased training cost for manufacturers to ensure staff have a common understanding of the change, and any additional remedies that would be provided as suppliers pass on possible increased numbers of remedies to consumers; there is no change in costs for manufacturers who are already complying with consumer guarantee obligations.

⁹⁹ 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 15: Likely net benefit of a civil prohibition on failing to indemnify suppliers for the 10 years to 2031 – economy wide approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Whole economy	\$565 million	\$371 million	\$194 million	1.5

b) New motor vehicles only approach

This option responds to the imbalances in bargaining power in the sector as reflected in the ACCC’s new car retailing market study¹⁰⁰, enabling dealers to provide remedies to consumers under the consumer guarantees with greater confidence to enforce indemnification rights where the responsibility for the failure lies with the manufacturer.

The economic costs and benefits of a civil prohibition on failing to indemnify suppliers for the new motor vehicle market are a subset of the economic costs and benefits identified for the economy-wide prohibition.

For new motor vehicles, Option 3 is estimated to create a net benefit of \$184 million in NPV terms over the 10 years to 2031 and a BCR of 2.2. This reflects costs of \$150 million in NPV terms and benefits of \$334 million in NPV terms over this period.

Table 16: Likely net benefit of a civil prohibition on failing to indemnify suppliers for the 10 years to 2031 – new motor vehicles only approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Motor vehicles	\$334 million	\$150 million	\$184 million	2.2

¹⁰⁰ ACCC, [New car retailing industry market study](#), Final Report, December 2017.

Table 17: Summary of benefits and costs of Part B, Option 3 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> Suppliers less likely to bear the full cost of a remedy where the responsibility for the failure lies with the manufacturer. Possible time and resource savings for suppliers in negotiating / discussing individual cases for indemnification with manufacturers. Suppliers may provide more remedies to consumers for failures within the manufacturer’s responsibility with the knowledge the risk of not being compensated is reduced. 	<ul style="list-style-type: none"> Costs associated with providing remedies (where a business is not already providing these). Costs of non-compliance (infringement notices and pecuniary penalties) (applicable to non-compliant businesses only) Increased training cost for business to ensure staff have a common understanding of the change.

Focus Questions:

For suppliers:

22. Have you sought indemnification from manufacturers under the existing law? If not, please provide details.
23. Have you experienced difficulties getting indemnified from manufacturers? If so, please provide details.
24. Would your inclination to seek an indemnification change if a civil prohibition was introduced?
25. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition was introduced? If so, how?

For manufacturers:

26. How (if at all) would a civil prohibition change your response to requests for indemnification?
27. What other issues might a civil prohibition create?

Part B, Option 4 – a prohibition against manufacturers retaliating against suppliers who request indemnification

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. Option 4 would maximise the potential for suppliers to be indemnified by making it unlawful for manufacturers to retaliate against suppliers when they seek indemnification for consumer guarantee failures that lie within the manufacturer’s responsibility.

This in turn would assist in suppliers being more willing to provide remedies to consumers for genuine consumer guarantee failures.

How would the law need to change?

Retaliation can include taking adverse commercial action like terminating a contract, increasing prices, or withdrawing supply or introducing less favourable terms and conditions of supply.

The civil prohibition would be intended to discourage retaliation and give suppliers greater confidence to seek indemnification from manufacturers. There are existing protections against retaliation in Commonwealth whistleblowing legislation, complemented by remedies for retaliation and sanctions against retaliators, although the context is quite different.¹⁰¹ Further consideration would need to be given to the legal and practical implications of introducing such a prohibition and how it could be framed.

What are the barriers for businesses and how can they be overcome in the law?

There may be difficulties in proving 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.

Consideration could be given to countering these difficulties through presumptive legal tests, for example factors like whether a renewed contract is on terms significantly different to other similar contracts, and not demonstrably based on commercial realities between the parties. Further consideration would need to be given to the nature of any tests and how they could be applied in practice.

What role could ACL regulators play?

It can be difficult and time consuming for a supplier to take action against a manufacturer. For example, a small business whose supply contract is terminated for seeking indemnification may not be in a financial position to take legal action. Under this option, regulators would be able to intervene, including through court action where there is significant harm or systemic issues. The ability to issue infringement notices and accept court enforceable undertakings may also serve to resolve issues, given the potential for court action. Suppliers could also still take their own independent action.

¹⁰¹ *Public Interest Disclosure Act 2013* (Cth) s 13; and *Corporations Act 2001* (Cth) s 1317AB (protection from legal liability and contract termination) and s 1317AC (protection from causing detriment and threatening to cause detriment).

What are limitations of this option?

Instances of retribution for seeking indemnification are considered an extreme consequence rather than the main problem, which is manufacturers simply refusing to reimburse suppliers or making the process difficult. Consequently, a limitation of this option is it will not solve the problem of manufacturers who simply refuse to indemnify a supplier or who make the process difficult to discourage suppliers from pursuing their right to indemnification.

Estimated cost benefit analysis

Under the status quo, and for the purposes of the consultation RIS, it is assumed 10 per cent of suppliers do not seek indemnification for fear of retribution. The cost benefit analysis assumes the civil prohibition would result in a reduction in retaliation and with less concerns about retaliation, resulting in an increase in suppliers who seek indemnification. This results in an increase in the overall rate of indemnification from manufacturers to suppliers. It is assumed under this option the propensity for a manufacturer to retaliate when a retailer requests a remedy decreases by 0.4 per cent per year from 10 per cent in 2020-21 to 6 per cent in 2030-31 and the propensity for manufacturers to indemnify suppliers (as a percentage of indemnifications sought) increases at 0.5 per cent per year from 80 per cent in 2020-21 to 85 per cent in 2030-31.

Appropriate indemnification from manufacturers to suppliers represents a shift in costs from suppliers to manufacturers

While the increase in indemnification provides suppliers with more confidence to provide consumers with remedies, it does not assume any time saving for consumers in this case as it is not clear the extent to which this would occur.

As with Option 3, the increased compliance by manufacturers results in a saving of time and resources by suppliers. It is assumed suppliers save one hour in time negotiating with manufacturers in each case indemnification is required.

Estimated regulatory burden

The regulatory burden for Option 4 is estimated to be \$44.8 million in the first year with no ongoing costs. The regulatory burden is incurred by businesses who are responsible for complying with the consumer guarantee provisions of the ACL and includes the cost of one-off staff training to raise awareness of the new regulatory requirements. This compliance burden is calculated by assuming every retail employee is required to undergo 30 minutes of training, at the expense of the business. 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.

Table 18: Regulatory burden estimate¹⁰² 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

This option can be applied in one of two ways:

- c) economy wide
- d) to new motor vehicles only.

a) Economy wide approach

Applying an economy wide civil prohibition on retribution by manufacturers against suppliers is estimated to create a net benefit of \$368 million in NPV terms over the 10 years to 2031 and a BCR of 1.6.

This option is expected to generate total benefits of \$956 million in NPV terms over 10 years, including benefits to suppliers of \$130 million in NPV terms over 10 years resulting from no longer bearing the full cost of providing refunds, replacements and/or repairs to consumers. Benefits are also estimated to be passed on to consumers – \$697 million in NPV terms over 10 years from accessing a working version of the good purchased (approximated to the average value of the relevant good).

In terms of costs, this option is estimated to create net costs for manufacturers and suppliers of \$587 million in NPV terms over the 10 years to 2031. The increase in cost to manufacturers consists of both increased costs of providing remedies by those who change behaviour, and infringement notices and pecuniary penalties paid by those who do not comply. Suppliers also bear remedy provision and staff training costs but benefit overall due to increased indemnification relative to the status quo, as they are better able to enforce their rights.

Table 19: Likely net benefit of a civil prohibition on retribution by manufacturers against suppliers for the 10 years to 2031 – economy wide approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Whole economy	\$956 million	\$587 million	\$368 million	1.6

¹⁰² 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.

b) New motor vehicles only approach

As with Part B, Option 3b, this option would give dealers greater confidence they will be able to enforce indemnification rights when they provide a remedy for a manufacturer fault.

The economic costs and benefits of a civil prohibition on retribution by manufacturers against suppliers for the new motor vehicle market are a subset of the economic costs and benefits identified for the economy-wide prohibition.

For new motor vehicles, Option 4 is estimated to create a net benefit of \$324 million in NPV terms over the 10 years to 2031 and a BCR of 2.3. This reflects costs of \$257 million in NPV terms and benefits of \$581 million in NPV terms, including a net benefit of \$455 million to consumers (as they receive more remedies), over this period.

Table 20: Likely net benefit of a civil prohibition on retribution by manufacturers against suppliers for the 10 years to 2031 – new motor vehicles only approach

	Total benefits	Total costs	Net benefit	Benefit Cost Ratio
Motor vehicles	\$581 million	\$257 million	\$324 million	2.3

Table 21: Summary of benefits and costs of Part B, Option 4 (covers both economy-wide approach and new motor vehicles only approach)

Benefits	Costs
<ul style="list-style-type: none"> Suppliers may be more likely to pursue indemnification because there may be a lower risk of retribution and suppliers may be less likely to bear the full cost of a remedy where the responsibility for the failure lies with the manufacturer. Possible time and resource savings for suppliers in negotiating / discussing individual cases for indemnification with manufacturers. Suppliers may provide more remedies to consumers for failures within the manufacturer’s responsibility with the knowledge that the risk of not being reimbursed is reduced. 	<ul style="list-style-type: none"> Costs of non-compliance (infringement notices and pecuniary penalties) (applicable to non-compliant manufacturers only). Increased training cost to ensure staff have a common understanding of the change.

Focus Questions:

For retailers:

28. Have you experienced retribution from a manufacturer after seeking indemnification? If so, please provide details.
29. Would your inclination to seek indemnification change if a civil prohibition on retaliation was introduced?
30. Would your approach to providing consumer guarantees remedies to consumers change if a civil prohibition on retribution was introduced? If so, how?

For manufacturers:

31. How (if at all) would a civil prohibition on retribution change your response to requests for indemnification?

For everyone:

32. If a civil prohibition was created to address manufacturer retribution:
 - c. what form should it take? (e.g., effective models in other laws)
 - d. should presumptive tests apply? If so, what presumptions should be included?
33. What penalties or sanctions should be available to deter or compensate for retribution?

Appendix A – Assumptions

In assessing the potential regulatory burden of each option, this Consultation RIS has been informed by analysis undertaken by Deloitte Access Economics, who were contracted by the Commonwealth Treasury. It is also guided by the requirements of the Office of Best Practice Regulation: [Regulatory Burden Measurement Framework](#).

This analysis is provided to inform the consultation process. Feedback received through consultation on this Consultation RIS will help to refine this analysis and inform the Decision RIS.

Framework for the analysis

Some impacts have not been analysed for the purpose of this report 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 service 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 regulation 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 CBA:

- Deloitte Access Economics Business Outlook and Retail Forecasts publications and forecasts
- The Australian Consumer Survey
- Australian Bureau of Statistics historical data on wages, consumer price index (CPI), 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 of four proposed changes to the Australian Consumer Law.

The impacts of each option is measured as a change relative to what would occur if nothing changed - the status quo.

The status quo case is forward looking over the period from 2020-21 to 2030-31. The level of problems with goods and services is assumed to continue into the future and grow in line with the industry relating to the production and delivery of goods and services respectively.

Assumptions are provided in **Table 22: 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 22: 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%	ACL 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%	

Improving the effectiveness of the consumer guarantee and supplier indemnification provisions

Sector	Value	Source
Construction (building, renovations etc.)	7.2%	
General assumptions		
Proportion of consumers who experience an issue and address the problem (For every 100 CG issues, consumers will attempt to address 82 of them)	82%	ACL 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%	ACL Consumer Survey and Deloitte/Treasury assumption
Rate 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

Sector	Value	Source
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
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 – Option 3 and 4 will have an average compliance cost impact, averaged over 10 years of \$4.48 million to business.¹⁰³ 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.

¹⁰³ 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.

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