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

INTRODUCTION

1. This submission responds to Part A, *Receiving Remedies*, of the Consultation Regulation Impact Statement (CRIS) issued in December 2021 concerning the consumer guarantee provisions of the Australian Consumer law (ACL). Its conclusion is that Policy Options 1 and 2 for Part A should be pursued (although some procedure reforms are suggested) and that Option 3 should not. Briefly, this is because-

   (a) There is no evidence that the ACL's consumer guarantee regime ("the regime") provides inadequate protection for consumers
   (b) The problems that currently exist concerning the regime are ones of unfamiliarity with the law and limited utilisation and enforcement
   (c) Penalty provisions already exist that cover many forms of non-compliance with the regime. Furthermore, experience with the ACL's penalty provision provides little or no evidence that creating new ones applicable to consumer guarantees would increase compliance with those guarantees.
   (d) Option 3 would further complicate an area of law that it already overly complicated and, if it involved creating special provisions relating to motor vehicles, would contradict the universality of the ACL. It would also increase the differences between the ACL regime and the comparable provisions of the ASIC Act and make the issue of which regime should apply to the supply of certain services even more excruciatingly difficult than it is already.

ADEQUACY OF THE EXISTING CONSUMER GUARANTEES REGIME (Q6)

2. Although this is not contested in the CRIS, it is important to emphasise that the substantive provisions of the regime give consumers significant rights and provide them with a variety of remedies should they be supplied with goods[1] or services that are defective or unsatisfactory[2]. For example:

   (a) Section 54 creates a guarantee that goods are fit for their common purpose, free from defects, acceptable in appearance and finish, safe and durable. This guarantee is broad enough to cover all the non-compliance situations described on pp 18-28 of the CRIS. It has not been interpreted restrictively and applies to both the supplier and the manufacturer.[3] It is also not

[1] Although the consumer guarantees regime applies also to services, for ease of expression, this submission will refer only to goods. However, the points it seeks to make are equally applicable to services.

[2] As the focus of the CRIS is upon the problems facing consumers who are supplied with goods that are unsatisfactory, this submission will adopt a similar focus. However, the points it seeks to make are applicable to all the guarantees created by Part 3-2, Div 1 and not merely that created by s 54.

[3] Early examples include *Zhang v United Auctions* [2013] NSWCTTT (appearance of a granite bench top); *Baratta v TPA Pty Ltd* [2012] VCAT 679, *Burton v Chad One Pty Ltd* [2013] NSWDC 301 and *Talaeibarforous v Kayenne Pty Ltd* [2016] VCAT 1523 (defective second-hand cars); *Bonomo v Tile Trends* [2012] NSWCITTT (appearance of floor tiles); *Cary Boyd v Agrison Pty Ltd* [2014] VMC (defective tractor); *Wesley v Liano (Civil Claims)* [2017] VCAT 1465 esp at [36]. More recent examples from superior courts include *ACCC v Jayco Corporation Pty Ltd* [2020] FCA; *Vautin v BY Winddown Inc* [2018] FCA 426; *Capic v Ford Motor Company Pty Ltd* [2021] FCA (discussing inherent risk cases).

subject to the personal injury restrictions that apply to other provisions of the ACL (via s 137C and Part IVB of the *Competition and Consumer Act 2010* (CCA)) and to the services guarantees (via ACL s 275). To that extent at least, it provides consumers with greater protection and potentially better remedies than other ACL provisions.

(b) Part 5-4 provides a graduated set of remedies that depend upon the seriousness of the supplier's non-compliance. These are summarised in the Appendix. As with the guarantees themselves, these remedies are broad enough to provide the consumer with a fair and adequate remedy (costs aside[4]) in all the case studies outlined on pp 13-28 of the CRIS. For example: Sonia (at p 26) whose new motor vehicle encountered a "major mechanical failure" would have been able (i) as against the supplier, to reject the vehicle and obtain a refund of all of the consideration she had paid for it plus compensatory damages for any foreseeable loss she had suffered (apparently, her preferred outcome); or as against the manufacturer, damages in the form of the reduction in value of the vehicle attributable to the failure plus compensatory damages for the foreseeable loss she had suffered as a result of that failure. *Vautin v BY Winddown Inc* [2018] FCA 326 is a helpful illustration of the extensive nature of the damages that can be awarded against the manufacturer should this alternative be pursued under the applicable provision of the ACL (s 272(1)(b)).

3. The problem with the regime is not that its substance does not provide adequate protection for consumers, but that it is not utilised. In part this is because it is structured and expressed in a manner that makes it very difficult to understand and apply. This exacerbates the lack of awareness on the part of consumers and suppliers of their rights and obligations and (in the case of consumers) their willingness to pursue those rights when they are aware of them. This is especially the case with the remedy provisions in Part 5-4. As Sackville AJA noted in *Scenic Tours Pty Ltd v Moore*[5]

> "[T]he statutory regime is anything but straightforward. A consumer would need to be particularly well informed (or advised) to understand his or her rights under the regime."

4. It is acknowledged that simplification of the regime is outside the scope of the CRIS and that its focus (in Part A) is on the problem of consumers not receiving the remedies to which they are already entitled. Nevertheless, it is a reason why Policy Option 3 for Part A should not be pursued as it would make an already complex regime more complicated and compound the problem rather than provide a solution

RECEIVING REMEDIES

5. The problem addressed in the CRIS is that of consumers not always receiving the remedies to which they are entitled under the regime. This is a real and significant problem. As the CRIS correctly notes, the success of the regime depends upon "the parties being well informed and acting in good faith: with consumers understanding an asserting their rights and suppliers and manufacturers meeting their obligations".

[4] Addressed below at para 10.

[5] [2018] NSWCA 238 at [119]. The damages aspect of this cases was reversed on appeal.

6. From personal experience and observation there to be three main reasons for consumers not receiving the remedies to which they are entitled; they are

   (i) Lack of awareness on the part of consumers of their rights and the remedies available to them; and a corresponding lack of familiarity on the part of suppliers of their obligations under the regime
   (ii) The cost and inconvenience consumers may experience in pursuing their rights
   (iii) Recalcitrant behaviour on the part of suppliers and manufacturers

7. **Lack of awareness**: when teaching the university subject *Consumer Law*, I am frequently struck by how little (if any) knowledge students have of the ACL. Many have not heard of the ACL and fewer still have any appreciation of the rights it gives them and the remedies it provides. As a result, the focus of much of this subject is on addressing this situation and on equipping them -

   (a) *In their capacity as consumers*: to know what rights they have, how to enforce those rights, the remedies available to them and resistance from suppliers they can expect to face
   (b) *In their (eventual) capacity as suppliers / manufacturers*: to know what their obligations are and the adverse consequences they may face through not complying with those obligations
   (c) *In their (eventual) capacity as advisors*: to equip them to act as advisors to consumers and suppliers by appreciating both (a) and (b)

8. I have also been struck by small retailers' lack of awareness of their obligations regarding defective manufactured goods. Despite the references in the regime to the obligations of "a person" who supplies goods to "a consumer" this often leads to the incorrect assertion that they have no responsibility for defective goods and that this lies only with the manufacturer under any warranty it may have given. This lack of awareness is compounded by the regime confusingly referring to the person supplying goods as "the supplier" in ss 51, 52 53 and 55 but not doing so in the guarantees most frequently relevant to defective goods cases, the acceptable quality guarantee (s 54) and ss 56 and 57. Presumably, this difference derives from the fact that the guarantees created by the latter apply also to the manufacturer. However, this difference makes it more difficult for a consumer to explain to a retailer that retailers as well as manufacturers are obligated by those guarantees. With this situation in mind, students are advised to install a copy of the ACL on their mobile phone for ready reference and explanation!

9. These experiences suggests that Part A, Option 2 should be pursued, especially as an economy wide campaign. Of course, the limitations of such a program (as addressed in the CRIS) are acknowledged as is the fact that the ACCC already conducts a variety of educational programs directed towards the achieving the outcomes listed above. However, this Option has the advantage of addressing directly one of the barriers to consumers receiving the remedies to which they are entitled and doing so without further complicating the regime and penalising what many would see as merely breach of contract. Furthermore, enhancing the awareness consumers have of their rights under the ACL will increase the likelihood that their interactions with recalcitrant suppliers will result in the latter contravening ACL ss 29(1)(m) / s 151(1)(m), thereby exposing

them to the imposition of a pecuniary penalty or a criminal prosecution[6] without the need to change the existing law. It would also address the economic considerations outlined in the CRIS at p 32.

10. **Cost and inconvenience**: enforcing legal rights can be costly, inconvenient and stressful for the reasons identified in the CRIS. These are significant impediments to consumers pursuing their rights under the consumer guarantees regime very unfortunate concomitants of an adversarial legal system such as ours and a remedy regime that requires fault (in the form of goods or services being defective in some way) on the part of the supplier or manufacturer before a remedy is available. One solution that would alleviate this situation for consumers would be the introduction of a cooling off period as described on p 13 of the CRIS; however, that option is not presently open for discussion. On the other hand, there are other solutions that could be implemented without amending the substantive provisions of the consumer guarantees regime. These include

    (a) Expanding legal aid to provide more assistance to consumers seeking to pursue claims based on non-compliance with a consumer guarantee

    (b) Increasing the capacity for the ACCC and other regulators to take representative actions on behalf of consumers; for example, by amending ACL ss 15 and 237-239 to enable the ACCC and other regulators to seek compensation orders based on a supplier or manufacturer's non-compliance with a consumer guarantee. Currently, those provisions can be used for the benefit of consumers only if a provision of the ACL has been contravened, or a contractual term has been declared to be unfair under s 250. This limitation should be removed.

    (c) Providing for costs to be awarded against suppliers and manufacturer against whom proceedings are taken successfully, based on non-compliance with a consumer guarantee. In Victoria, for example, these costs cannot be awarded at all in claims under $15,000.[7] Above that amount, they can be awarded at the discretion of the Tribunal, but this is not the norm[8]. As the CRIS notes at 16, the costs associated with taking legal proceedings "act as a barrier to consumers enforcing their ACL remedy rights". Allowing costs to be awarded against unsuccessful suppliers and manufacturers would lower this barrier and simultaneously provide an incentive for them to comply with their consumer guarantee obligations. As the CRIS notes at 32, currently there is no such incentive as "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."

11. **Recalcitrant behaviour by suppliers and manufacturers**: their contribution to the problem is obvious. The current response of the ACL and why Option 3 would not improve the situation are discussed below.

[6] This point is discussed further below. The situation described is illustrated by the facts in *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96.
[7] *Victorian Civil and Administrative Tribunal Act 1998,* Sch 1, cl 4I.
[8] *Victorian Civil and Administrative Tribunal Act 1998* s 109(1)-(3).

EXISTING PENALTY PROVISIONS (Qs 6 and 14)

12. The CRIS acknowledges that there are penalty provisions already applicable to the regime[9]. However, the operation and value of these provisions (ss 29/151 in particular) is understated; this has the effect of exaggerating the need for new penalty provisions

13. The provisions in question are:

    (a) Sections 29 / s 151 applying to false or misleading representations
    (b) Sections 20-22 applying to unconscionable conduct

    Contravention of these provisions can lead to the imposition of a pecuniary penalty and, in the case of s 151, a fine. They are also infringement notice provisions under s 134A of the CCA, exposing contravening firms to the penalties listed in s 134C.

14. **Sections 29/151**: Briefly, s 29(1)(m) prohibits a person (such as a supplier or manufacturer) making in trade or commerce a false or misleading representation concerning "the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2)". This conduct is also made a criminal offence by s 151(1)(m). Noticeably, these prohibitions specifically identify false or misleading representations about consumer guarantees as one of their targets.

15. Although they do not cover the mere non-performance of a consumer guarantee, these prohibitions are very broad. Thus, they cover *misleading* as well as false representations and representations about the *effect* of guarantees as well as about their existence or exclusion forms. As a result, they have been held to cover conduct such as the following:

    (a) A supplier representing that it has a no refund policy[10]
    (b) An online retailer representing that goods purchased from its online store cannot be returned or exchanged unless otherwise agreed by the retailer at its sole discretion[11]
    (c) A supplier denying that the consumer has a remedy under the consumer guarantees regime[12]
    (d) A supplier representing that guarantees were limited or non-existent [13]
    (e) A retailer refusing to deal with a consumer's complaint about faulty goods by representing that it was for the manufacturer to decide whether to replace them, not the retailer[14]
    (f) A manufacturer representing that a consumer has no rights other than those under the manufacturer's warranty[15]
    (g) A manufacturer/retailer representing that[16]
        (i) defective products must be repaired multiple time by the manufacturer before the consumer was entitled to a refund or replacement

[9] At p 12.
[10] See *ACCC v Valve Corporation (No 3)* [2016] FCA 2014; *ACCC v Jetstar Airways Pty Ltd* [2019] FCA 797.
[11] See *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653.
[12] See *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672.
[13] See *ACCC v MSY Technology Pty Ltd* [2012] FCAFC 56.
[14] See ACCC v Moonah Superstore Pty Ltd [2013] FCA 1314.
[15] See *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96.
[16] See *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653.

(ii) after a certain period, it would repair defective goods only on condition that the consumer paid for the repairs
(iii) the warranty period for its products was limited to a specified warranty period

16. It is apparent from cases such as those noted above that, in practice, it would be very difficult for a supplier or manufacturer to resist the approach of a consumer seeking a remedy under the existing guarantees regime without contravening those prohibitions. This would be especially so, as the *LG Electronics* case illustrates,[17] with a consumer who was aware of the regime. Furthermore, unlike Option 3, these prohibitions can apply –
    (a) whether or not the failure to comply with a guarantee is a major failure
    (b) even in cases in which there is not a failure at all.

17. **Sections 20-22**: the potential for these provisions to be used in cases of non-compliance with consumer guarantees is noted in the CRIS at 28. One of the cases referred to, *ACCC v Ford Motor Company of Australia,*[18] provides a useful illustration of this potential. This case led to the imposition of a pecuniary penalty of $10m following Ford's admission that it has contravened 21 of the ACL by:

    (i) Failing to ensure that its customers were provided with adequate information about their legal rights and potential legal rights (including potential rights under the consumer guarantee provisions of the ACL); and
    (ii) Giving effect to processes for dealing with and responding to customer complaints and requests for refunds or replacement vehicles that:

    - failed to ensure that proper consideration was given to the individual circumstances and actual or potential legal rights of customers; and
    - resulted in many customers accepting offers made by Ford Australia because they were told refunds or no-cost replacements were not an option and had limited time to accept offers, which were conditional on them entering into settlement agreements that included nondisclosure provisions; and
    - failed to ensure that customers who signed settlement agreements understood that they may be compromising their legal rights; and
    - had inadequate processes which caused many Customers to purchase new replacement vehicles at a significant additional cost to them.

18. The inevitable conclusion to be drawn from the cases applying the existing penalty provisions to the regime is that there is very little scope for the operation of a new prohibition. Perhaps it could apply to a mere failure to respond to a complaint, unaccompanied by any false or misleading representation, but even in that situation the *Ford Australia* case suggests that a large company could be guilty of unconscionable conduct.

PART A, OPTION 3

19. This option proposes introducing a new prohibition against not providing a remedy for consumer guarantee failure when this is requested and required by law. This would

[17] *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96.
[18] [2018] FCA 703.

(a) Allow the courts to impose only a pecuniary penalty
(b) Apply only to failing to provide a remedy when the non-compliance with a consumer guarantee amounts to a major failure as defined in ACL s 260.

20. This option should not be pursued for the following reasons:

(a) As indicated above, it is largely unnecessary as the ACL already prohibits most of the forms of behaviour in which suppliers and manufacturers engage when not comply with their obligations under the regime. Furthermore, as the applicable prohibitions are infringement notice provisions, they can be used in the manner outlined in the CRIS at p 37 and so, in this respect, already provide the enforcement advantages attributed to Option 3.

(b) It would impose only a pecuniary penalty for contravention. This is in contrast to s 151 of the ACL which currently makes contravention a criminal offence punishable with a fine. This is relevant to the ability of Option 3 to act as an additional incentive for suppliers / manufacturers to meet their obligations under the regime – an argument advanced in its favour on p 37 of the CRIS. Thus, in response to Q14, it is suggested that if the possibility of being exposed to a criminal prosecution does not already act as a sufficient incentive for suppliers and manufacturers to comply with those obligations, there is no reason to believe that the possibility of lesser enforcement action being taken against them will do so. This point would be strengthened further if the penalty for the new prohibition was set at an amount less than that which can currently be imposed for contravention of ss 29 and 21 – a possibility envisaged by the CRIS at p 38.

(c) It would further complicate an already complex areas of law. This is especially so as Option 3 proposes that the new prohibition would apply only when a remedy is not provided for a "major failure', rather than in in all cases in which a supplier or manufacturer does not comply with their obligations under the regime. As a result, for enforcement proceedings to be successful, the complainant would need to establish that:

(i) a guarantee applies to the transaction in question
(ii) that guarantee has not been complied with
(iii) the failure to comply was a major failure and
(iv) the supplier or manufacturer has not complied with their obligations in respect of that failure

Importantly, this would almost inevitably invite a contest concerning whether the failure to comply with the guarantee in question was a major failure or not. The current penalty provisions, on the other hand, involve no such distinction being made. For example, should a misleading representation be made regarding the regime, liability will arise regardless of whether the failure to comply was major or not. Indeed, liability can arise even if there is no such failure; for example, should a supplier advise a consumer that any problems with the goods supplied must be directed to the manufacturer, liability would arise under s 29(1)(m) even if the goods in question were not defective.

It is acknowledged that a contest regarding the seriousness of the failure to comply may currently arise when determining which set of remedies are open to the consumer.

However, this would be far more acute if penalties were applicable to one option but not the other.

A further complication that would arise from implementing Option A as described in the CRIS concerns the position of suppliers who do not comply with their obligations in respect of a failure that cannot be remedied but which is not a major failure. Under ACL s 259, the remedies available to the consumer are the same in both cases. However, it is also clear that because a failure cannot be remedied does not automatically mean that it is a major failure as defined in 260. Consequently, if Option 3 *was* restricted to major failures, this alignment would be broken.

(d) It would not provide a new remedy when the failure to comply with a guarantee does not amount to a major failure. Whilst (of course) major failures are likely to be of greater concern to consumers and cause them greater loss or damage, it significant that Option 3 would do nothing to assist consumers in cases when the failure is not major.

VEHICLE DEALER CONCERNS (Q4)

21. Question 4 of the CRIS asks whether a "depreciation deduction" of some kind should be applied when determining the amount of a refund due to a consumer. For the following reasons, this proposal should not be pursued.

22. **It is unnecessary**: although a consumer can sometimes obtain a refund of the money and the value of any other consideration they have provided, this is possible only if they are entitled to reject the goods or, in the case of services, terminate the contract for their supply.[19] In this case of goods, this requirement protects dealers from consumers "gaming" the system in the kinds of situations identified in the CRIS at pp28-29. This is because:

(a) rejection is possible only if the failure to comply with a consumer guarantee is a major failure or one that cannot be remedied. Although much will depend upon what precisely is wrong with the vehicle, if it has operated trouble free for a significant period of time (one of the scenarios raised by dealers) the consumer may be unable to meet this requirement and a refund will not be available.

(b) rejection is not possible after the rejection period has expired, or the goods have been damaged[20] The rejection period is defined in ACL s 262(2) as the period within which it would be reasonable for the failure to comply to become apparent having regard to a number of listed considerations. Although there is uncertainty about how the rejection period is to be calculated,[21] it is likely to militate against a consumer being able to enjoy trouble free motoring for "several years" and then reject the vehicle and obtain a refund.

[19] As a "depreciation deduction" is most relevant to the supply of goods, its possible application to services is not considered.

[20] Section 262 specifies other situations in which rejection is not possible; however, these are not relevant to the issue under consideration.

[21] As to which see *Vautin v BY Winndown Inc (No 4)* [2018] FCA 426.

23. **It would further complicate the regime**: the CRIS has identified some of the possible forms a "depreciation deduction" could take. Any one of these would add a layer of complexity to the regime and add a further disincentive to consumers enforcing the rights it give them.

24. **It would reduce the incentive for manufacture and supply produce quality goods**. Potentially having to refund the purchase price and the simplicity of the obligation to do this imposed by ACL s 263(4) serves as an incentive for manufacturers and suppliers to produce and supply goods that do not suffer from a major failure to comply with a consumer guarantee. Their compliance with the regime is the major concern identified by the CRIS and it would be inadvisable to amend it in a manner likely to make this worse.

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APPENDIX

Remedies available to a consumer where the failure cannot be remedied or is a major failure

25. Reject the goods pursuant to ACL s 259(3)(a)	
A consumer who is entitled to reject goods because of non-compliance with a consumer guarantee:	
▪ must notify the supplier that they wish to do this and the grounds they are relying upon and do so within the "rejection period"	ACL ss 259(3)(a) and 262(2)
▪ must return them to the supplier unless this is not practical, in which case the supplier must collect the goods within a reasonable time and at the supplier's expense	ACL s 263
▪ will lose the right to reject if: ▪ they do not reject within the rejection period ▪ the goods are lost, destroyed or disposed of by the consumer ▪ the goods were damaged after delivery ▪ the goods have become attached to land and would be damaged if they were detached.	ACL 262 (a)-(d)
Having rejected the goods, the consumer is entitled to: ▪ obtain a refund of the purchase price and other consideration provided; **or** ▪ obtain a replacement; and ▪ recover damages for any foreseeable loss or damage suffered because of the failure	ACL s 263(4)(a) ACL s 263(4)(b) ACL s 259(4)(5)
26. Keep the goods pursuant to ACL s 259(3)(b)	
In this case, the consumer is also entitled to ▪ compensation for any reduction in the value of the goods below the price paid or payable for them ▪ recover damages for any foreseeable loss or damage suffered because of the failure	ACL s 259(3)(b) ACL s 259(4)(5)
27. Terminate any connected services contract	
If a consumer rejects the goods and supplier is required to give a refund and related services were supplied in trade of commerce - consumer may also terminate any services contract they have entered into relating to the goods	ACL s 265

Remedies available to a consumer where the failure can be remedied and is not a major failure

1. Require the supplier to fix the problem within a reasonable time pursuant to ACL s 259(2)(a)	
If the consumer purses this remedy the supplier has some choices	
▪ If failure relates to title – fix title	ACL ss 261(a)
▪ Failures not relating to title - repair the goods	ACL s 261(b)
▪ Replace the goods	ACL 261(c) + s 264
▪ Refunding money paid and any other consideration provided	ACL s 261(d)
2. Should a supplier refuse to remedy the failure or not do so within a reasonable time	
In such cases the consumer may	

▪ Have the failure remedied and recover the reasonable cost involved	ACL s 259(2)(b)(i)
▪ Reject the goods	ACL s 259(2)(b)(ii) – subject to s 262
3. Claim damages	
A consumer can choose not to require the supplier to fix the problem. In this situation, the consumer can recover compensatory damages in respect of any *foreseeable* loss or damage they have suffered. A consumer can also do this should they choose to have the goods fixed by the supplier. However, in this case, where the goods are fixed, the amount recovered be reduced because the goods are no longer defective.	ACL s 259(4)(5)
4 Terminate any related service contract	
If a consumer rejects the goods and supplier is required to give a refund and related services were supplied in trade of commerce - consumer may also terminate any services contract they have entered into relating to the goods	ACL s 265