



Dr Luke Nottage *BCA/LLB/PhD (VUW), LLM (Kyoto)*
Professor of Comparative and Transnational Business Law
Co-Director, Australian Network for Japanese Law (ANJeL)
Associate Director, Centre for Asian and Pacific Law (CAPLUS)

17 January 2022

By email:
consumerlaw@treasury.gov.au

Re: Submission to Australia's Treasury Consultation on 'Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law' (ACL)¹

1. I have researched, lectured and published on consumer law for over thirty years.² I agree with the proposed Part A Option 3: adding an ACL "prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms" (notably infringement notices).
2. This should be extended on an economy-wide basis, not just for the persistent problem area of new motor vehicles, as this generates on the maximum benefit cost ratio (4.7, at p47, on conservative assumptions³) and the problem with suppliers not providing ACL remedies is pervasive (except perhaps for very small-value goods, especially from large suppliers more mindful of reputational and organisational costs).
3. As evidence of that problem, in addition to the 78% increase in consumers contacting the ACCC with consumer guarantee problems in

¹ <https://treasury.gov.au/consultation/c2021-224294>

² CV at <https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html>

³ For example, the Consultation RIS assumes that there are only 2.7-6.6% chances of general consumer products having problems (p76), which is far less than evidenced than many product types in the consumer survey research undertaken by Choice as mentioned in paragraph 3 below and highlighted in my Appendix II powerpoint slides (although some of the "performance or reliability" issues may not necessarily involve ACL guarantee violations). Similarly, in light of Choice and anecdotal evidence, the "Deloitte assumption" of 60% of such product suppliers being likely "to provide remedies or refunds" is questionable (pp 77-79). In addition, the assumption that only half of consumers who do not obtain ACL remedies are entitled to them (p20, fn34) seems conservative, given that suppliers have many more financial and technical resources to resist even valid claims.

2019 compared to 2016 (noted at pp22-23 of the Consultation RIS), I append some of the scenarios based on real-life cases I became involved in the last few years. (As noted, only some resulted in a resolution, after formal complaints including in the case of Chris, filing a claim with NCAT.) I secondly append my Powerpoint joint presentation to the December 2021 meeting of the Australasian Consumer Law Roundtable,⁴ including key results from Choice showing many reported defects across many goods sectors. Those survey results were presented to the Productivity Commission's inquiry last year into the ACL "Right to Repair", which also recommended introducing pecuniary penalties for not complying with ACL consumer guarantees.⁵

4. If that is politically difficult, despite the economic and other policy arguments for introducing this ACL reform on an economy-wide basis, at least the ACL should be amended to allow pecuniary penalties and/or infringement notices to be issued by Regulation. Initially the Regulation can target the areas which such surveys and other evidence indicate are most problematic (eg smartphones, new motor vehicles etc). Another possibility is for such a Regulation to apply to allow penalties etc only where the affected consumer is an individual, rather than a sole trader, partnership, corporation or trust – as access to justice is comparatively difficult for individuals, which suppliers in trade well know.
5. In any event, the ACL should add the possibility of issuing pecuniary penalties etc for defects which are not only "major failures". The Productivity Commission inquiry also found many examples of suppliers not providing repairs or replacements, which should be available for such defects. Consistently with their internal guidance on allocating resources, ACL regulators can be expected to target however suppliers that refuse to provide remedies even for major failures.
6. The maximum penalties etc should align with those proposed in exposure draft legislation for terms found to be unfair under the ACL.⁶ Those are practically and conceptually similar to terms in contracts that attempt to contract out of mandatory consumer guarantees, even though such terms are also void under the ACL. Both mechanisms seek to ensure minimum

⁴ <https://japaneselaw.sydney.edu.au/2021/08/australasian-consumer-law-roundtable-1-december-usydney/>, linking to a PDF of our Powerpoints.

⁵ <https://www.pc.gov.au/inquiries/completed/repair>

⁶ <https://treasury.gov.au/consultation/c2021-201582>

- performance standards in consumer transactions and therefore trust in the marketplace, for the benefit of both consumers and suppliers.
7. As the Productivity Commission final report also recommended, new penalties for violating ACL consumer guarantee obligations should be supplemented by improvements in access to justice for consumers themselves seeking claims. For example, South Australia reportedly allows consumers to compel mediation. NSW introduced a few years ago a Consumer Guarantees Direction power allowing the OFT to order compensation to be paid to a consumer for up to \$3000, but there is no evidence of it ever having been used and it is not widely publicised in ACL related information for consumers.⁷ The latter power at least could be added into the ACL regime for nation-wide implementation.
 8. Option 2 of more education / guidance, let alone Option 3 of doing nothing, is not compelling. Your estimated benefit cost ratio is lower. And there has already been guidance issued by regulators from the 2010 implementation of the ACL regime, including inquiries into the new motor vehicle market and indeed many court cases, plus from 2020 ACCC guidance relating to core consumer guarantees of reasonable durability and safety.⁸ Even the latter guidance is phrased quite generally, and the Choice survey and other evidence shows that defects are still being reported and/or not easily claimed against, for many types of consumer goods.
 9. Indeed, as indicated in my two Appendices, it seems that suppliers are now *too* well educated regarding the core problem that has become evident with the ACL regime: it essentially requires consumers to “prove their case” of product or services defects in a tribunal or court. (Gradually since 2010, suppliers seem to have been mostly educated to not say that consumers only have manufacturers or other voluntary warranty rights, which misrepresentations of ACL mandatory consumer guarantee rights already can attract regulatory action and sanctions.) Yet proving their

⁷ See <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>. However, the power is not evident in the NSW OFT website information provided to consumers or those using its new online consumer complaints (register) system. Another reason why the power does not seem to have been used is that any Direction issued can anyway be challenged through NCAT: <https://www.ncat.nsw.gov.au/ncat/case-types/consumers-and-businesses/consumer-claims/consumer-guarantee-directions.html>)

⁸ <https://consumer.gov.au/resources-and-guides>



case for defects is often prohibitive in terms of financial and indirect costs to consumers (especially those not in trade, thus not repeat players or able to deduct legal or expert witness costs from pre-tax income).

10. I am very happy to provide further information or advice on any of the above.

Yours sincerely,

Luke R Nottage

APPENDIX I: SCENARIOS based on recent actual cases

1. Liam, a high school student, buys a new iPhone 6 for \$489 from JB HiFi. One year and three months later, the screen stops working properly. He tries to get a remedy from the retailer. But the store manager says that while she acknowledges any rights he may be able to prove under the ACL, she has no discretion except to follow JB HiFi's Refunds and Warranties Policies at <https://support.jbhifi.com.au/hc/en-au/articles/360053005194-Refunds-Warranties-guide> which would mean Liam must bear the cost of JB HiFi assessing and then repairing the faulty screen.

Original purchase price	< 3 Months	< 6 Months	< 12 Months	< 2 Years	< 2.5 Years	< 3.5 Years	> 3.5 Years
<\$500	Green	Orange	Orange	Blue	Blue	Blue	Blue
>\$500	Green	Orange	Orange	Orange	Blue	Blue	Blue
>\$1000	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 A*	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 B*	Green	Green	Orange	Orange	Orange	Blue	Blue
>\$4000 B*	Green	Green	Orange	Orange	Orange	Orange	Blue

That policy states that for electrical products under \$500, only if the fault manifests itself within 4-12 months:

“JB HI-FI or the manufacturer will determine, at no cost to the customer, whether the product is faulty and the cause of the fault within a reasonable time frame. In the event of a major failure or minor defect and if the product is determined faulty through no fault of the customer, then the customer can request repair free of charge by an approved manufacturer's repairer. If the goods cannot be repaired within a reasonable time frame the customer can request that JB Hi-Fi replace the product. JB Hi-Fi will then replace the product with a new or used product of the same brand that has similar features. In some circumstances, the



provisions under the ACL may still provide for an automatic replacement or full refund of the original purchase price. See the blue section below for seeking a remedy under the ACL.”

The store manager asserts that Liam’s claim after a year of purchase falls within the “blue section” of their policy webpage chart viz:

“Whilst individual circumstances may vary and the law is uncertain, the policies set out above are intended to provide you with remedies that JB Hi-Fi believes in most circumstances to be consistent with your statutory rights under the ACL in the event of breach of a Consumer Guarantee relating to faulty products. However, these policies are in addition to, and do not limit your rights with respect to, the Consumer Guarantees or any other rights and remedies that you have under a law in relation to the goods sold by JB Hi-Fi. If you are not satisfied with a remedy under the JB Hi-Fi Minimum Voluntary Warranty Policy you can discuss your concerns with a JB Hi-Fi Store Manager who is authorised to provide an alternative remedy where appropriate. If the store manager believes that the JB Hi-Fi remedy is adequate but you are not still satisfied that your ACL rights are being appropriately observed then you can submit your concerns in writing to our ACL Warranty Claims Officer [contacting us](#) for further consideration by JB Hi-Fi.”

Advise Liam about his next possible steps, and generally about the JB Hifi refund policy which also would have applied their following “green section” if the fault and claim had arisen within 3 months of purchase:

“JB HI-FI or the manufacturer will determine, at no cost to the customer, whether the product is faulty and the cause of the fault within a reasonable time frame. In the event of a fault and if the product is determined faulty through no fault of the customer, then the customer can request an exchange or refund of the original purchase price. Alternatively, customers can request repair free of charge in accordance with the manufacturers warranty. If the product is a Big & Bulky product (i.e. white goods, large/fixed kitchen goods and certain TVs), then if possible, JB Hi-Fi will organise with the manufacturer to repair the product at your premises because this is generally the most convenient remedy. If you are not satisfied with this remedy, see the blue section below for seeking a remedy under the ACL.”

2. Chris, a pensioner, needs a new smartphone during the pandemic so buys a new \$500 one from Officeworks. It is not a major brand, as those had limited stock. He soon notices internet connectivity dropouts with his new smartphone. Initially he thinks it might be his telecom supplier but finds out that is not the problem. When he drops by a phone shop in the shopping mall, they manage to get internet connected for him by rebooting, but later it drops out again. Same with staff in the Officeworks shop where he had bought it. They then refuse to give him a replacement, let alone a refund, when requested 38 days after purchase. Officeworks instead insist that it be sent off for "assessment" and then potential repair or replacement (in effect from the manufacturer) to make sure nonetheless the fault wasn't due to damage from dropping / in water (despite no such harm being evident from the casing and my neighbour declaring that never happened). The store manager also says he has no discretion, and that refunds of phones are only if the goods are unusable. Chris cannot afford to be without a reliably functioning smartphone during the pandemic for "at least 1-2 weeks" while it is being "assessed", so goes to another store that day to buy a different phone, and seeks a refund from Officeworks.

After four weeks Officeworks says the phone has been assessed having no hardware or software defect, so refuses to refund (or indeed repair or replace). Advise Chris as to the law under the ACL,⁹ as well as practical steps to take next,¹⁰ in light also of this webpage information: <https://www.officeworks.com.au/information/policies/return-policy> [Eventually, after multiple visits to the Officeworks store, written complaints to their head office and NSW OFT (which states that as Officeworks can find no malfunction or cause, it is closing the complaint and his next option would be to go to a tribunal or court, Chris files a claim with NCAT – whereupon Officeworks provides him with a refund, so the hearing does not need to proceed.)

⁹ See eg https://consumer.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability_0.pdf via <https://consumer.gov.au/resources-and-guides>

¹⁰ See eg <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register> and <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>

Consumer Guarantees

Our goods and services come with guarantees that cannot be excluded under Australian Consumer Law. For major failures with the service, you are entitled to:

- cancel your service contract with us; and
- a refund for the unused portion or compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods.

If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done, you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund for any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

Change of Mind Returns – 30 Days

If you have changed your mind about your purchase, Officeworks will be pleased to offer you a refund or exchange provided that:

- You return the item within 30 days of purchase
- You produce a satisfactory proof of purchase (being your original register receipt or online proof of purchase, such as a tax invoice)
- The item is in re-saleable condition, including its original packaging (if any), is unused and as sold.

- | |
|---|
| <p>3. Three years and nine months ago Luke bought a \$800 washing machine, which completely stopped working - no power coming through. The manufacturer's warranty is two years. The manager of a Good Guys retail chain store where he bought it says that he has no discretion to offer any remedies, because under the chain's internal system developed in light of ACL consumer guarantees, a manager has only discretion up to three and a half years (after she inputs the product/type, price and purchase date) but after that can only invite the customer to contact Good Guys legal</p> |
|---|

department / customer service if wanting to pursue an ACL claim. [Eventually, after a written complaint is filed with Good Guys and then the NSW OFT, Luke essentially obtains a replacement product.]

4. Roy opens his 18-year-old fridge, a shelf on the door collapses, a beer bottle crashes to the ground and explodes, cutting his shin and calf deeply. He goes to hospital emergency for an urgent operation, has to buy then a boot to secure his leg initially and cancel holiday trips, substitute a gym membership for social soccer, and pay for physiotherapy over the next six months before making a full recovery. Roy unsuccessfully claims to the manufacturer and what he thinks was the retailer about the product failure, his injury and consequences.

APPENDIX II: Consumer Roundtable
**Post-Pandemic Rights to Repair
and Other Remedies Under the
Australian Consumer Law**

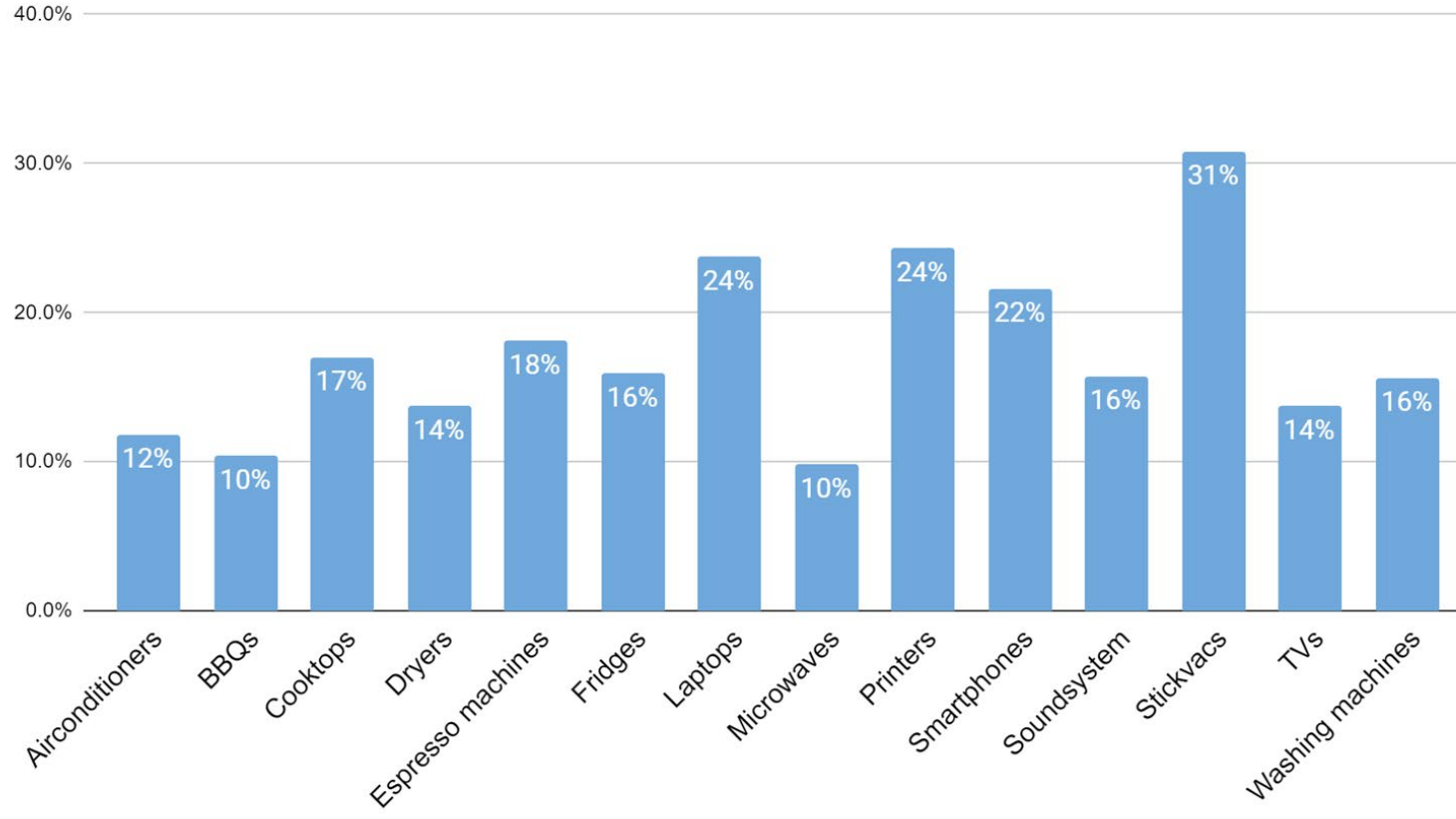
Luke Nottage (USydney), Jeannie Paterson
(UMelbourne) & Erin Turner (CHOICE)

Overview: How bad a problem? What solutions?

- Have suppliers become too well educated re the 2010 ACL rights, so they now tell consumers ‘make our day – prove your interpretation is correct through courts or tribunals, compared to our interpretation / policy’?!
- Two surveys: CHOICE
- Two case studies: Liam & Chris
- Two approaches from the Productivity Commission’s ‘Right to Repair’ Inquiry
 - Better mechanisms for accessing justice and redress: mandatory conciliation or orders
 - Further regulator guidance on minimum durability for different types of products (and possible labelling requirements re durability)
- Three further possible reforms:
 - UK/EU-style multi-tiered approach to remedies within certain timeframes
 - Require suppliers to specify in extended warranties how they offer more than ACL guarantees
 - Pecuniary penalties for violating at least some consumer guarantees or product types

1. What products are most likely to break?

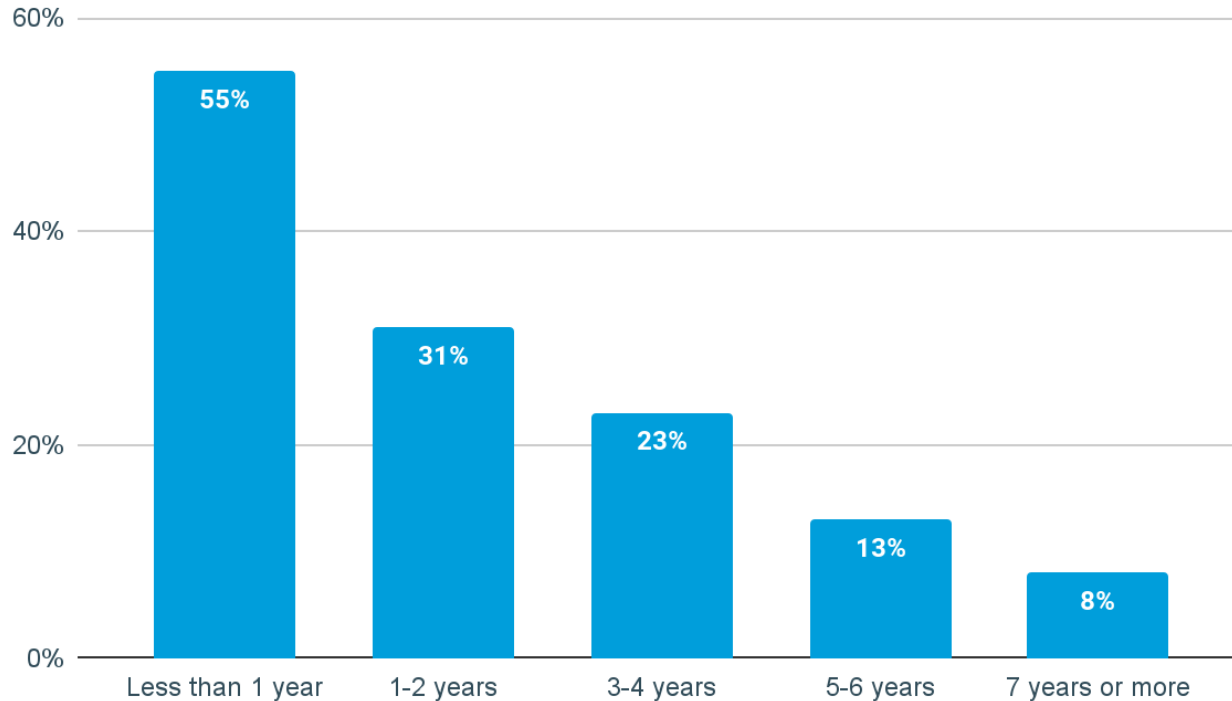
Consumers reports of performance or reliability problems in the last 12 months



Source:
Choice
reliability
surveys
(2019-2020),
responses
sourced from
over 5,000
CHOICE
members.

How common are product problems?

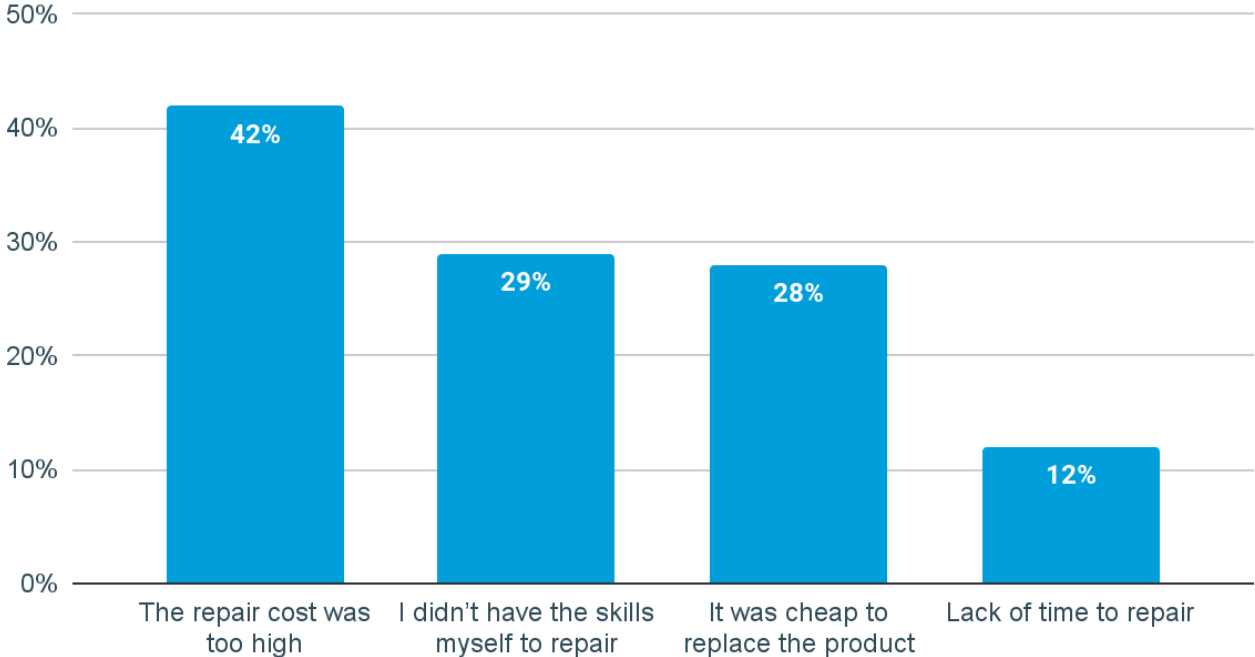
How long did you have your product before you experienced issues?



Source: Nationally representative survey of 1,047 people, conducted online between 9-23 June 2021 for CHOICE.

Do people realise a free repair is available under the ACL?

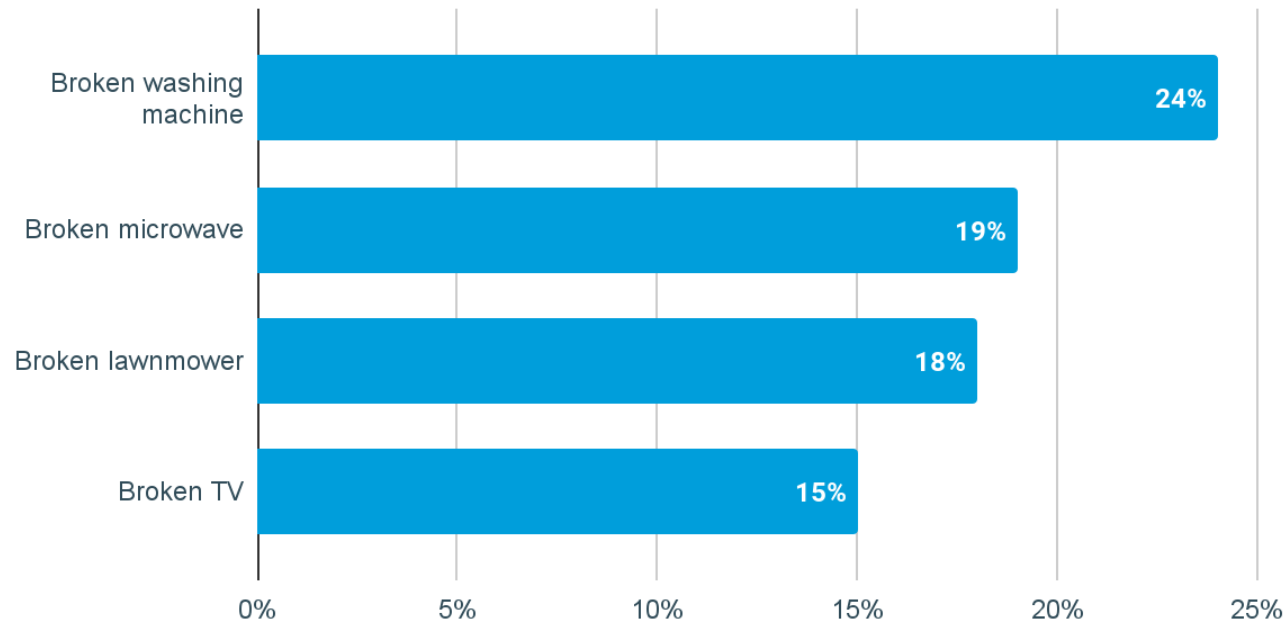
Why didn't you get your broken product repaired?



Source: Nationally representative survey of 1,047 people, conducted online between 9-23 June 2021 for CHOICE.

Even engaged consumers aren't seeking repairs

How many CHOICE members with a broken product tried to get a remedy?



Most people who had a problem with a product never tried to get a remedy.

Why? 31% of CHOICE members said they didn't seek a remedy because the product was "past its warranty period"

Source: 2021 CHOICE reliability survey, completed by 6,571 CHOICE members and supporters (not representative of the Australian population).

2. Two case studies: advise LIAM and CHRIS

(1) LIAM, through his dad, buys a \$489 iPhone 6. Its screen stops working after 15 months. Retailer JBHifi store manager says she has no discretion and its express warranty provides that it can be sent off for assessment and repair only at Liam's own cost – blue section here:

Original purchase price	< 3 Months	< 6 Months	< 12 Months	< 2 Years	< 2.5 Years	< 3.5 Years	> 3.5 Years
<\$500	Green	Orange	Orange	Blue	Blue	Blue	Blue
>\$500	Green	Orange	Orange	Orange	Blue	Blue	Blue
>\$1000	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 A*	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 B*	Green	Green	Orange	Orange	Orange	Blue	Blue
>\$4000 B*	Green	Green	Orange	Orange	Orange	Orange	Blue

<https://support.jbhifi.com.au/hc/en-au/articles/360053005194-Refunds-Warranties-guide>

(1) CHRIS, a pensioner, buys from Officeworks a \$500 smartphone during pandemic lockdowns (iPhone knock-off, as not much stock available).

Within the first few weeks, he notices it disconnects from the internet. He confirms first it is not a problem with his telecom supplier. A shopping mall phone repair stall, then Officeworks sales staff, get it connecting again after fiddling around, but it keeps disconnecting. After 38 days he asks Officeworks for a replacement but the office manager says he has no discretion under their policy,* requiring such phones to be sent off for ‘assessment’ (and then possible repair) taking at least 1-2 weeks. He says this is to check for any evidence of dropping or water damage, even though Chris points out there is no evidence of that & declares before a witness in the store that that did not occur.

Chris cannot be without a functioning smartphone and has lost trust in Officeworks so he buys a similar phone elsewhere and wants to claim a refund. The manager says he can only give a refund if the phone is ‘unusable’. After 3 weeks for “assessment” Officeworks inform Chris they cannot find any hardware or software fault in the phone he returned to them.

* <https://www.officeworks.com.au/information/policies/return-policy>








- For Liam, retailer as well as manufacturer/importer owe ACL s54 consumer guarantee of ‘acceptable quality’ including reasonable durability, but how long?
 - <https://consumer.gov.au/consumers-and-acl/articles/guidance-businesses-meanings-safe-and-durable-consumer-guarantees> (Sept 2019, after 2017 ACL Review report recommendation)
- For Chris, how much evidence does he need in the store (or later) to prove the smartphone is not connecting and therefore is defective under s54?
 - Doesn't the supplier then have the burden of proving that the phone was ‘damaged by abnormal use’ (s54(6))? Does this give any legal or practical reason for Chris to have to wait for the supplier's ‘assessment’ before claiming remedies?
 - Is this a ‘major failure’ allowing rejection and refund because (s260(1)):
 - (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; And/or
 - (c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose
 - If not a major failure, can Chris anyway ‘require the supplier to remedy the failure within a reasonable time’ (s259(2)(a)) and otherwise reject the goods?

- In practice, for both, how can they enforce such ACL rights?
 - Complain online to NSW OFT via <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/make-a-complaint>, which then shows up on new public register if the supplier/chain has more than 10 complaints lodged in a month: <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register>
 - Since 2019, NSW OFT can issue Consumer Guarantees Direction for goods purchased up to six months earlier for \$25-\$3000, but compensation seems never to have ordered? <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>
 - NCAT tribunal sets a non-refundable application fee of \$52 (less 25% for pensioners), no lawyers allowed

3. PC 'Right to Repair' Inquiry: Draft Report (June 2021, Final Report submitted to Gov't)

Figure 1 Possible reforms to overcome barriers to repair

- ▶ Eg mandatory conciliation (SA) or consumer guarantees direction (NSW)
- ▶ (UK-style) “super-complaints” mechanism (not recommended in 2017 ACL Review!)

Enhance access to consumer rights	Enable access to repair supplies
<p>States and Territories use of alternative dispute resolution options to better resolve complaints</p> 	<p>Evaluate proposed motor vehicle mandatory information sharing scheme</p> 
<p>Consumer groups to be able to lodge complaints on consumer issues</p> 	<p><i>Seeking further information on possible reforms to:</i></p> <ul style="list-style-type: none">Include software updates in consumer guarantees Require manufacturers to provide access to repair supplies in particular product markets Introduce 'fair use' or 'fair dealing' in the Copyright Act to allow use of copyright repair information (e.g. manuals and schematics) Amend the Copyright Act to allow repairers to legally circumvent digital locks to access repair information (e.g. diagnostic data) 

www.pc.gov.au/inquiries/completed/repair#report

- ▶ How will regulators provide guidance per product type?
Why not also labelling scheme?
- ▶ PS 'misleading conduct' to not mention consumer guarantees allow own repairer?
- ▶ PS 'unfair term' for voluntary warranty to insist on using authorised repairer?

Ensure warranties do not impede independent repair

Require warranties to inform consumers that consumer guarantees do not require use of authorised repair



Seeking further information on prohibiting warranties from requiring authorised repair



Better information on product durability and reparability

Regulator guidance of minimum expected length of product durability



Seeking further information on a product labelling scheme



Improve management of e-waste

Enable product stewardship schemes to count repaired and reused products



Use GPS trackers to audit e-waste recycling streams



4. Further possible reforms:

- Three further inspirations from UK/EU consumer law
 - Within 30 days of purchase: (dead-on-arrival) refund right (UK 2015)
<https://www.businesscompanion.info/en/quick-guides/goods/the-sale-and-supply-of-goods#Theshorttermrighttoreject>
 - Within 6 months: defect presumed when supplied ('99 Directive, also copied in Singapore)
<https://www.gov.uk/accepting-returns-and-giving-refund>
 - Within 2 years: minimum legal guarantee of durability, but harder to prove ('99 Directive, extended years in 6 EU states: <https://www.evz.de/en/shopping-internet/guarantees-and-warranties.html>)
- Recall one of the (few still unactioned) proposals from 2017 ACL Review:
 - Require suppliers to specify what their extended warranties (including sometimes longer periods than 'free' express warranties against defects) offer in addition to the ACL
 - PS Why not already 'misleading conduct' if they don't? Cf eg 'Applecare' fines in EU:
<https://www.degruyter.com/document/doi/10.1515/ercl-2013-0017/html>
- Pecuniary penalties for breaches of at least 'acceptable quality' guarantee and/or up for certain types or value of goods? Cf Exposure Draft legislation now for unfair contracts:
<https://www.claytonutz.com/knowledge/2021/august/massive-penalties-more-contracts-caught-by-exposure-draft-legislation-for-unfair-contract-terms-reform-open-for-comment>