



14 Feb 2022

Consumer Policy Unit Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600
consumerlaw@treasury.gov.au

Dear Consumer Policy Unit Market Conduct Division,

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

Please find attached my response to the Consultation Regulation Impact Statement December 2021. Thank you for the extension in submitting this response until 14 February 2022.

Overall, I am supportive of the reforms proposed in the Impact Statement. Nonetheless, I advocate for stronger concrete measures to assist consumer themselves resolving disputes and enforcing their rights.

I have no objection to this submission being published.

Kind regards,

Jeannie Paterson

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Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law - Consultation Regulation Impact Statement(December 2021)

Key questions

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?*

Most case law on the consumer guarantees represents actions by the ACCC for misleading or unconscionable conduct.¹ These decisions illustrate the need for a direct right of action against repeat recalcitrant traders, rather than having to rely on the circular route of using s 18 or 22. In LG for example the case failed on the courts' characterisation of whether the conduct in question was misleading by omission rather than on the core question of whether the consumers were entitled to a remedy.

The decisions also show the real struggles faced by consumers in enforcing their consumer guarantee rights. Although the decisions in most cases resulted in substantial civil penalties being awarded against the trader, this followed unsuccessful efforts by consumers in enforcing their rights to a remedy for goods that failed to comply with the consumer guarantees.

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?*

It is difficult to accept that consumers are 'gaming' the system on a major scale. In to obtain a remedy for a failure to comply with the consumer guarantees it is necessary to show the goods have in fact failed to comply with the guarantees. Case law on this area shows recalcitrant and even aggressive behaviour by some traders.

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.*

A depreciation allowance will not be appropriate in most cases. Where the consumer is entitled to a refund on the basis of a failure to comply with the consumer guarantees, the consumer has not had the benefit of the product so as to justify a depreciation discount on the amount to be refunded. The consumer in such a case has not had the benefit of what he or she paid for – and indeed should receive restitution of what they paid and an amount compensating for additional losses and any improvements in the value of the product.

¹ See eg *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190; [2017] FCAFC 224; *Australian Competition and Consumer Commission v Ford Motor Company of Australia Limited* [2018] FCA 703; *Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2018] FCAFC 96; [Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd \[2020\] FCA 1672 \(20 November 2020\)](#); *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49.

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.*

The penalties for failure to comply with the consumer guarantees should be in line with the award for other comparable contraventions, primarily misleading conduct or unconscionable conduct. This has the attraction of consistency and encourages litigation on the basis of the most applicable provision (not the largest penalty).

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?*

The concern in making civil pecuniary penalties available for failure to provide a remedy is that the circumstances in which such a remedy should be available are often contested. A trader who errs should not necessarily be subject to a penalty award. The penalty provision might usefully be applied to 'a system of conduct or pattern of behaviour'. This language mirrors that in s 22, and also makes clear the penalty doesn't apply to one off failures to provide a remedy.

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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?*

My observation is that young people and people with less experience and resources in pursuing a claim find it more difficult to assert their consumer guarantee rights. Such consumers are subject to disputes about whether the product is faulty, delays in assessing the fault in the product or allegations that the product is faulty through abnormal use.

12. *If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a major failure:*
 1. *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)?*
 2. *How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?*
 3. *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)?*

Notably tribunals seem not to allow the cost of expert evidence and reports to be recoverable as damages for consequential losses, which seems inconsistent with the language and purposes of the regime.

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

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?

A civil penalty regime is likely to be a useful incentive to firms to take their obligations under the consumer guarantee regime seriously. But on its own civil penalties are not enough. Only some instances of failure to provide a remedy will be taken to court by the regulator and litigation takes time.

In my opinion there is still much that could be done in clarifying the law for consumers and traders. In particular it should be possible (despite assertions from the regulators to the contrary) to provide guidance on durability.

For example JB HiFi provides a chart showing the time frame over which it will provide refunds, repairs or other response. It is provided in the context of information about extended warranties and might be seen as having a tendency to persuade consumers to purchase such warranties. The time periods set out in that chart are to my eye too conservative and shorter than the legislation would allow. It nonetheless lends support to arguments that a useful and functional table providing guidance on time frames for remedy, including providing a quick and simple response to 'dead on arrival' goods, could be developed.

As a final point I note that little attention in regulatory strategy or analysis has been paid to the content of the guarantee as to service. Given the rise in digital services in particular, more work could usefully be done in this area.²

² Paterson, Jeannie Marie and Maker, Yvette, AI in the Home: Artificial Intelligence and Consumer Protection (October 15, 2021). To be published in Ernest Lim and Phillip Morgan (eds), *The Cambridge Handbook of Private Law and Artificial Intelligence* (Cambridge University Press, Forthcoming), Available at SSRN: <https://ssrn.com/abstract=3973179>.