CONSULTATION REGULATION IMPACT STATEMENT

CHAPTER TWO

Australian Consumer Law Review: Clarifying the consumer guarantees remedies

Consumer Affairs Australia and New Zealand

2018

© Commonwealth of Australia 2018

This publication is available for your use under a Creative Commons BY Attribution 3.0 Australia licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from **http://creativecommons.org/licenses/by/3.0/au/legalcode**.

Use of Treasury material under a Creative Commons BY Attribution 3.0 Australia licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used 'as supplied'

The Commonwealth's preference is that you attribute this publication (and any material sourced from it) using the following wording:

Source: Board of Taxation, *Review into merits of a new Deductible Gift Recipient Category for community foundations* (2017).

Derivative material

The Commonwealth's preference is that you attribute this publication (and any material sourced from it) using the following wording:

Source: Board of Taxation, *Review into merits of a new Deductible Gift Recipient Category for community foundations* (2017).

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the It's an Honour website (see **www.itsanhonour.gov.au**).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Communications
The Treasury
Langton Crescent
Parkes ACT 2600
Email: **medialiaison@treasury.gov.au**

TABLE OF CONTENTS

EXECUTIVE SUMMARY **1**

THE PROBLEM **2**

When can consumers reject goods? 2

What is a major failure? 2

When is the current law unclear? 3

POLICY OBJECTIVE **6**

Clarification 6

Simplification 6

POLICY OPTIONS AND IMPACT ANALYSIS **7**

Problem 1: Failure within a short period of time 7

Problem 2: Multiple failures 28

FOCUS QUESTIONS **37**

EXECUTIVE SUMMARY

The consumer guarantees in the Australian Consumer Law (ACL) set out standards for goods and services supplied to consumers, remedies available to consumers when goods and services do not meet those standards and the rights and obligations of both consumers and traders.

The consumer guarantees are framed as broad principles (for example, goods must be of 'acceptable quality'). This facilitates a flexible and economy-wide application of the consumer guarantees provisions, allows traders to lower their compliance costs and helps traders and consumers resolve disputes. However, the nature of some product faults and the case-by-case application of the consumer guarantees also contribute to uncertainty regarding the remedy to which consumers are entitled.

When a good or service fails to meet the consumer guarantees the consumer's rights are impacted by whether or not a failure is defined as major. Consumers can choose a refund or replacement if a failure is major. If a failure is non-major, traders can choose the remedy, including repair.

The 2017 ACL Review (the Review) found that consumers and businesses sometimes have difficulty determining what constitutes a major failure. Specifically, the Review identified there is uncertainty about:

- whether a failure to meet the consumer guarantees within a short period of time after purchase is considered a major failure; and
- whether multiple non-major failures can collectively amount to a major failure.

This chapter is a consultation regulation impact statement (RIS) on options to improve the framework for consumer guarantees remedies. The policy options examined in this RIS chapter aim to clarify the existing definition of a major failure and, in some cases, expand on existing rights to better align the law with consumer and community expectations.

Views are sought on these options – including whether they would address the problem, how effective they would be and what impacts they would have.

THE PROBLEM

1. The consumer guarantees provide consumers with a set of statutory protections when buying goods. For example, goods must be of acceptable quality and fit for purpose.[1] If goods fail to meet the standards required by the consumer guarantees, consumers are entitled to a remedy. The remedy may be a repair, refund or replacement.

2. There is a concern that the consumer guarantees remedies provisions are currently unclear and that consumers and traders face uncertainty about when consumers are entitled to reject goods and choose a remedy.

WHEN CAN CONSUMERS REJECT GOODS?

3. The right to reject goods and choose a remedy depends on the severity of the failure to meet a consumer guarantee.[2] Consumers have the right to reject goods that are subject to a major failure. If goods are rejected, the consumer has the choice of a refund or replacement. If a failure is non-major, the trader is still obliged to provide a remedy but may choose their preferred remedy. The trader's preferred remedy may be a repair, rather than a refund or replacement.

WHAT IS A MAJOR FAILURE?

4. A major failure to meet the consumer guarantees is when:

   - a reasonable consumer would not have bought the goods if they had known about the nature and extent of the failure;

   - the goods are significantly different from the description, sample or demonstration model shown to the consumer;

   - the goods are substantially unfit for their normal purpose or a disclosed purpose and cannot easily and within a reasonable time be made fit; or

   - the goods are not of acceptable quality because they are unsafe.[3]

1 Other guarantees include that goods must: be fit for a disclosed purpose; match descriptions and samples; have spare parts and repair facilities available; come with full title and undisturbed possession; not carry any hidden debts or extra charges; satisfy any express warranty.

2 Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, page 198.

3 *Competition and Consumer Act 2010* (Cth), Schedule 2, Australian Consumer Law ('ACL'), Part 5-4.

5. The legal test for a major failure, as outlined above, is dependent on the particular facts of each situation. Although the generic, principles-based approach allows flexibility to deal with different situations, consumers sometimes face difficulties when interpreting and applying the provisions to establish whether a failure is major. The complexity of determining whether there is a major failure has resulted in an inconsistency between consumers' expectations and their rights under the ACL in relation to when they are entitled to a refund or replacement.

WHEN IS THE CURRENT LAW UNCLEAR?

6. In some situations when consumers would ordinarily expect a refund, it can be unclear whether a major failure has occurred. This RIS will examine two situations: when there is a failure to meet the consumer guarantees within a short period of time after purchase; and when there have been multiple failures in the same good.

7. These are generally situations where it is inherently likely that a reasonable consumer would not have bought the goods if they had known about the nature and extent of the problem. Accordingly, it is likely that there has been a major failure under the current law. However, consumers in these situations can still spend a disproportionate amount of time and resources determining whether a major failure has occurred and negotiating with the trader to obtain a remedy which may not be their preference or may leave them unsatisfied.

8. Consumers rarely go to court to enforce their rights under the consumer guarantees. In many cases, the costs of legal action are likely to exceed the value to the consumer of having an issue remedied. As a result, it has been acknowledged that the consumer guarantees remedies provisions should be spelled out clearly, on the face of the legislation, so that the mechanisms for obtaining redress are so unambiguous that court action is unnecessary.[4] However, the Review identified two situations where the application of the consumer guarantees remedies provisions is ambiguous and feedback from a range of stakeholders during the Review identified a need to clarify 'major failure' in these situations.

9. Although the consumer guarantees are valued by consumers and generally supported by traders, the complexity of the remedies provisions is a barrier to applying them easily in some instances.

Problem 1: Failure within a short period of time

10. The consumer guarantees remedies provisions do not explicitly refer to the timing of the occurrence of failures as a factor in determining whether a failure is major. Accordingly, it is unclear whether a failure, regardless of severity, within a short period of time after purchase is considered to be a major failure.

4 CCAAC, *Consumer rights: Reforming statutory implied conditions and warranties*, page 65.

11. It is likely that failures occurring within a short period of time after purchase would be considered major failures under the current law. This is because it is likely that a reasonable consumer would not have purchased a good had they known it would fail so quickly. However, in determining whether there has been a major failure, the current provisions require consideration of the hypothetical action of a 'reasonable consumer'. Although this principles-based approach allows for flexibility, it can also cause practical problems if the trader disputes the consumer's right to choose the remedy, such that the consumer would need to establish what the hypothetical reasonable consumer would have done.

12. The case-by-case application of the current law can sometimes cause uncertainty and confusion about how the timing of the occurrence of a failure is considered as part of the legal test for a major failure. It can also be resource intensive because it requires the individual circumstances of every dispute to be assessed by parties who may not be confident in doing so.

13. Uncertainty in the application of the law can also lead to issues where a consumer, otherwise entitled to a refund or replacement, is only offered a repair. For goods that are expensive to refund or replace, this can contribute to consumers becoming trapped in 'cycles of failed repairs'.

14. In circumstances where major failures are generally likely to have occurred, but are not necessarily clear or easy for parties to determine or assert, the overall costs to parties, regulators and the legal system in determining whether each failure within a short period of time is a major failure is likely to outweigh the usual benefits of flexibility.

15. Options for how to best simplify and clarify the consumer guarantees remedies and who chooses them when a good fails to meet the consumer guarantees within a short period of time will be considered in this RIS chapter.

Problem 2: Multiple failures

16. The current law is also unclear in relation to whether multiple non-major failures can collectively be considered a major failure. For example, a product may have many minor issues that may or may not be related.

17. The current legal test for a major failure does not specifically consider whether the totality of these discrete issues can give rise to a major failure and the right for the consumer to choose a refund. The singular use of major 'failure' in the text of the law may also contribute to an interpretation that multiple minor issues are not considered collectively.[5]

18. The principles-based nature of the consumer guarantees provisions is intended to allow consideration of all relevant circumstances. Accordingly, one of the grounds for a major failure is whether a reasonable consumer would have bought the good if they had known the nature and *extent* of the failure at the outset. This would suggest that multiple non-major failures *can* be considered collectively, and this is the existing approach of ACL regulators.

5 ACL section 260.

19. However, the existing language of the ACL may not be sufficiently clear and courts and tribunals have reached different conclusions on this point. This has resulted in uncertainty and inconsistent outcomes for both consumers and businesses.

20. Options for how to best simplify and clarify the consumer guarantees remedies and who chooses them when goods have multiple non-major failures will be considered in this RIS chapter.

POLICY OBJECTIVE

21. The policy objective is to simplify and clarify what remedies are available to consumers when they buy goods that do not meet the consumer guarantees.

22. The options proposed seek to improve the accessibility of remedies and better align these remedies with consumer expectations, rather than change the law to add extra layers of complexity or create unnecessary regulatory burden for businesses. The proposed reforms may also allow for greater consistency with other modern consumer law frameworks in overseas jurisdictions.

CLARIFICATION

23. Uncertainty in the application of the law has created barriers to resolving disputes early, quickly and economically in some instances. The Review found that consumers have difficulty asserting their right to refunds and replacements in some situations. The proposed options are aimed at providing clarity about when consumers are entitled to reject goods and receive a refund or replacement, rather than accept another remedy.

24. Greater certainty about the application of the law may reduce the number and duration of disputes and lower training costs for suppliers. It may also encourage better quality assurance practices and repair processes to prevent failures from arising, avoid repeat failures and improve consumer satisfaction with repairs.

SIMPLIFICATION

25. A simpler, easier to understand law would allow consumers to participate in the market with greater confidence. Effective and efficient markets rely on confident and empowered consumers. Consumer decisions send signals to suppliers, driving innovation, productivity and competition among firms.[6] A clearer legal framework would also create time and cost savings for consumers, businesses, regulators, consumer advocates and tribunals.

6 *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, 2008, Vol. 2, page 28.

POLICY OPTIONS AND IMPACT ANALYSIS

PROBLEM 1: FAILURE WITHIN A SHORT PERIOD OF TIME

OVERVIEW

The 2017 Australian Consumer Law Review (the Review) found that consumers and traders may be uncertain about how the right to reject goods for a refund or replacement under the consumer guarantees regime applies when goods have a failure within a short period of time after purchase.

If a good purchased by a consumer fails to meet one of the consumer guarantees in the ACL, a consumer's right to reject the good is dependent on whether the failure to meet the consumer guarantees is 'major' as defined by the ACL. If the failure is a major failure, consumers have the right to reject the goods within a reasonable period of time and choose a remedy, including a refund. If the failure is non-major, the supplier chooses the remedy, which can be a repair, replacement or refund.

Under the current law, it is likely that if a failure that occurs within a short period of time after purchase it would be considered a major failure, as it is likely that a reasonable consumer would not have purchased a good had they known it would fail within a short period.

However, in determining whether a major failure has occurred, the current provisions require consideration of a number of factors on a case-by-case basis, including the action of a hypothetical 'reasonable consumer', which can make the resolution of disputes time consuming and difficult if the trader challenges the consumer's right to choose the remedy. Although this case-by-case application of the law provides flexibility, it provides little guidance on how the timing of a failure is considered as part of the legal test for a major failure.

In response to these concerns, the Review proposed that the law be amended to specify that where a good fails to meet the consumer guarantees within a short specified period of time, consumers can choose a refund or replacement regardless of whether the failure is major.

Options exploring how to best clarify a consumer's right to choose a remedy of a refund or replacement in the event of a failure to meet the guarantees, within a short period of time, are being considered.

To address the problem, three options are proposed:

- **Option 1**: Status quo.
- **Option 2**: Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure. The proposed period is 30 days.
- **Option 3**: Option 2, but specify a different time period for high value goods, such as motor vehicles and white goods, based on a monetary threshold, during which a consumer is entitled to a refund or replacement without needing to prove a major failure.
  - Within **Option 3**, there is consideration of two approaches: A longer period of time for high value goods and an exemption (status quo) for high value goods.

Option 1: Status quo

26. Option 1 would maintain the existing legal test for a major failure. If a good fails quickly, consumers would still need to prove that there has been a major failure to meet the consumer guarantees to be able to choose their preferred remedy.

BOX 1: DEFINING MAJOR AND NON-MAJOR FAILURES

Section 260 of the Australian Consumer Law outlines the test for a major failure. This test considers the severity of a failure by the supplier to comply with the consumer guarantees.[7]

A **major failure** is when the goods:

- would not have been acquired by a reasonable consumer, fully acquainted with the nature and extent of the failure;
- are significantly different from the description, sample or demonstration model shown to the consumer;
- are substantially unfit for their normal purpose or a disclosed purpose and cannot easily and within a reasonable time be made fit;
- are unfit for a disclosed purpose, and cannot easily and within a reasonable time be remedied to be fit for purpose; or
- are not of acceptable quality because they are unsafe.

A **non-major failure** is any failure to comply with the consumer guarantees that does not meet the test of severity outlined above. For example, the goods may be substantially unfit for normal purpose but ***can*** be remedied to be made fit for purpose easily and within a reasonable time.

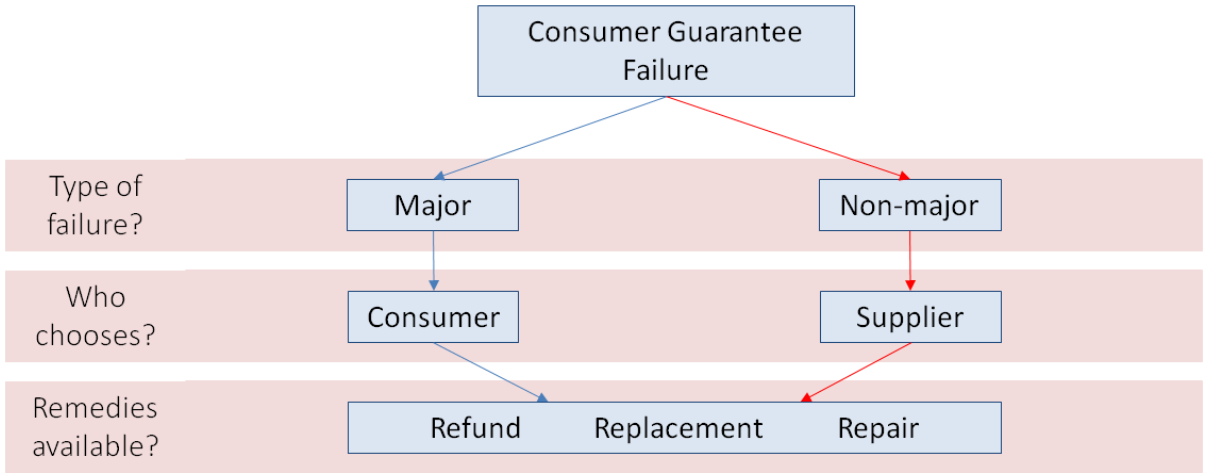
27. The broadly-framed, principles-based provisions of the status quo provide scope for redress in most of the circumstances a consumer would expect. The law allows for consideration of all relevant factors and determine whether a reasonable consumer would have purchased the good had they known about the nature and extent of the failure at the time of purchase. Accordingly, a failure that occurs within a short period of time may be sufficient to demonstrate that the consumer would not have purchased the good. It is possible that suppliers may acknowledge this and offer a refund in this situation.

7 These guarantees include that goods must: be of acceptable quality; be fit for purpose; match descriptions and samples; have spare parts and repair facilities available; come with full title and undisturbed possession; not carry any hidden debts or extra charges; satisfy any express warranty.

Impact Analysis

28. The status quo would continue to provide a mechanism for consumers to seek a refund or replacement, if there has been a major failure. However, the uncertainty about whether a major failure has occurred, allowing the consumer to choose a remedy, when goods fail within a short period of time would remain. As outlined in Box 1, determining whether there has been a major failure requires consideration of several factors, including ambiguous concepts such as 'reasonable time' and a 'reasonable consumer'. This can be complex in some circumstances and difficult for consumers and businesses to understand and apply in practice. It can also be resource intensive to apply as it requires the individual circumstances of each dispute to be assessed. This can lead to issues where the supplier does not agree with the consumer's assertion that a major failure has occurred and therefore offers a repair rather than the refund or replacement to which the consumer is entitled.

Figure 1: Diagram of Option 1



29. On the other hand, the status quo would maintain the balance between the interests of consumers and suppliers that the current distinction between major and non-major failures strikes. The right of a trader to choose whether a good is repaired or replaced when there is a non-major failure gives suppliers flexibility and is often more economical. This right, which is generally available when the failure can be remedied within a reasonable time, gives consumers satisfactory redress in most circumstances.

30. Non-regulatory options, such as regulator guidance and education, could be pursued and improved under the status quo. ACL regulators already prepare guidance for consumers and businesses on the consumer guarantees which include content on the distinction between major and non-major failures.[8] Further clarity and explanation could be provided on this point, through guidance, given the finding of Consumer Affairs Australia and New Zealand (CAANZ) in the Review that consumers have difficulty asserting their rights to refunds and replacements. However, improved information and disclosure would be expected to only marginally assist consumers when negotiating with suppliers, given the inherent power imbalance between the parties.

8 See: **http://consumerlaw.gov.au/consumers-and-the-acl/**; **https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees**.

BENEFITS	COSTS
• Consumers and businesses would not have to familiarise themselves with a change to the law.	• Costs associated with unnecessary disputes and litigation.
• Traders have greater flexibility to negotiate and offer a repair, rather than a refund or replacement.	• Consumers would continue to have difficulty when asserting their right to reject goods for a refund or replacement.

FOCUS QUESTIONS

For consumers

- Have you experienced issues with a trader not agreeing to a refund when you have had a failure with a good within a short period of time after purchase? What types of goods were involved? Was there a difference in approach between low and high value goods?
- If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a failure:
  - What *direct financial* costs did you incur during the period the good was being repaired (for instance, visiting the retailer, or hiring a replacement for the good)?
  - How much time did you spend collecting the repaired good and/or negotiating with the retailer?
  - Did you have a different experience with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good)?

Option 2: Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure

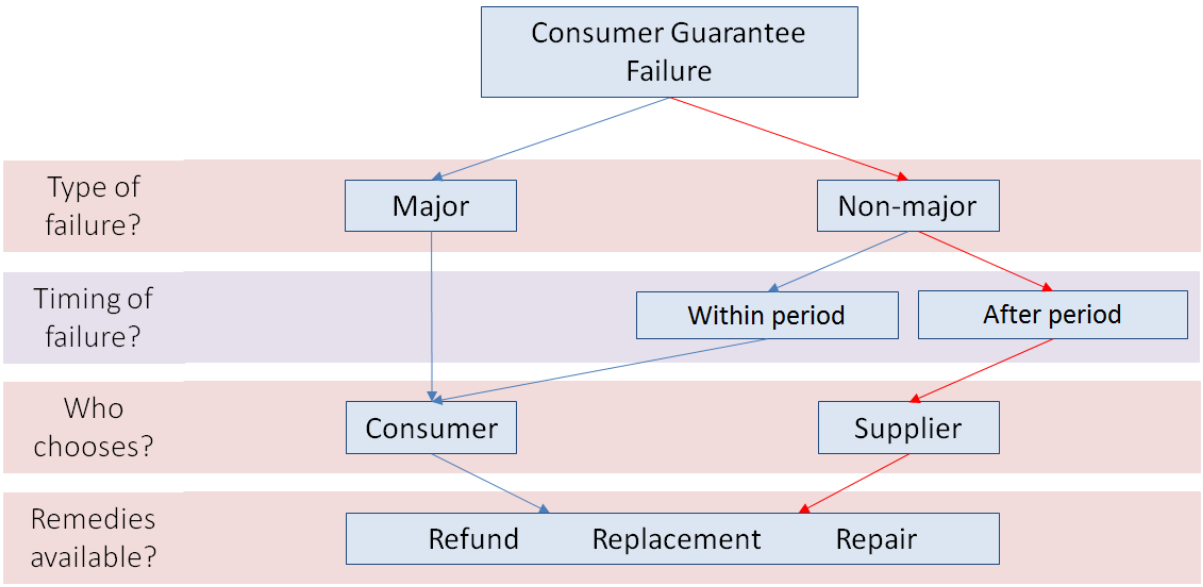
31. This option would involve a legislative amendment to specify that where a good fails to meet the consumer guarantees within a short specified period of time, consumers can reject the good and choose the remedies of a refund or replacement regardless of whether the failure is major. It is intended to enhance and strengthen existing rights. It would simplify the law by providing a clear right to reject where there has been a failure within a short specified period of time.

32. This option does not weaken the protections already available to consumers. It provides an easier, less complicated avenue to reject goods, within a specified period of time, which complements the existing consumer guarantees regime by clarifying what consumers are likely already entitled to. This option would not remove the right for a consumer to claim a refund or replacement outside of the specified period, if a major failure has occurred and the consumer rejects the goods within a 'reasonable' time.[9] Although it would be easier for consumers to reject goods for a refund or replacement with this option, they would still be able to choose to keep the goods and agree to a repair if they wish.

9 See ACL section 262.

33. This option acknowledges that while consumers have a good awareness of their rights under the consumer law, there is less understanding about the remedies available and when they can be accessed.

Figure 2: Diagram of Option 2



34. Option 2 would expand on the existing law to include consideration of timing. As outlined in Figure 2, the type of consumer guarantee failure is not relevant if the failure occurs within the specified short period of time after purchase. The purpose of this option is to allow a consumer to reject goods and choose a refund or replacement if a failure to meet the guarantees has occurred within the specified short period. The objective is to simplify the law, clarifying entitlements a consumer likely already has, rather than adding layers of complexity or new tests.

35. This option also recognises the high inherent likelihood that a consumer would not have purchased the good if they had known it would fail within a short period of time. In practice, courts and tribunals would likely presume that an early failure would be a major failure. However, the ambiguity of the current law and the difficulties in accessing dispute resolution sometimes leaves consumers unable to assert their current right to a refund. This option would reflect the likely outcome under the current law but addresses uncertainty by making consumers' right to a remedy explicit.

36. Although the consumer guarantees are generally understood, consumers and businesses can still encounter uncertainty about when consumers are entitled to reject goods for a refund or replacement. The current application of the law is highly dependent on the particular facts of each individual case. Although this case-by-case application allows for flexibility, as consumers' rights are framed broadly, it can create uncertainty and undermine consumers' confidence when asserting their rights. It can also encourage inconsistent outcomes.

37. Option 2 is based on the assumption that it is easier for consumers to assert their rights if they have a clearly defined time period during which they can choose to reject the goods for a refund or replacement without having to prove a major failure under the current legal test.

Proposed Approach: 30 days

38. A short specified period of 30 days would bring the law in line with what is already accepted as good practice by many retailers and is a reasonable period of time for most problems to emerge and be identified.

39. The findings of the 2016 Australian Consumer Survey suggested that most consumer problems arise in the first month after purchase. The survey found that 58 per cent of problems were identified by consumers in the first month after purchase.[10] For some products, such as clothing, footwear and cosmetics, problems were more likely to be identified within 24 hours of purchase.

40. This situation is recognised, in part, by refund policies offered by some retailers which allow for refunds within a limited time period, often 14 to 30 days (See Box 2). In many cases, these voluntary policies go further than the statutory requirements of the ACL and offer refunds for 'change of mind'. These policies can offer competitive advantages for traders in creating goodwill and repeat custom. While traders would not be required to provide refunds for change of mind during the 30 day short specified period proposed, Option 2 would streamline the process for accessing refunds for a time period which is consistent with current industry practice and consumer expectations.

Box 2: Voluntary refund policies

Days (in general)	Supplier†
< 30 days	Booktopia, Kmart, Kogan***, Target
30 days	Big W**, David Jones, JB Hi-Fi, Myer, The Iconic
> 30 days	Aldi*, Holden
Not specified (usually a 'reasonable time')	BMW, Bunnings, Good Guys, Harvey Norman, Volkswagen

† Generally applicable but certain exclusions and conditions might apply
* Non-food products
** 10 days for electrical items
*** Kogan exclusive products.

41. Under the UK's Consumer Rights Act 2015, consumers have a 30-day 'right to reject' goods that do not meet certain statutory requirements, including for goods to be of 'satisfactory quality'. The 30-day period was proposed by the UK Law Commission because it is easier to understand, communicate and apply than the previously used concept of 'reasonable time'.

42. Similar to the Australian experience, during consultation the UK Law Commission was told that consumers do not find it helpful to be told that whether a refund is available depends on a series of factors which must be applied on a case by case basis. Rather, consumers expect the simplicity of a set period.[11]

10 The Australian Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, May 2016 ('Australian Consumer Survey'), page 44.

11 UK Law Commission, *Consumer Remedies for Faulty Goods – A Summary of Reponses*, page 15.

43. The reform was prompted by uncertainty about how long the 'right to reject' period lasts. UK market research found that the most common reply to the question of how long the 'right to reject' should last was 'about a month'. The UK Law Commission considered that 30 days provides a balance between maintaining consumer confidence, reducing disputes and preventing unnecessary waste. Their objective was to maintain the broad approach of the existing law but also simplify and clarify the way it operates.[12]

BOX 3: UK 'RIGHT TO REJECT'

- Under the United Kingdom's *Consumer Rights Act 2015*, consumers have a right to reject goods and receive a full refund if the goods are of unsatisfactory quality, unfit for purpose or not as described.
- This 'right to reject' is limited to 30 days from the date the product is bought.
- After the 30 days, consumers are not automatically entitled to a full refund. The retailer has one opportunity to repair or replace the goods. Consumers can state a preference but the retailer will choose the remedy.
- If the attempt at a repair or replacement is unsuccessful, consumers can claim a refund or a reduction in price (if they want to keep the goods).
- Consumers are also entitled to a refund if:
  - the cost of the repair or replacement is disproportionate to the value of the goods;
  - a repair or replacement is impossible;
  - a repair or replacement would cause significant inconvenience to the consumer; or
  - the repair would take an unreasonably long time.
- During the first six months there is a reverse onus of proof, meaning that it is the retailer's responsibility to prove that the defect was not present when the goods were bought. After six months, to access a remedy the onus is on the consumer to prove that the goods were faulty.

44. Although a 30 day approach was implemented successfully in the UK, it was clarifying an existing time-limited 'right to reject within a reasonable time' for all failures, which is different to the Australian law. In Australia, the right to reject depends on the distinction between major and non-major failures, in addition to a requirement to reject within a reasonable time.

45. Although the UK approach provides a useful guide, it is not directly transferable to the Australian situation. In the UK, after six months consumers are also subject to a 'final right to reject' if they are seeking a refund, which is far more restrictive than the Australian law and includes a 'deduction for use'. The 30 day 'right to reject' in the UK is the product of a more restrictive and prescriptive approach to refunds.

12 UK Law Commission, *Consumer Remedies for Faulty Goods – Report*, page 74.

46. A specified period of 30 days is likely to have an impact and be recognised by consumers and businesses as a reform they should take notice of and adapt to. A specified period of less than 30 days is more likely to be confused with the status quo and less likely to empower consumers to assert their rights. Education and additional guidance would be an important part of the implementation of a short specified period, to ensure that consumers and traders know where they stand and recognise that their existing ACL rights continue after the specified period of time has passed.

47. As many defects only become obvious after use, a specified period of 30 days would give consumers a reasonable opportunity to use the goods and become aware of any failure to meet the guarantees. Following the 30 day period, a failure to meet the guarantees would have to be considered a major failure (under the existing major failure test) to entitle a consumer to a refund or replacement. If the failure is non-major and the 30 day period has expired, the supplier would be required to provide their choice of a repair, refund or replacement.

48. The proposed 30 day approach also emphasises the importance of minimising the compliance burden for suppliers and manufacturers. It casts the scope of the change to the law narrowly. The availability of remedies is clarified only in relation to failures to meet the guarantees that are identified quickly.

Longer specified periods

49. A longer specified period, such as 60 days or six months, was proposed by some stakeholders during consultation for the Review. Under this approach, the existing major failure test would become relevant in relation to failures to meet the guarantees which emerge well after purchase. This may go beyond the scope of the Review proposal, which suggested a short time for the specified period.

International approaches

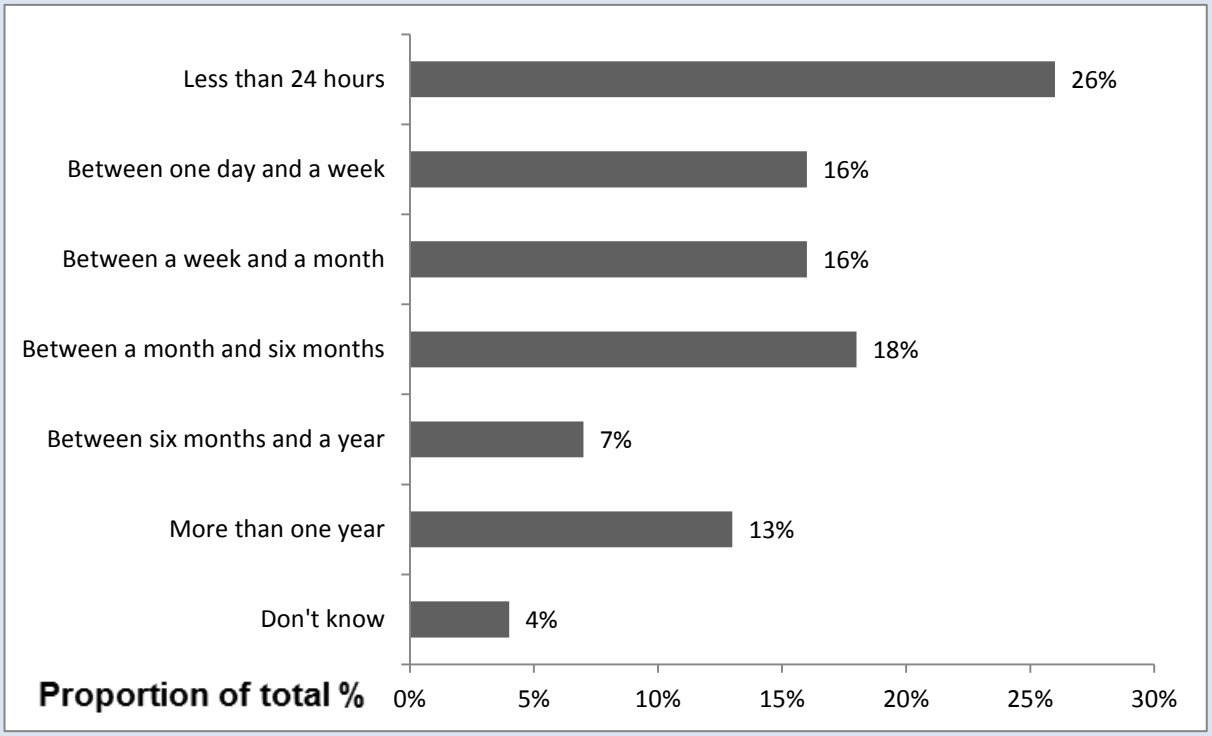
50. In 2012, Singapore introduced laws which set out a six month period after the delivery of goods during which there is a reversal of the onus of proof for goods if a defect arises. This means that it is assumed that the defect existed at the time of delivery unless the supplier can prove otherwise. However, even within this period the consumer does not have an automatic right to a refund during the six months, although they can request a repair or replacement. If those remedies are not possible, they can then request a refund. This means that although Singapore provides a six month period, the remedies available during the period and who chooses them are similar to the existing law in Australia. Accordingly, this approach cannot be considered on a like-for-like basis.

51. The European Union, under Directive 1999/44/EC, sets out a two month period during which consumers can inform traders of a defect to receive a remedy. However, this Directive only requires traders to provide a repair or replacement in most circumstances and uses a similar major/non major failure distinction. Accordingly, it, like the Singaporean regime outlined above, only provides a time limited version of something similar to the status quo under the ACL.

Australian evidence

52. Additionally, as Box 4 indicates, the 2016 Australian Consumer Survey found that 18 per cent of problems for goods and services were recognised by respondents as having occurred between one month and six months after purchase, with 20 per cent occurring later than six months after purchase.[13] These findings suggest that while a longer period, such as six months, would capture some additional failures, it may not greatly expand on the coverage of the proposed approach of 30 days.

Box 4: When are problems recognised?



Derived from: Australian Consumer Survey

53. The longer the consumer has a good, the more reasonable it is to take into account use and differences in the nature of the good. A short period, such as 30 days, avoids these considerations and may be appropriate as a generic, economy wide approach. A longer specified period may overreach and result in supplier non-compliance and a disproportionate burden on small businesses.

Exemptions and interaction with existing law

54. Option 2 may present challenges for some types of goods and it may be appropriate to allow exemptions from the short specified period in certain circumstances. For example, there may be certain goods, such as perishables and cosmetics, which would not be reasonably expected to last for the duration of the short specified period.

13 Australian Consumer Survey, page 44.

55. However, the ACL already sets a limitation period, known as a 'rejection period', on when goods can be rejected by the consumer for a refund or replacement.[14] Consumers cannot reject goods and choose their preferred remedy once the 'rejection period' for the goods has ended. This existing concept may provide an effective 'exemption' in place of creating product-specific exemptions to the new consumer right proposed in Option 2.[15]

56. The 'rejection period' is the period of time within which it would be reasonable to expect the failure to become apparent. In determining this period, regard is given to the type of goods, the use to which they are likely to be put, the length of time it is reasonable for them to be used and the amount of use to which it is reasonable for them to be put before the failure becomes apparent.[16] Therefore, if the 'rejection period' for certain goods is shorter than the short specified period (such as perishable goods), the 'rejection period' would limit the entitlement to reject these goods to this shorter period. After the 'rejection period' has ended consumers may still be entitled to a remedy if there has been a failure but they would not be able to reject the goods and choose their preferred remedy.

FOCUS QUESTIONS

For consumers

- Have you had a different experience with lower value goods? Have you found that lower value goods are more readily replaced or refunded in comparison with higher value goods (such as white goods or vehicles) anyway?
- Would you be more confident negotiating a refund with greater clarity and specificity about when you can choose your preferred remedy?
- Would a right to receive a replacement or refund for a non-major failure, rather than just a repair, in the first 30 days increase your confidence in purchasing items from smaller traders? Would you opt to buy more from smaller traders as a consequence?

For businesses

- Are there any unintended consequences, risks or challenges that need to be considered? For example, would there be an impact on current voluntary refunds policies? Would providing more common replacements or refunds materially increase the number of faulty products that go to waste?
- What is the difference in value between the cost of providing a refund or replacement, rather than providing a repair, for the goods you supply? Do you more readily replace or refund lower value goods currently in comparison with higher value goods?
- What proportion of returned products with non-major failures do you currently seek to repair and re-sell? By how much is the final retail price of the product likely to be reduced for repaired and resold goods?

14 See ACL section 262.

15 Note: the rejection period is distinct from the concept of 'durability' in the ACL.

16 See ACL subsection 262(2).

Impact Analysis

57. This option would allow consumers to choose the remedy they receive when there is a failure within a short period of time, including a refund or replacement. With consumers in control of the choice of remedy, it is possible that refunds and replacements could become more common. This would give suppliers an incentive to ensure their repairs are effective and completed quickly, so that repairs are an attractive remedy for consumers to choose. A specified period may also improve the quality of goods and encourage better quality assurance and pre-sale checks. However, there would also be increased costs, which may be passed on to consumers, such as the costs of improving quality control, re-training staff and educating consumers.

58. More clarity may enable consumers to better understand their rights and exercise them effectively. Less time would be spent determining whether the consumer is entitled to a refund and some unnecessary disputes would be avoided. Greater certainty in the application of the law may also lead to confident and satisfied consumers that are more willing to take risks by trying new products and shopping with unfamiliar suppliers.

59. Under Option 2, suppliers would be unable to choose their preferred remedy during the specified period when there has been a failure to meet the guarantees. This may result in more consumers receiving a refund or replacement for higher value goods where it is more economical to repair the good. As a result, under this option, it is expected that traders may incur costs in relation to providing a refund or replacement for higher value goods, rather than a repair, in circumstances where a repair is a more economical remedy for the trader and would have otherwise been provided.

60. This cost would be the difference in value between the cost of providing a repair and the cost of the remedy actually provided. These costs are difficult to accurately quantify, as they would vary dramatically depending on variables such as the type and value of the goods, when the dispute arises, and the preferences or likely behaviour of each party.

61. These costs could be mitigated by several factors. Not all consumers will choose a refund or replacement. While they have a right to these remedies, consumers can choose to agree to a repair. Where the issue can be easily fixed and the good as a whole still functions well, a consumer may prefer a repair rather than return the good and do without it or find a substitute. Moreover, not all goods are cheaper to repair than to replace or refund. For these kinds of goods, it is likely that a refund or replacement is the preferred remedy of choice for the trader and the consumer.

62. This potential burden for suppliers may also be offset through a simpler, easier to apply law which lowers ongoing training costs and the prevalence of unnecessary disputes and litigation. A clearer law would also give suppliers a clearer legal basis on which to claim indemnification from manufacturers who have supplied faulty goods. Consumer groups, advocates and ACL regulators would also be able to give advice more confidently about when remedies are available and how they are chosen.

63. Option 2 may increase waste, as returns may become more common. In some circumstances, there may be less incentive for traders to repair returned goods, as repaired and used goods can be more difficult to re-sell. As a result, some returned goods, which would otherwise be repaired, are likely to be disposed of.

64. A specified period may increase the risk of abuse and gaming by consumers. If rejecting goods for a refund is made easier, consumers may look to use the goods and then speculatively request a refund. Potentially, this could include consumers seeking a refund on a change of mind basis, rather than the good not being of acceptable quality. However, a consumer would have no legal foundation to require a refund in a short period of time after purchase, and the retailer would have no obligation to provide a refund, unless there has been a failure to meet the guarantees. Consumers may also overestimate their rights which may lead to increased costs in relation to customer service and dispute resolution for businesses.

65. Option 2 would result in costs for businesses to learn the new law and adjust practices to ensure the short specified period is understood and applied correctly when resolving consumer guarantees issues.

BENEFITS	COSTS
• More efficient resolution of consumer guarantees disputes.	• Costs for businesses of learning the short specified period and adjusting customer service practices and training staff.
• Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.	• Costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy for the supplier, particularly for higher value goods.
• Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods.	• Costs associated with the increased potential for consumers to overestimate their rights.
• Potential improvements in the quality and safety of goods.	• Costs associated with some increased waste.
• Greater consumer confidence and willingness to purchase substitute products.	
• Easier for ACL regulators and consumer advocates to provide advice on the application of the law.	
• Potential improvements in customer service and better repair policies and procedures.	

FOCUS QUESTIONS

For consumers

- Have you experienced issues with a trader not agreeing to a refund when you have had a failure with a good within a short period of time of purchase? What types of goods were involved? Did you have a different experience with lower and higher value goods?
- What is your preferred remedy when there has been a failure to meet the guarantees within a short period of time - a refund, replacement or repair? Does your preference vary depending on the type, value or intended use of the goods? Does your response depend on the type or extent of repair offered, including the estimated time required to complete the repair?
- In what circumstances do you expect to be able to reject goods for a refund? Do your expectations vary depending on the type or value of the goods?
- What is your preferred approach to the time period in Option 2? Should another time period be considered?

For businesses

- What is your preferred approach to the time period in Option 2? Should another time period be considered?
- Do you currently offer a voluntary refund policy within a short specified period?
- What is your preferred remedy when a consumer guarantees issue arises in relation to goods you supply? Why? Are there any specific issues arising from the provision of a particular remedy (for example, accounting for prior use of the good or depreciation, determining the cause of the defect, or issues related to government duties and taxes)?
- Would you be more confident negotiating indemnification from manufacturers with greater clarity and specificity about when there is a major failure?
- What proportion of products in your industry is likely to experience a non-major failure in the first 30 days?
- If a good experiences a non-major failure in the first 30 days which per cent might you repair rather than replace? Are you more likely to offer a replacement or refund immediately for lower value goods? How is this proportion likely to vary across industries?
- If you have had a product brought back with a non-major failure, what is the average time taken for the product to be repaired?

Option 3: Option 2, but specify a different time period for high value goods, such as motor vehicles and white goods, based on a monetary threshold, during which a consumer is entitled to a refund or replacement without needing to prove a major failure

66. Option 3 would build on Option 2 by providing a different specified period of time for high value goods within which any failure would entitle the consumer to a refund or replacement. During consultation for the Review, there was significant stakeholder concern about how any proposed changes to the consumer guarantees would apply to high value goods such as new motor vehicles and white goods. A number of stakeholders also requested that there be specific consumer guarantees relating to new motor vehicles.

67. There are two approaches outlined under this option: a longer period of time (Approach 3A) and an exemption for high value goods (Approach 3B). These approaches reflect the marked difference in stakeholder views in relation to how these goods should be treated. A new motor vehicle or white good, for example, is a significant consumer purchase. The value of these goods generally raises consumer expectations of performance and durability. Reflecting this, Approach 3A considers a longer period of time for high value goods. This longer period would operate in conjunction with the short specified period for other goods, such as 30 days, as described in Option 2. Although this approach does not propose specific motor vehicle 'lemon laws', it would expand the specific refund rights for high value goods across the economy, such as motor vehicles and white goods. The options considered for Problem 2: Multiple failures (later in this chapter) may also address some of the issues raised by stakeholders who have called for 'lemon laws'.

68. Alternatively, industry stakeholders have indicated that a specified period, as outlined in Option 2, would be overly burdensome and unworkable in practice for high value goods. Although the law provides that suppliers can seek reimbursement from manufacturers when remedies are provided for defective goods, problems with these goods can be difficult to diagnose. Repairs are often an economical and reasonable remedy to provide. Accordingly, to recognise the complex nature of many high value goods, Approach 3B considers an exemption from the short specified period for high value goods. This would maintain the status quo for these goods and consumers would have to continue to establish that a major failure has occurred, under the existing legal test, to access a refund or replacement.

Approach 3A: A longer period of time for high value goods

69. This approach would build on the short specified period, under Option 2, to specify which goods would be subject to a longer period. This could be achieved by setting a monetary value threshold. If goods are above this value, consumers purchasing those goods will be eligible for a longer period during which they can more easily access a refund or replacement. This approach reflects a general consumer expectation that more expensive goods should be less prone to a failure within a short time period.

70. Under Approach 3A, an appropriate period of time for high value goods, such as motor vehicles and white goods, may be three to six months. The 2016 Australian Consumer Survey (the Survey) indicated that 74 per cent of problems in the 'motor vehicles' category were recognised by consumers in the first six months after purchase, with 57 per cent of these problems recognised during the first month. Further, 77 per cent of problems with electrical products were recognised within six months, with 58 per cent of these problems being recognised during the first month.[17]

71. This compares to 71 per cent of problems recognised during the first month for 'clothing, footwear, cosmetics or other personal products' and 62 per cent for 'non-electrical household goods such as furniture'. Only 17 per cent of consumer problems in the motor vehicles category, and 19 per cent with electrical products, were found to occur after the first month and before six months.[18] These findings indicate that a longer period for high value goods may be unlikely to capture many more potential failures than an economy wide approach would, such as 30 days for all goods (proposed by Option 2).

72. The Survey also found that a higher proportion of consumers reported experiencing a problem with products in categories other than motor vehicles. The Survey found that of the respondents who had purchased electronics or electrical goods within the last two years, 19 per cent experienced a problem, a result higher than the average (12 per cent), and more than half of the consumer problems (58 per cent) were resolved to the consumer's satisfaction. The Survey found that only 8 per cent of respondents who made a purchase in the motor vehicle category within the last two years reported a problem of any kind. This is down from 16 per cent in 2011. However, 56 per cent of these consumers reported that the problem had not been resolved to their satisfaction.[19]

73. In addition, the Survey estimated that the cost to consumers to take some action to resolve a motor vehicle issue (including direct costs incurred by the consumer and time spent dealing with the problem) was higher than almost all other product categories, costing on average over $840.[20]

74. It is also important to note that the 'problems' reported in the Survey do not necessarily equate to what would be considered a 'failure' for the purposes of the consumer guarantees. For example, 26 per cent of problems experienced related to 'poor customer service', which is unlikely to be a consumer guarantees issue.[21] While the data on the timing of 'problems' gives some indication of when failures are likely to be experienced, the Survey is less helpful for ascertaining the scale of consumer guarantees failures experienced.

17 Australian Consumer Survey, page 44.

18 Australian Consumer Survey, page 44.

19 Australian Consumer Survey, pages 39, 40, 50 and 54. Note that fuel has been added to this category since the previous Australian Consumer Survey in 2011.

20 Australian Consumer Survey, page 63.

21 Australian Consumer Survey, page 42.

75. More than 29,000 people reported consumer guarantee issues to the ACCC in 2017, with half noting problems getting remedies for faulty automotive, white goods or electronics products. The ACCC noted its concern with the growing trend in consumer guarantee issues, which shows a 39 per cent increase in reports about consumer guarantee issues when compared to the 21,000 received in 2016.[22]

76. The high instances of unresolved problems with motor vehicles found by the Survey and the number of complaints received by the ACCC indicate that there may be systemic issues in the motor vehicle industry which make it difficult for consumers to enforce their consumer guarantees rights. A period longer than 30 days might give consumers sufficient time to test high value goods, diagnose problems and seek redress easily. However, data from the Survey about when problems are recognised suggests that the economy wide approach of 30 days proposed by Option 2 may already provide enough of an opportunity to do this.

77. Views are sought on the appropriate level for a high value monetary threshold which could apply to give consumers a greater period of time to choose a refund or replacement in the event of a failure to meet the guarantees.

Impact Analysis

78. The Review found consumers had particular difficulty asserting a right to refunds for higher-cost goods such as motor vehicles and white goods where refunds are potentially more costly than repairs.[23]

79. To avoid providing a refund, suppliers of high value goods may have an incentive to challenge claims that a major failure has occurred.

80. The cost of providing a refund may not be as easily absorbed for high value goods in comparison to other goods. High value goods are sometimes not as easily re-sold or disposed of. Consumers who have purchased high value goods are also more likely, in general, to have to take their claim to a court or tribunal if they are refused a refund following a failure to meet the guarantees.

81. Although problems with high value goods may be less prevalent than with other goods, the emotional and financial impact that consumers experience is likely to be amplified. For example, during the Review some stakeholders noted the unique impact of experiencing safety related issues and being unable to use their new vehicle for prolonged periods while it was being repaired. This approach would provide greater certainty about when consumers have their choice of remedy and facilitate more efficient resolution of consumer guarantees disputes.

22 **https://www.accc.gov.au/media-release/39-per-cent-increase-in-consumer-guarantee-reports-in-2017**, *39 per cent increase in consumer guarantee reports in 2017*, 8 January 2018.

23 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017 ('ACL Review Final Report'), page 17.

82. As with Option 2, this approach may impose costs where a refund or replacement is chosen, rather than a repair, in circumstances where a repair is the more economical remedy for the trader and would have otherwise been provided (particularly for high value goods). This cost would be the difference in value between the cost of providing a repair and the cost of the remedy actually provided. The longer period proposed by Approach 3A would mean that these circumstances are more common and, as a result, these costs are likely to be greater than under Option 2.

83. Approach 3A would also result in costs for businesses to learn the new law and adjust practices to ensure the implications of the specified period are understood and that it is applied correctly when resolving consumer guarantees issues.

84. Similar to Option 2, this approach may increase waste because the proportion of returned goods that are likely to be disposed of may increase. The longer period may also increase the risk of abuse and gaming by consumers.[24] With a longer period for high value goods, there may be even greater potential for consumers to overestimate their rights.

BENEFITS	COSTS
• More efficient resolution of consumer guarantees disputes.	• Substantial costs for businesses of learning the new law and adjusting customer service practices and training staff.
• Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.	• Greater costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy for the business.
• Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods.	• Cost for government and ACL regulators of regular review of the law to ensure value thresholds stay current, as well as additional education and enforcement.
• Improvements in the quality and safety of goods in the market.	• Greater likelihood of costs associated with consumers overestimating their rights.
• Greater consumer confidence and willingness to purchase substitute products.	• Costs associated with increased waste.

24 However, under Approach 3A, a failure to meet the guarantees would still have to occur for the consumer to return the good and obtain a refund or replacement.

FOCUS QUESTIONS

For consumers

- Are there any benefits or costs to consumers that have not been acknowledged?
- Are there any products that should be exempt from a short specified period? (for example, by industry, type of good, value of good)
- What would be an appropriate value threshold for Option 3 'high value goods'?
- If high value goods are exempt from the short specified period, should there be any specific inclusions for certain goods which are above the value threshold?

For businesses

- Are there any products that should be exempt from a short specified period? (for example, by industry, type of good, value of good)
- What would be an appropriate value threshold for Option 3 'high value goods'?
- If high value goods are exempt from the short specified period, should there be any specific inclusions for certain goods which are above the value threshold?
- What additional training costs do you expect if Option 2 or Approach 3A is implemented? How much training would your staff require?
- Are there any costs or benefits to businesses that have not been acknowledged?

Approach 3B: No short period of time (status quo) for high value goods

85. Approach 3B would provide an exemption for high value goods from the Option 2, 30 day short specified period. Consumers would not have a short specified period of time for goods over a specified value during which they can choose a refund or replacement without demonstrating a major failure. This approach reflects concerns from suppliers and manufacturers that a short specified period would be overly burdensome if applied to high value goods.

86. As discussed above, if Option 2 is implemented, there may be substantial costs to businesses who supply high value goods if the threshold for accessing a refund or replacement is eased by the introduction of a short specified period for these goods. Being required to provide a refund for these high value goods may leave businesses with goods that are worth less than their wholesale value and difficult to re-sell. Accordingly, the ability to offer a repair rather than a refund is important to the sustainability of some business models. This situation is reflected by the well-developed aftermarket repair industries for many high value goods.

87. It is often difficult to determine whether a failure has occurred because of an inherent issue with the good rather than because of misuse, unreasonable expectation, wear and tear or inappropriate selection for an intended purpose. This determination is often highly subjective and can impact on the effectiveness of repairs and can lead to further disputes. For high value goods these issues can be amplified because these goods cannot be easily disposed of and quickly depreciate in value once 'used'.

88. Stakeholders report that modernisation and technological advances have made the diagnosis of faults in some goods a complicated and difficult process. It has also made replacement of components a more viable and cost effective alternative to traditional repairs. The complexity of many high value goods means that problems can be difficult to quickly diagnose and the delineation between major and non-major failure can be blurred. Accordingly, the inconvenience experienced by consumers must be balanced with the practical constraints of providing an effective repair.

89. Additionally, often these are goods which can be modified by consumers or serviced and repaired by a third party. In these circumstances, it can be difficult to ascertain whether a problem has arisen from an inherent defect that was present at the time of purchase or whether it was the result of an intervening modification.

90. However, it may also be argued that the same measures which are designed to simplify the consumer guarantee provisions and reduce levels of disputation should also be available to consumers when they purchase high value goods.

91. Views are sought on the appropriate level for a monetary threshold that would limit the operation of Option 2, so that it only applies to goods of a value less than the amount set by the 'high value' threshold.

Impact Analysis

92. The short specified period may, in certain circumstances, result in some abuse and gaming by consumers. As noted previously, there is a risk that some consumers might look to exploit the short specified period to obtain a refund due to a change of mind or after use. However, a consumer would have no legal basis to require a refund in a short period of time after purchase, and the retailer would have no obligation to provide a refund, unless there has been a failure to meet the guarantees.

93. The prevalence of voluntary refund policies, which often allow refunds for change of mind, may also result in consumers conflating these policies with the short specified period. As a result, the short specified period might encourage consumers to overestimate their rights and assume that they have an extended 'trial' period.

94. An industry or goods specific approach to Option 3 would be inconsistent with the economy-wide application of the ACL and raises a number of definitional issues which would add complexity to the law. Value thresholds would have to be defined to qualify for an extended period (Approach 3A) or exemption (Approach 3B).

95. Many businesses and consumers supported maintaining the generic, economy wide nature of the consumer guarantees during the Review. There are benefits to maintaining a generic approach to consumer guarantees. The guarantees currently apply generically across the economy, allowing for flexibility in individual circumstances. Product specific treatment may make the application of the law more rigid and inflexible to changes in the market.

96. For an industry or goods specific approach to be justified, generally it would have to be demonstrated that there are issues that are particular to that industry that an economy wide approach would not be able to address. Although high value goods present some unique issues, there is no clear case that these high value goods specific approaches would address the issues raised more effectively than the economy wide approach proposed in Option 2.

97. An approach which introduces industry or goods specific carve-outs or treatments may be inconsistent with the overarching objective to simplify and clarify the law to improve consumer confidence and understanding. The Review reaffirmed that a flexible, generic and principles-based approach to the consumer law should be maintained where possible, with consistent application across the economy.[25]

98. Industry specific issues could be targeted through regulator actions such as guidance, education and compliance and enforcement activities. For example, CAANZ members are implementing a non-regulatory proposal from the Review by updating regulator guidance on 'durable' and 'safe' in the consumer guarantees framework. Regulators will also continue to work with the automotive industry to improve compliance and potentially develop best practice guidelines on the circumstances in which to provide refunds.[26]

99. To this end, the ACCC recently conducted a market study into new car retailing which examined how the consumer guarantees apply to new cars and repairs. The final report, released in December 2017, found that consumers are struggling to enforce their consumer guarantee rights when a new car is defective or fails to perform as promised. The ACCC found that the biggest obstacle consumers face when seeking a remedy is the failure of car manufacturers' complaints handling systems and policies across the new car industry to adequately take consumer guarantees into account.[27]

100. In the market study final report, the ACCC committed to assisting consumers to better understand their rights in relation to new car defects and failures. The ACCC will develop updated guidance which includes specific guidance on criteria for determining a major failure. The ACCC will also work with automotive manufacturers and dealers to develop a concise and simple explanation of the consumer guarantees which can be provided to consumers.[28] These actions will provide new car buyers with additional clarity about when they are entitled to a refund or replacement under the ACL.

101. Implementation of Option 3 may introduce these inconsistencies and undermine the effort and resources that have gone into educating consumers and businesses about their rights and responsibilities, resulting in confusion and non-compliance.

102. Nevertheless, monitoring by CAANZ and the ACL regulators would continue and industry specific laws could be reconsidered if the generic, economy wide approach does not resolve the unique issues experienced in relation to high value goods.

25 ACL Review Final Report, page 8.

26 **https://www.accc.gov.au/media-release/hyundai-to-improve-consumer-guarantees-approach**, *Hyundai to improve consumer guarantees approach*, 8 February 2018; **https://www.accc.gov.au/media-release/holden-undertakes-to-comply-with-consumer-guarantees**, *Holden undertakes to comply with consumer guarantees*, 3 August 2017.

27 ACCC, *New Car Retailing Industry market study: consumers' guide*, page 2.

28 ACCC, *New Car Retailing Industry market study: Final Report*, page 5.

BENEFITS	COSTS
• Businesses would still be able to choose a repair in circumstances where there has been a non-major failure and a repair is the most economical remedy.	• Minor costs for businesses of learning the new law and adjusting customer service practices and training staff (as being an exemption from an Option 2 approach for other goods).
	• Cost for government and ACL regulators of regular review of the law to ensure value thresholds stay current, as well as additional education and enforcement.
	• Inconsistency with the current economy wide approach of the law.
	• Potential confusion for consumers and businesses resulting from different periods.

PROBLEM 2: MULTIPLE FAILURES

SUMMARY

The consumer guarantees provisions are currently unclear about whether multiple non-major failures can collectively be considered a major failure. Courts and tribunals have given conflicting interpretations of the law. This has resulted in uncertainty for both consumers and businesses.[29]

The basic threshold test for a major failure is whether a reasonable consumer would not have purchased the good had they known the nature and extent of the failure at the outset. It is arguable that this test is likely to be met when there have been multiple non-major failures. However, the language of the ACL is currently unclear about whether this situation can give rise to a major failure and the right for the consumer to choose a refund. The singular use of 'failure' in the text of the law may also contribute to an interpretation that multiple minor issues should not be considered collectively.

In response, the ACL Review Final Report proposed that the law be amended to clarify that multiple non-major failures can collectively amount to a major failure under the consumer guarantees regime. The clarification would reflect the reality that multiple issues can be sufficient to deter a reasonable consumer from buying a good.

To address the problem, three options are proposed:

- **Option 1**: Status quo.
- **Option 2**: Clarify that multiple non-major failures can amount to a major failure.
- **Option 3**: Specify the number of non-major failures that can amount to a major failure.

Option 1: Status quo

103. Option 1 would maintain the existing distinction between major and non-major failures to meet the consumer guarantees. Although the existing law allows for courts and tribunals to consider all relevant factors and determine whether a reasonable consumer would have bought the good if they had known about the nature and extent of the failure at the outset, there have been different decisions on whether multiple non-major failures can collectively amount to a major failure.

104. In a recent NSW Supreme Court case, the Judge indicated that multiple non-major failures can amount to a major failure (*Prestige Auto v Bonnefin* [2017] NSWSC 149).

29 Consumer Affairs Australia and New Zealand, *ACL Review Interim Report*, October 2016, page 54 (details stakeholder concerns regarding multiple non-major failures).

105. In contrast, the Victorian Civil and Administrative Tribunal took a less direct approach in *Marwood v Agrison Pty Ltd* [2013] VCAT 1549 and *Australia Rong Hua Fu Pty Ltd v Ateco Automotive Pty Ltd (Civil Claims)* [2015] VCAT 756. In the *Marwood* decision, the Tribunal considered several failures in turn, concluding that each was not a major failure, and then concluding that the good did not exhibit a major failure. This decision did not explicitly address the status of the failures *taken together*. In the *Australia Rong Hua Fu* decision, the Tribunal concluded that none of the individual failures constituted a major failure, and separately went on to state that the failures *taken together* did not constitute a major failure either.

106. At the very least, analysis of the few reported decisions on this matter raises concern about whether a lack of clarity in the law results in tribunals insufficiently directing their consideration to whether several non-major failures taken together constitute a major failure.

107. The status quo would still provide a path for consumers to seek a refund. The principles-based nature of the consumer guarantees provisions is intended to take into account 'all of' the relevant circumstances. One of the grounds for a major failure is whether a reasonable consumer would have bought the good if they had known the nature *and extent* of the failure at the outset. This would suggest that multiple non-major failures *can* be considered collectively, and this is the existing approach of ACL regulators.

108. As indicated above, the singular form of 'failure' may contribute to an interpretation that multiple minor issues should not be considered collectively. A 'failure' in the text of the ACL does not actually refer to a failure of the good as such, but to whether the supplier has failed to comply with a consumer guarantee. As a supplier either has, or has not, complied with a consumer guarantees, a plural form of 'failure' is not strictly necessary. Accordingly, the singular form of that word does not necessarily support the interpretation that non-major failures cannot be considered collectively.[30]

109. Accordingly, consumers may have a legal basis to argue that multiple non-major failures can collectively be considered a major failure under the existing law.

Impact Analysis

110. Under the status quo, the law would remain as it is, with the existing lack of clarity about whether multiple non-major failures can amount to a major failure. The resulting uncertainty may create barriers to parties resolving disputes early, quickly and economically, and can create inconsistent consumer outcomes.

111. It would be left to courts and tribunals to continue to develop the application of the law. However, judicial consideration is rare because of the high cost of litigation relative to the value of most goods. This means that further clarity may take a long time and unnecessary disputes will continue to be likely in the interim.

112. The current law would be left open to further interpretation, which may allow it to retain the flexibility to develop and adapt to consumer expectations. However, legislative intervention might be necessary if courts and tribunals interpret the law in a way which conflicts with the intent of the ACL.

30 See ACL section 260.

113. Other non-regulatory options, such as regulator guidance and education, could be pursued and improved under the status quo. However, ACL regulators already provide regularly updated guidance on the consumer guarantees which includes content on the legal test for a major failure.[31] Although further explanation could be provided on this point, education has not yet been effective at resolving uncertainty in the law.

BENEFITS	COSTS
• Consumers and businesses would not have to familiarise themselves with a change to the law.	• Costs associated with unnecessary disputes and litigation.
• Further judicial interpretation would allow the law to continue to develop and adapt to consumer expectations.	

Option 2: Clarify that multiple non-major failures can amount to a major failure

114. Option 2 would involve a legislative amendment to clarify that multiple non-major failures can amount to a major failure. The drafting would not prescribe a specific number and may simply involve a legislative note to clarify the existing law. It would be left to courts and tribunals to determine the amount of non-major failures required, on a case by case basis.

115. Consumers would be able to assert their right to a refund or replacement with more confidence and certainty. Option 2 would provide consumers with certainty that they have recourse to a refund or replacement where there have been a series of issues that, collectively, would mean that a reasonable consumer would not have acquired the goods. These issues would not necessarily need to be related.

116. Option 2 may also prevent consumers becoming trapped in cycles of repeated repairs. The existing law requires suppliers to repair goods within a reasonable time. This Option would provide further clarity that there is recourse where there have been multiple failed repairs, even if these repairs have been provided within a reasonable time.

117. Courts and tribunals would retain their ability to consider all factors and whether a reasonable consumer would have bought the good if they were fully aware of the nature and extent of the failures at the outset. Accordingly, the unique facts of each case would be considered individually. This approach would go some way to addressing concerns about 'lemon' goods without being overly prescriptive or setting a numerical threshold. It would also preserve the role of repairs where non-major failures are not sufficient to amount to a major failure. This is important because a repair is often more practical and economical for suppliers to offer, reduces waste, and in most cases will satisfy consumers.

118. Option 2 would not change the distinction between a major and non-major failure. Legislation would simply provide that courts may consider multiple non-major failures collectively, where appropriate, in deciding whether there has been a major failure.

31 See: **http://consumerlaw.gov.au/consumers-and-the-acl/**; **https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees**.

119. This option was canvassed in the ACL Review Interim Report for public consultation. It had strong support from a range of legal, academic and consumer stakeholders and generally did not raise concerns from industry stakeholders.

Impact Analysis

120. Compliance costs are likely to be minor because Option 2 reflects the legislative intent of the ACL and existing regulator interpretations. However, the actual cost impact will depend on what common practice is and how much of an impact Option 2 would have on this behaviour. Views are sought on the common practice of retailers when presented with a refund request arising from a failure to meet the guarantees.

121. Clarification would also reduce the time and money spent by consumers and suppliers in unnecessary disputes and litigation. This Option provides greater clarity to traders' existing obligations and does not replace or expand on them. Court action would be less likely, as the law would be clearer and remedies would be better understood.

122. With a clearer law, consumers are less likely to feel compelled to accept a supplier's assertion that a refund cannot be provided (with the underlying reason being that multiple non-major failures cannot be collectively considered to be a major failure). A regulator education campaign may also be appropriate to encourage understanding of and compliance with the clarified law.

123. Less time would be spent determining whether the consumer is entitled to a refund. However, there may also be increased time of negotiation between the trader and consumer in situations where previously no remedy would have been sought because the law was unclear.

124. Option 2 may also ease the evidentiary difficulties consumers face proving a major failure when there has been a pattern of failures or defects after a repair or replacement. These issues relating to 'failed repairs' are particularly problematic when there has been a time lag between the last repair and the problem re-emerging. Accordingly, Option 2 would not include a time limitation on what can be considered.

125. A clearer statement of the law would also assist suppliers in making claims against manufacturers who have supplied the faulty goods, as they would have a clearer legal basis on which to claim indemnification. As a result, suppliers could more confidently facilitate a refund if the consumer chooses it as a remedy, rather than pushing back against a claim of major failure due to difficulties in seeking reimbursement from the manufacturer for payment of a refund. In turn, this is also likely to encourage manufacturers to improve the quality and safety of goods in the market.

126. Greater certainty in the application of the law may also result in benefits for competition, as consumers would be more confident when selecting substitute products from unfamiliar traders. The clarification would also make it easier for ACL regulators and consumer advocates to provide clear advice on the application of the law.

127. There may be minor costs for businesses to familiarise themselves with the clarified law and adjust their customer service practices and training, however, these would primarily be business-as-usual costs and are unquantifiable.

BENEFITS	COSTS
• More efficient resolution of consumer guarantees disputes.	• Minor costs for businesses to familiarise themselves with the clarified law.
• Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.	
• Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods.	
• Easier for ACL regulators and consumer advocates to provide advice on the application of the law.	
• Potential for improvements in the quality and safety of goods in the market.	
• Potential for increased competition, as a result of greater consumer confidence and willingness to purchase substitute products.	

Option 3: Specify the number of non-major failures that can amount to a major failure

128. Option 3 would involve a legislative amendment to prescribe that a set number of non-major failures amount to a major failure, rather than leaving it to courts and tribunals to determine this issue on a case by case basis. Such a legislative change would effectively set a numerical threshold requirement for non-major failures which, once met, would trigger a major failure. The preferred approach would be to set a single threshold that applies to all goods. This would ensure consistency with the generic, economy wide nature of the existing law.

129. It may not be appropriate for this threshold test to apply across all industries, product types and monetary values. As a result, exemptions or alternative thresholds may be considered in circumstances where consumer expectations in relation to certain goods do not align with the economy-wide set number of failures.

130. Although an objective is to prevent consumers from being trapped in a cycle of failed repairs, the nature of the existing law means that the non-major failures would not necessarily have to be related to another failure or connected to a failed attempt to repair.

131. During ACL Review consultation, stakeholders suggested that the issue of multiple failures was one of clarification rather than change.[32] Option 3 may go beyond the problem that is being addressed and likely create definitional issues. A simple change, which minimises compliance and education costs for businesses and consumers was preferred by CAANZ in the ACL Review Final Report.[33]

32 Submission from CHOICE (ACL Review Interim Report), page 27.

33 ACL Review Final Report, page 22.

132. Further, the aim of increased clarity may be partly achieved through regulator actions such as guidance, education and compliance and enforcement activities. For example, following the recommendation in the Review, CAANZ members are currently working on updating the regulator guidance on 'durable' and 'safe' in the consumer guarantees framework.

133. Another alternative approach, which is not proposed, would be to set a limit on failed attempts to repair. This approach would limit the multiple non-major failures to those that are directly related and have been subject to a repair attempt.

134. Currently, the ACL provides that when there is a non-major failure with goods, they must be remedied to be made fit for purpose within a reasonable time.[34] If they cannot be remedied within a reasonable time, there has been a major failure and the consumer can reject the goods for a refund. The alternative approach would augment the reasonable time requirement by adding a limitation on attempts to repair. Once this limit is reached, consumers would be able to reject the goods for a refund.

135. The United Kingdom's Consumer Rights Act 2015 sets a similar limit on 'failed' repairs. The UK approach allows consumers to reject goods for a refund after one failed repair. Consumers are also entitled to a refund if the repair would cause significant inconvenience to the consumer or the repair would take an unreasonably long time. However, the United Kingdom also has a reverse onus of proof in the first six months after purchase, requiring traders to prove a defect did not exist at the time of purchase. In Australian jurisdictions, a reverse onus is usually only justifiable on narrow policy grounds. This would mean that consumers would generally need to prove both the number and status of each repair attempt, which could be costly and would require technical evidence.

136. At this stage, a limit on failed attempts to repair is not proposed. Failed repair attempts are a potential subset of what could collectively be considered failures. However, failed repair attempts are not intended to be a necessary pre-requisite to multiple non-major failures amounting to a major failure. The approach of Options 2 and 3 is broader and would consider all failures, not just those that are related or have been subject to attempts to repair.

Impact Analysis

137. While Option 3 may give some consumers more confidence to raise the issue of a major failure with suppliers, it may create definitional issues and the need for exemptions.

138. Option 3 also creates a new need for Government to continuously review and update the threshold to keep it current as new products and technologies emerge. This may result in a fragmented law which is not easily or flexibly applied. The problem defined indicates a need for clarification, rather an overhaul of how the consumer guarantees operate. Option 3 would go beyond clarification and alter the existing law to effectively add a new means of establishing a major failure.

34 See ACL section 260.

139. The ACL provides broad and general protections. The setting of thresholds would likely be an impractical and arbitrary process which may have the unintended consequence of reducing consumer protection in individual circumstances if it has the effect of putting remedies that would have previously available out of reach. The potential multitude of thresholds and exemptions could be confusing for consumers and businesses. There would be substantial costs involved in adjusting to the new law and training staff.

140. As with Option 2, Option 3 may assist suppliers in making claims against manufacturers who have supplied the faulty goods, as they may have a clearer legal basis when negotiating indemnification. The clear threshold test proposed may also allow for more efficient resolution of disputes between traders and consumers about consumer guarantees remedies.

141. Under Option 3, traders would incur costs in relation to providing a refund or replacement, rather than a repair, in circumstances where a repair is the most economical remedy for the trader and would have otherwise been provided. This cost would be the difference in value between the cost of providing a repair and the cost of the remedy actually provided. These costs are difficult to accurately quantify, as they would vary dramatically depending on the type and value of the goods, when in a good's life the dispute arises, and the preferences or likely behaviour of each party. It is also relevant that costs could be mitigated by the ability to resell those goods that would otherwise have been repaired for the consumer.

142. Although Option 3 may incentivise some suppliers to improve their repair services, it may also create inadvertent incentives for suppliers to refuse to repair products, or count repairs in such a way as to avoid triggering a right to a refund or replacement.

143. Option 3 would result in substantial costs for businesses to learn the new law and adjust customer service practices to ensure the new threshold is understood and applied correctly. Record keeping costs may also increase, as businesses may be required to track and verify failures in more detail.

144. The new law would likely require ACL regulators to increase education and guidance activities to ensure that consumers and traders are aware of the threshold and can apply it. The complexity of the new law may also necessitate additional regulator enforcement to ensure compliance.

BENEFITS	COSTS
• More efficient resolution of consumer guarantees disputes.	• Substantial costs for businesses of learning the new law and adjusting customer service practices and training staff.
• Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.	• Costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy.
• Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods.	• Cost for government and ACL regulators of regular review of the law to ensure thresholds stay current, as well as additional education and enforcement.
• Potential for improvements in the quality and safety of goods in the market.	• Costs of record keeping, to track and verify failures in more detail.
• Potential for increased competition, as a result of greater consumer confidence and willingness to purchase substitute products.	

FOCUS QUESTIONS

For consumers

- Have you experienced issues with a trader not agreeing to a refund when you have had multiple non-major failures with a good? What types of goods were involved? Over what time period did you experience these failures?
- Would you be more confident negotiating a refund with greater clarification about whether multiple non-major failures can amount to a major failure?
- Are there any benefits or costs to consumers that have not been acknowledged?
- What is your preferred remedy (repair, replacement or refund) when a consumer guarantees issue arises? Does your preference vary depending on the type, value or intended use of the goods?
- In what circumstances do you expect to be able to reject goods for a refund? Do your expectations vary depending on the type or value of the goods?
- Are there any product types that would benefit from a set number of non-major failures that would amount to a major failure (as described in Option 3)? What would be an appropriate number of failures? What would be an appropriate number of failures for an economy wide approach?
- Where a good you have returned has been repaired what has been the typical time taken for the good to be repaired?
- Where you have had to have a good repaired, on average how many more times have you needed to have that good repaired for other non-major failures?
- Would a move to option 2 or option 3 increase your confidence in purchasing items from smaller traders? Would you opt to buy more from smaller traders as a consequence?

For businesses

- Is the clarification proposed by Option 2 consistent with your current business practices?
- Are there any product types that would benefit from a set number of non-major failures that would amount to a major failure (as described in Option 3)? What would be an appropriate number of failures?
- Is an economy wide approach to this problem preferable or should the approach vary depending on the type or value of goods? What would be an appropriate number of failures for an economy wide approach?
- What additional costs do you expect if Option 2 or Option 3 is implemented? How much training would your staff require? How much time do you think it might take to train the average staff member about the requirements in Option 2 and Option 3?
- Are there any costs or benefits to businesses that have not been acknowledged?
- Are there any unintended consequences, risks or challenges that need to be considered? Would there be an impact on current voluntary refund policies?
- Do you experience difficulties getting indemnified by the manufacturer when there have been multiple failures?

FOCUS QUESTIONS

For businesses (continued)

- If you are required to replace or refund a good you would have otherwise repaired what are you most likely to do with a good that has a minor failure, for example, repair it and sell it as a refurbished product/demonstrator?
- What proportion of products in your industry is likely to experience multiple non-major failures over time? How is this proportion likely to vary across industries?
- How much time (in a year) might the average full-time staff member spend discussing with consumers the need to repair a product subject to multiple non-major failures?
- Have you experienced any legal costs in relation to disputes about repeated non-major failures? Have these been significant and can you quantify them?
- How much staff time in minutes is typically used to contact and interact with a consumer to return to them a product that has been repaired?

FOCUS QUESTIONS

Stakeholders are encouraged to refer to the focus questions in their submissions. Where possible, Consumer Affairs Australia and New Zealand encourages stakeholders to provide case studies, data and evidence to support their views. The focus questions from throughout this chapter are set out below for ease of reference.

PROBLEM 1: FAILURE WITHIN A SHORT PERIOD OF TIME

For consumers

- Have you experienced issues with a trader not agreeing to a refund when you have had a failure with a good within a short period of time after purchase? What types of goods were involved? Was there a difference in approach between low and high value goods?

- If you have experienced issues where a trader has offered to repair, rather than refund or replace a good with a failure:

    - What *direct financial* costs did you incur during the period the good was being repaired (for instance, visiting the retailer, or hiring a replacement for the good)?

    - How much time did you spend collecting the repaired good and/or negotiating with the retailer?

    - Did you have a different experience with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good)?

- Have you had a different experience with lower value goods? Have you found that lower value goods are more readily replaced or refunded in comparison with higher value goods (such as white goods or vehicles) anyway?

- Would you be more confident negotiating a refund with greater clarity and specificity about when you can choose your preferred remedy?

- Would a right to receive a replacement or refund for a non-major failure, rather than just a repair, in the first 30 days increase your confidence in purchasing items from smaller traders? Would you opt to buy more from smaller traders as a consequence?

- Have you experienced issues with a trader not agreeing to a refund when you have had a failure with a good within a short period of time of purchase? What types of goods were involved? Did you have a different experience with lower and higher value goods?

- What is your preferred remedy when there has been a failure to meet the guarantees within a short period of time - a refund, replacement or repair? Does your preference vary depending on the type, value or intended use of the goods? Does your response depend on the type or extent of repair offered, including the estimated time required to complete the repair?

- In what circumstances do you expect to be able to reject goods for a refund? Do your expectations vary depending on the type or value of the goods?

- What is your preferred approach to the time period in Option 2? Should another time period be considered?
- Are there any benefits or costs to consumers that have not been acknowledged?
- Are there any products that should be exempt from a short specified period? (for example, by industry, type of good, value of good).
- What would be an appropriate value threshold for Option 3 'high value goods'?
- If high value goods are exempt from the short specified period, should there be any specific inclusions for certain goods which are above the value threshold?

For businesses

- Are there any unintended consequences, risks or challenges that need to be considered? For example, would there be an impact on current voluntary refunds policies? Would providing more common replacements or refunds materially increase the number of faulty products that go to waste?
- What is the difference in value between the cost of providing a refund or replacement, rather than providing a repair, for the goods you supply? Do you more readily replace or refund lower value goods currently in comparison with higher value goods?
- What proportion of returned products with non-major failures do you currently seek to repair and re-sell? By how much is the final retail price of the product likely to be reduced for repaired and resold goods?
- What is your preferred approach to the time period in Option 2? Should another time period be considered?
- Do you currently offer a voluntary refund policy within a short specified period?
- What is your preferred remedy when a consumer guarantees issue arises in relation to goods you supply? Why? Are there any specific issues arising from the provision of a particular remedy (for example, accounting for prior use of the good or depreciation, determining the cause of the defect, or issues related to government duties and taxes)?
- Would you be more confident negotiating indemnification from manufacturers with greater clarity and specificity about when there is a major failure?
- What proportion of products in your industry is likely to experience a non-major failure in the first 30 days?
- If a good experiences a non-major failure in the first 30 days which per cent might you repair rather than replace? Are you more likely to offer a replacement or refund immediately for lower value goods? How is this proportion likely to vary across industries?
- If you have had a product brought back with a non-major failure, what is the average time taken for the product to be repaired?

- Are there any products that should be exempt from a short specified period? (for example, by industry, type of good, value of good).
- What would be an appropriate value threshold for Option 3 'high value goods'?
- If high value goods are exempt from the short specified period, should there be any specific inclusions for certain goods which are above the value threshold?
- What additional training costs do you expect if Option 2 or Approach 3A is implemented? How much training would your staff require?
- Are there any costs or benefits to businesses that have not been acknowledged?

PROBLEM 2: MULTIPLE FAILURES

For consumers

- Have you experienced issues with a trader not agreeing to a refund when you have had multiple non-major failures with a good? What types of goods were involved? Over what time period did you experience these failures?
- Would you be more confident negotiating a refund with greater clarification about whether multiple non-major failures can amount to a major failure?
- Are there any benefits or costs to consumers that have not been acknowledged?
- What is your preferred remedy (repair, replacement or refund) when a consumer guarantees issue arises? Does your preference vary depending on the type, value or intended use of the goods?
- In what circumstances do you expect to be able to reject goods for a refund? Do your expectations vary depending on the type or value of the goods?
- Are there any product types that would benefit from a set number of non-major failures that would amount to a major failure (as described in Option 3)? What would be an appropriate number of failures? What would be an appropriate number of failures for an economy wide approach?
- Where a good you have returned has been repaired what has been the typical time taken for the good to be repaired?
- Where you have had to have a good repaired, on average how many more times have you needed to have that good repaired for other non-major failures?
- Would a move to option 2 or option 3 increase your confidence in purchasing items from smaller traders? Would you opt to buy more from smaller traders as a consequence?

For businesses

- Is the clarification proposed by Option 2 consistent with your current business practices?

- Are there any product types that would benefit from a set number of non-major failures that would amount to a major failure (as described in Option 3)? What would be an appropriate number of failures?

- Is an economy wide approach to this problem preferable or should the approach vary depending on the type or value of goods? What would be an appropriate number of failures for an economy wide approach?

- What additional costs do you expect if Option 2 or Option 3 is implemented? How much training would your staff require? How much time do you think it might take to train the average staff member about the requirements in Option 2 and Option 3?

- Are there any costs or benefits to businesses that have not been acknowledged?

- Are there any unintended consequences, risks or challenges that need to be considered? Would there be an impact on current voluntary refund policies?

- Do you experience difficulties getting indemnified by the manufacturer when there have been multiple failures?

- If you are required to replace or refund a good you would have otherwise repaired what are you most likely to do with a good that has a minor failure, for example, repair it and sell it as a refurbished product/demonstrator?

- What proportion of products in your industry is likely to experience multiple non-major failures over time? How is this proportion likely to vary across industries?

- How much time (in a year) might the average full-time staff member spend discussing with consumers the need to repair a product subject to multiple non-major failures?

- Have you experienced any legal costs in relation to disputes about repeated non-major failures? Have these been significant and can you quantify them?

- How much staff time in minutes is typically used to contact and interact with a consumer to return to them a product that has been repaired?