



Australian Government

CONSULTATION REGULATION IMPACT STATEMENT

Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework

**Consumer Affairs Australia and New Zealand
2018**

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ABOUT THIS REGULATION IMPACT STATEMENT

BACKGROUND TO THIS CONSULTATION RIS

In June 2015, the Australian Consumer Affairs Ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF), asked Consumer Affairs Australia and New Zealand (CAANZ) to initiate a broad-reaching review of the Australian Consumer Law (ACL).

In March 2017, CAANZ presented the Final Report of the ACL Review (the Review).

The Review found that the introduction of the ACL had been beneficial for both consumers and traders and the ACL is generally 'fit for purpose'. In particular, the Review found that the flexible and economy-wide approach taken to consumer guarantees within the ACL has assisted in clarifying the rights and responsibilities of both traders and consumers. However, the Review also identified ongoing difficulties with the operation of the consumer guarantee provisions, and made a number of proposed amendments to the ACL, to assist with further clarification, simplification and modernisation of the law.

In August 2017, CAF supported regulatory impact assessment of seven proposals from the Review. Five of those proposals and their implementation options relate to the consumer guarantees regime in the ACL, and are considered in this consultation regulatory impact statement (Consultation RIS).

AN OVERVIEW OF THE ACL

The ACL is a single generic consumer protection law operating as a law of the Commonwealth and in each State and Territory. The ACL provides a system of consumer protections and remedies for consumers in relation to defective goods and services (consumer guarantees), prohibitions against misleading and deceptive conduct and unconscionable conduct, unfair contract term protections, a harmonised national product safety and enforcement system, national laws covering a number of sales practices and enforcement powers.

The consumer guarantees set out standards for goods and services supplied to consumers, and are independent of contractual arrangements between parties. They are outlined in Part 3-2, Division 1 of the ACL. Among these guarantees is section 54, which provides the consumer with the principal guarantee that goods are of acceptable quality. Other key guarantees include the guarantee of title (section 51), that the product is fit for purpose (section 55) and that the goods correspond with the description or sample model provided to the consumer (sections 56 and 57).

PURPOSE OF THIS CONSULTATION RIS

A Consultation RIS presumes that there *may* be scope for the Government to take action to address an identified problem. The purpose of the Consultation RIS, therefore, is ‘to canvass the regulatory options under consideration, in order to determine the relative costs and benefits of those options.’¹

The Council of Australian Governments (COAG) Best Practice Regulation guidelines for regulatory proposals made by Ministerial Councils and National Standards (the Guidelines) require that a Consultation RIS canvass both regulatory and non-regulatory approaches, and include a status quo or ‘no change’ option (recognising that not all problems have a cost effective solution through government action).

The Consultation RIS is provided to stakeholders for comment. Your views are sought on those areas where further data is needed and/or where assumptions made in the analysis require verification. Views are also sought on the costs and benefits of each of the five proposals and their associated options for implementation. The costs and benefits of each of the five proposals will be assessed individually to assist Ministers to form a view on whether any regulatory change should be supported. The Consultation RIS therefore provides a valuable means through which governments and stakeholders can consider policy and regulatory options in meaningful and constructive way.

THE STRUCTURE AND FOCUS OF THIS CONSULTATION RIS

This Consultation RIS is comprised of four chapters, addressing five proposals from the Review which relate to the consumer guarantee regime in some way and their implementation options. The Consultation RIS is structured as follows:

1. **Chapter 1:** Increasing the threshold in the definition of ‘consumer’ from \$40,000 to \$100,000;
2. **Chapter 2:** Clarifying the consumer guarantees remedies (comprised of two proposals – failure within a short period of time and multiple failures);
3. **Chapter 3:** Enhanced disclosure for extended warranties; and
4. **Chapter 4:** Access to consumer guarantees for goods sold at auctions.

In considering this Consultation RIS it is important to note some key features of the consumer guarantee provisions which operate as preconditions to accessing the consumer guarantees regime. These features are who is a ‘consumer’, and which party is entitled to choose the remedy where there is a failure to meet the consumer guarantees, and are the focus of chapters 1 and 2 respectively. Accordingly, these chapters set the scene for the next two chapters, which focus on disclosure obligations and auction exemptions.

1 COAG (2007), *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, Canberra.

AN OVERVIEW OF THE PROPOSALS AND THEIR IMPLEMENTATION OPTIONS

This section provides an outline of the main findings for each of five proposals, and a summary of their implementation options.

Chapter 1: Increasing the threshold in the definition of ‘consumer’ from \$40,000 to \$100,000

Many of the ACL’s protections (including consumer guarantees) apply only when goods or services are supplied to a ‘consumer’ as defined in the ACL. According to one of the definitions, a buyer of goods will be a consumer if the purchase price does not exceed the current threshold of \$40,000 and the goods are not bought for the purpose of resupply or to make a new product for a commercial purpose.

The current threshold amount of \$40,000 has not changed since its introduction in 1986. A finding from the Review is that the level of protection afforded to consumers (including small businesses) has been eroded over time as the decline in the real value of the threshold means that certain business purchases once covered under the ACL are no longer so covered. The Review proposed that the threshold amount be increased to \$100,000.

In relation to this proposal, Chapter 1 explores these options:

1. Maintain the status quo;
2. Increase the threshold in the definition of consumer from \$40,000 to \$100,000; and
3. Increase the threshold in the definition of consumer from \$40,000 to \$100,000 and apply indexation.

Chapter 2: Clarifying the consumer guarantees

Chapter 2 comprises of two proposals from the Review.

Failure within a short period of time

Under the current regime, where a good purchased by a consumer fails to meet one of the consumer guarantees, the consumer’s right to reject the good is dependent on whether the failure is ‘major’. If it is a major failure, consumers have the right to reject the goods within a reasonable 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.

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 there is a failure within a short period of time after purchase. The Review also noted that a failure that occurs within a short period of time would be considered a major failure, as a reasonable consumer would not have purchased a good had they known it would fail within a short period. Accordingly, the Review proposed that the ACL be amended to specify that where there is a failure 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.

In relation to this proposal, Chapter 2 explores these options:

1. Maintain the status quo;
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;
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.
 - 3.1. 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.

Multiple failures

The consumer guarantees provisions are currently unclear about whether multiple non-major failures can collectively be considered a major failure. This has resulted in uncertainty for both consumers and businesses. The Review 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.

In relation to this proposal, Chapter 2 explores these options:

1. Maintain the status quo;
2. Clarify that multiple non-major failures can amount to a major failure; and
3. Specify the number of non-major failures that can amount to a major failure.

Chapter 3: Enhance disclosure for extended warranties

The Review noted that it was sometimes difficult for consumers to determine if an extended warranty offers value for money and provides the additional protection they seek. The Review recommended enhancing disclosure in relation to extended warranties by requiring:

- agreements for extended warranties to be clear and in writing;
- additional information about what the ACL offers in comparison; and
- a cooling-off period of 10 working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed orally and in writing.

In relation to this proposal, Chapter 3 explores these options:

1. Maintain the status quo;
2. A legislative amendment comprising a cooling-off right, oral disclosure and written disclosure; and
3. Oral and written disclosure with an opt-in process.

Chapter 4: Access to consumer guarantees for goods sold at auctions

Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the ACL on the basis that, typically, consumers purchasing from traditional auctions have had the ability to inspect goods and identify defects prior to purchase. However, such an ability does not extend to auctions that occur in an 'online only' manner. The traditional rationale for the exemptions is difficult to apply to the online context.

The Review proposed modernizing the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

In relation to this proposal, Chapter 4 explores these options:

1. Maintain the status quo;
2. Goods purchased through online auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales). The status quo remains if the auctioneer makes the goods reasonably available for inspection;
3. Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding) receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person ; and
4. All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

CONSULTATION

SUMMARY

1. CAANZ aims to use the public consultation process to seek feedback on the policy options for each of the proposals as presented in this Consultation RIS.
2. CAANZ will accept formal written submissions, conduct face-to-face meetings with key stakeholders and provide the opportunity for consumers to share their experiences with the ACL generally, and consumer guarantees in particular, through a comment facility on our website.

CAANZ will undertake an extensive public consultation process in relation to the proposals and options explored in this Consultation RIS. The objective of the consultation process is to gather additional evidence and data on the extent of the problem and to seek views on the benefits and costs of the proposed policy options in each of the chapters.

The consultation process will consist of:

- a formal written submission process;
- targeted face-to-face and telephone meetings with key stakeholders; and
- a comment facility for consumers to share their experiences.

CAANZ intends to reach a broad cross-section of stakeholders. It will be important to assess the views of consumers, traders and businesses.

Once the initial consultation process has concluded, a final or decision-making RIS will be produced to discuss the results of the consultation process, the evidence that has been gathered and the preferred policy option for each of the proposals. All submissions to the consultation process will be published on the CAANZ website, unless authors have indicated that they would like all or part of their submission to remain in confidence.

Specific questions are likely to arise from this consultation paper which may have not been considered at the time of drafting and CAANZ may undertake further targeted consultation with key stakeholders if necessary.

CAANZ has designed the consultation procedures consistently with COAG consultation principles and has ensured that there is flexibility to maximise stakeholder participation in the consultation process.

Both this Consultation RIS and the decision-making RIS will be published on the Office of Best Practice Regulation website.

CONSULTATION REGULATION IMPACT STATEMENT

CHAPTER ONE

Australian Consumer Law Review: Increasing the threshold in the definition of ‘consumer’ from \$40,000 to \$100,000

Consumer Affairs Australia and New Zealand
2018

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EXECUTIVE SUMMARY

The Australian Consumer Law (ACL) contains a number of definitions of who is and is not a 'consumer' for the purposes of the legislation, each of which is independent from the other. The application of many (but not all) ACL consumer protection provisions is contingent upon a claimant establishing that they are a 'consumer' as defined by the ACL.

One of the definitions states that a person is a 'consumer' if they acquire goods or services that do not exceed the monetary threshold of \$40,000.

In 2017, the ACL Review Final Report (the Review) found that the extent of consumer and small business protection provided by the ACL had eroded over time, as the real value of the monetary threshold of \$40,000 in the ACL's definition of 'consumer' declined. As a result, the scope of purchases protected by the ACL has diminished, and the definition is no longer fit for purpose. The Review proposed that the \$40,000 threshold be increased to \$100,000 to broadly account for inflation since the threshold was set in 1986.

This chapter is a consultation regulatory impact statement (RIS) on three options which aim to ensure that the monetary threshold remains fit for purpose, and that eligible consumers, including small businesses, remain protected by the ACL regime. The Review's proposal to increase the threshold is one of these options (Option 2). The remaining options are to maintain the status quo (Option 1) or to increase the threshold from \$40,000 to \$100,000 and apply indexation (Option 3).

Views are sought on these options – including whether they would address the problem, how effective they would be and what impacts they would have. Consumer Affairs Australia and New Zealand also welcomes views on any alternative options for ensuring that the ACL's definition of 'consumer' remains fit for purpose.

INTRODUCTION

THE EXISTING LEGISLATIVE FRAMEWORK

1. Section 3(1) of the ACL defines a consumer as someone who acquires goods in any of the three circumstances set out below.
2. The first situation, which is the focus of this RIS chapter, involves a person acquiring goods or services that do not exceed the monetary threshold of \$40,000. Section 3(3)(a) adopts a similar definition for a consumer acquiring services. The inclusion of the monetary threshold was intended to broaden the group of consumers who were protected under the regime, with specific emphasis on protecting small businesses. This situation also covers purchases of commercial products not exceeding \$40,000 for personal use by a consumer.
3. The second situation involves a person acquiring goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. There is no monetary threshold set for this situation.
4. The third situation involves a person acquiring a vehicle or trailer for transporting goods on public roads.
5. Under subsection 3(2), in order to fall within the definition of 'consumer', the goods or services acquired must not be used for any of the following purposes:
 - a. Resupply; or
 - b. Using them up or transforming them, in trade or commerce: in the course of production or manufacture, or in the course of repairing or treating other goods or fixtures on land.
6. For example, a small business acquires an excavator for \$30,000 for the purpose of on-sale (as opposed to using in the course of its business). Although the purchase is under the \$40,000 threshold and so appears to fall within the definition of 'consumer', because the excavator was purchased for the purpose of re-supply, the transaction is excluded from the definition of 'consumer'.
7. As the consumer guarantees are key and commonly used rights, it is important that the definition of 'consumer' continues to be fit for purpose so individual and small business consumers continue to receive the protection that they are entitled to.

THE AUSTRALIAN CONSUMER LAW REVIEW

8. The Review noted that the monetary threshold of \$40,000 in the definition of 'consumer' has not changed since the threshold was increased from \$15,000 in 1986. The decline in the real value of the threshold means that certain purchases not ordinarily made for personal, domestic or household use that were once within the ACL's protection are no longer so protected. The Review proposed that the \$40,000 threshold be increased to \$100,000 to broadly account for inflation on the cost of goods and services since 1986.

9. The Review involved two stages of public consultation. In both stages, the majority of responses that referenced the \$40,000 threshold in the definition of 'consumer' supported increasing the monetary amount.

THE PROBLEM

OVERVIEW

The level of protection provided by the \$40,000 threshold in the definition of 'consumer' has eroded since it was set in 1986. The decline in the real value of the threshold means that certain purchases not ordinarily made for personal, domestic or household use that were once covered under the ACL are no longer covered. The existing threshold may no longer be fit for purpose.

THE DEVELOPMENT OF THE MONETARY THRESHOLD: PROTECTING SMALL BUSINESSES

10. The history and development of the monetary threshold in this definition of 'consumer' demonstrates that lawmakers were conscious of the need to extend protection to small business consumers.¹
11. The 1976 Trade Practices Act Review Committee Report (the *Swanson Report*) was 'strongly of the view' that consumer protections should extend to 'a range of business transactions, particularly purchases by small businesses.'² In their view, this would address one of the functions of consumer protection laws, being 'to redress, between supplier and customer, inequalities in the technical expertise required to recognise, and the bargaining power to negotiate, a fair bargain.'³
12. The *Trade Practices Amendment Act 1977* first introduced a monetary threshold of \$15,000. According to the explanatory memorandum, the introduction of this threshold was to 'permit parties to contract for a **minimum limitation on liability**...in relation to goods or services not ordinarily acquired for personal, domestic or household use or consumption.' The Bill Digest noted that the definition was broadened for the benefit of 'small businessmen'.
13. In 1986, the *Trade Practices Revision Act 1986* (Cth) increased this threshold amount to the current value of \$40,000. The Explanatory Memorandum to the Bill explained that:

*As a result of inflation over the past 8 years, the real value of the \$15,000 monetary limit ... has been significant eroded, and an adjustment to the monetary limit is needed to restore the protection given by the Act to consumers and small businesses.*⁴

1 However, larger businesses are not precluded from claiming protection under the ACL. In *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43, Aravco made a successful claim against Qantas for failure to render services worth around \$5,000 with due care and skill under the section 74 of the *Trade Practices Act 1974* (Cth).

2 Swanson Committee, Trade Practices Act Review Committee Report 1976, [9.40].

3 Swanson Committee, Trade Practices Act Review Committee Report 1976, [9.40].

4 Parliament of the Commonwealth of Australia, Trade Practices Revision Bill 1986 – Explanatory Memorandum, [13].

14. A specific example of how small business owners may benefit under the statutory regime providing for simplified avenues of redress as a 'consumer' is outlined below (**Case study 1**).

CASE STUDY 1 – PROTECTING SMALL BUSINESS TRUCK OWNER-OPERATORS

15. The original 1986 amendments considered increasing the monetary threshold from \$15,000 to \$200,000. Speaking in this context, the *National Road Freight Industry Inquiry Report* (September 1984) 'wholeheartedly' endorsed the proposed increase of the monetary threshold as it would extend the *Trade Practices Act 1974* implied warranties regime to protect truck owner-operators. The Inquiry found that the then existing consumer protection arrangements available for truck owner-operators was complex, and that the 'iterant owner-driver finds it very difficult to quickly establish his rights without involving legal advice with its attendant costs.'
16. Consistent with inflation, the monetary threshold was eventually increased to \$40,000 in the 1986 amendments. In response to the Inquiry's finding, the 1986 amendments also provided that all purchases of commercial road vehicles would be deemed to be consumer purchases. Addressing the Inquiry's concerns, the 1986 amendments ensured that 'truck owner-operators who purchase a truck for use in their business are afforded the protection offered' by the implied warranties regime.⁵
17. In 2010, when the ACL was being developed, the removal of the monetary threshold part of the definition of 'consumer' was considered. However, the threshold amount of \$40,000 was retained in the final version of the ACL. The Second Reading speech for the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) justified retaining the threshold on the basis of ensuring that 'small businesses continue to be protected' under the new regime.
18. From this history, it appears that a key rationale behind the 1977 introduction of the monetary threshold, the 1986 increased threshold amount and the 2010 retention of the threshold was to ensure that small businesses consumers were afforded legal protections that were similar to those afforded to individual consumers under *the Trade Practices Act 1974* (Cth) and State and Territory consumer law regimes. However, while the threshold was developed with small businesses in mind, there was no intention to exclude businesses, large or small, from the protections in the ACL.

Small businesses require the same protection as consumers

19. Small businesses play a key role in driving growth and creating jobs in the Australian economy. In 2017, the Australian Bureau of Statistics announced an annual 2.4 percent increase in business numbers (in the 2015-16 financial year), primarily driven by growth in small businesses.⁶

5 Parliament of the Commonwealth of Australia, *Trade Practices Revision Bill 1986 – Explanatory Memorandum*, [13]-[14].

6 ABS Media Release, *Business numbers up 2.4% from June 2015* <http://www.abs.gov.au/ausstats/abs@.nsf/media/releasesbytitle/950EC94DB899312ECA2573B00017B8F4>.

20. In the *Review of Australia's Consumer Policy Framework: Inquiry Report*, the Productivity Commission acknowledged the unique dual role of small businesses: 'as well as being suppliers of goods and services, they are consumers in their own right.'⁷ The Productivity Commission continued:

Indeed, in their dealings with larger businesses, small businesses can face many of the same issues as individual consumers, particularly relating to unequal bargaining power and the lack of resources to effectively negotiate contracts.

21. From this perspective, the ACL simultaneously confers both protections and obligations on businesses of all sizes.
22. Freilich and Webb highlight that the general presumptions about businesses being on equal footing and not requiring protection does not reflect the reality of small businesses.⁸

Small-business persons come from a variety of backgrounds, levels of business and personal experience, financial liquidity, education and literacy. Moreover, small businesses feature a significant proportion of persons who are, in many circumstances, marginalised from the wider workforce, such as women and migrants. Also, being a good business person with regard to one's own trade or profession does not automatically mean that a person is well versed in business and the law. In most cases, the future of a small business rests on the managerial expertise of an individual or small group of owners. ... [M]any small businesses simply cannot afford the accounting, financial and legal advice which larger concerns take for granted.⁹

23. Like individual consumers, small businesses are often in a weaker bargaining position and should be afforded comparable legal protection.

Many small business consumers are denied access to the ACL solely due to the decline in the real value of the monetary threshold

24. With the decline in the real value of the threshold which has occurred since 1986, certain small business purchases that were once protected by the ACL regime are no longer so protected. The Review cited client record systems, certain farm and agricultural equipment, air-conditioning units for industrial buildings, water tanks and some vehicle purchases as examples.
25. Using producer price index (PPI) analysis, the NSW Department of Finance, Services and Innovation (NSW DFSI) provided a case study (see **Case study 2**) of a particular small business purchase that would have satisfied the definition of 'consumer' in 1986, but no longer did in 2011, solely due to the decline in the real value of the monetary threshold.

7 Productivity Commission Inquiry Report, *Review of Australia's Consumer Policy Framework*, 2008, page 318.

8 Aviva Freilich and Eileen Webb, 'Small Business: Forgotten and in need of protection from unfairness?' (2013) 37 *University of Western Australia Law Review* 134, 138.

9 Aviva Freilich and Eileen Webb, 'Small Business: Forgotten and in need of protection from unfairness?' (2013) 37 *University of Western Australia Law Review* 134, 138-139.

CASE STUDY 2 – COMPLAINT ABOUT AN AGRICULTURAL EXCAVATOR

26. An agricultural business owner lodged a complaint about his agricultural excavator, which he purchased in 2011 for \$54,000. The agricultural business owner needed to repair the excavator after it broke down. However, neither the manufacturer nor the dealer were able to provide the spare part. As an excavator is not likely to be considered something that is normally used for domestic or household use and costs more than \$40,000, the agricultural business owner was advised that he was not able to seek a remedy under the ACL.
27. According to the producer price index, the prices of agricultural machinery and equipment in 2011 were 33 index points or 41 percentage points higher than the prices in 1986. This means the price paid for the excavator in 2011 (\$54,000) would have been \$38,297 if purchased in 1986 and therefore would have been covered by the ACL's \$40,000 threshold.
28. NSW DFSI also provided examples of other types of machinery that would be covered by the ACL if the threshold was raised to \$100,000:
 - Trucks ranging from \$40,000 to \$100,000
 - Portable compressors – average price \$45,000
 - Forklifts – average price \$40,000 to \$55,000
 - Diesel powered pumps – average price \$85,000
 - Tanks for trucks – average price \$90,000
 - Excavators – average price \$85,000
29. Since 1986, there will also have been a *decline* in the relative prices of some goods and services as a result of significant technological advancement and improvements, for example, computer equipment. In these cases, the decline in the relative price of such goods and services offsets the impact of the decline in the real value of the monetary threshold, so that these goods and services continue to be covered by the ACL.

FOCUS QUESTION

For everyone

- In your sale and purchase of goods experiences, what purchases of goods or services would have formerly met the requirements of the definition of 'consumer', but are now excluded from this definition due to the decline in the real value of the monetary threshold? Please describe how you have reached this conclusion.

Small businesses suffer a commercial impact

30. All consumers are, to varying degrees, adversely affected by the purchase of a good or service which fails to comply with a particular standard or guarantee. Particularly from a small business perspective, faulty or defective goods or services could result in lost productivity or profits. An example of this was provided by NSW DFSI and is outlined below (see Case study 3).

CASE STUDY 3 – A SMALL BUSINESS DISPUTE ABOUT A WATER TANK

A small business owner paid \$70,000 for a water tank to be installed on his truck by the supplier. After installation, the water tank began to crack. The small business owner believed that the manufacturer had used inferior plastic to construct the tank. The small business owner lost four jobs as a result of the faulty water tank, causing financial loss. The manufacturer of the water tank declared bankruptcy and the supplier refused to provide a refund. The supplier refused to participate in mediation to resolve the dispute, forcing the small business owner to take the matter to Court.

FOCUS QUESTION

For businesses

- If you have been excluded from making a claim under the ACL due to the decline in the real value of the monetary threshold, how has this exclusion impacted or affected your business? Please explain the circumstances.

Consumer purchases of commercial products should be entitled to protection

31. The Review observed that a flow-on benefit of increasing the threshold was that consumer purchases of commercial products which are above the current \$40,000 threshold would also be protected.¹⁰
32. An example is where an individual consumer purchases commercial glass for installation in a home. If the cost exceeds \$40,000, it is likely that the consumer would not be protected under the ACL, as commercial glass is likely not ordinarily acquired for personal, domestic or household use of consumption and the purchase does not fall within the threshold.¹¹

10 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, page 74.

11 Australian case law on the interpretation of when a good or service is 'ordinarily acquired for personal, domestic or household use or consumption' is currently unsettled on this point. In a key consumer guarantees case from New Zealand, *Nesbit v Porter* [2000] 2 NZLR 465, the Court of Appeal confirmed the view that goods and services could be acquired for both personal and commercial use.

FOCUS QUESTION**For businesses**

- In your experience as a business, how often have consumers bought goods or services which could be used in both a domestic and commercial setting? Can you provide some common examples?

For consumers

- Please describe your experiences as a consumer when you have acquired a good or service that would not ordinarily be acquired for personal, domestic or household use? Why did you make this choice?

EXCLUSION FROM THE ACL: LIMITED ALTERNATIVE RECOURSE

33. The previous discussion suggests that but for the decline in the real value of the monetary threshold, more small businesses purchases would be protected by the ACL. The ACL was never intended to offer blanket protection coverage for all business purchases. However, the failure to recognise inflation does mean some consumers, including small businesses, have been unjustifiably excluded from the regime over time.
34. Under the current law, where the cost of a good or service exceeds the monetary threshold of \$40,000 (and the nature of the transaction does not satisfy other definitions of 'consumer'), the purchaser would not be able to take advantage of certain protections offered by ACL provisions, including the consumer guarantees. The effect of such exclusion is that they would be required to rely upon alternative legal avenues, such as claims based on contract law or negligence.
35. However, many small businesses (like ordinary consumers) may not be able to negotiate contract terms or establish a duty of care from their supplier to support a claim under negligence. In contrast, the consumer guarantees cannot be excluded by contract, nor is it necessary to establish any duty of care.
36. In the absence of ACL protections, in particular the consumer guarantee provisions, consumers and small businesses will need to seek non-ACL based recourse. As the nature and extent of contractual warranties outside of the ACL's consumer guarantees vary between suppliers and manufacturers, a small business consumer may need to invest in locating a supplier who is able to provide adequate warranties. However, small businesses may (like ordinary consumers) lack bargaining power as well as the time, skill and expertise to assess the quality of products and the adequacy of any warranties provided. Where a good or service is faulty, the consumer will need to consider alternative, non-ACL legal redress or compensation, including commencing court proceedings. The process for resolution of a dispute for claims under contract and negligence can be complex, slow and resource-consuming, and may require professional legal advice.

FOCUS QUESTIONS

For consumers

- If you have experienced exclusion from the ACL's protective regime due to the monetary threshold, please outline your experience in obtaining redress and remedy. What alternative legal recourse/s did you rely on? What was the cost associated with obtaining this redress?
- What means have you adopted to protect your rights as a consumer? Please discuss costs, resources required and experiences in negotiating and dealing with suppliers (if applicable).

POLICY OBJECTIVE

OVERVIEW

The policy objective behind the proposal to increase the monetary threshold in the definition of 'consumer' is to ensure that the ACL continues to be fit for purpose in protecting individual and small business consumers when purchasing goods or services not ordinarily acquired for personal, domestic or household use or consumption.

37. The policy objective acknowledges that small businesses, like individual consumers, often face information asymmetries and are time and resource poor. It remains unchanged from when it was first introduced in 1977. In light of the changes in prices since 1986, the increase to \$100,000 would broadly reinstate the original purchasing power of the \$40,000 threshold, ensuring the ACL remains fit for purpose in this context.

OPTIONS AND IMPACT ANALYSIS

OVERVIEW

In achieving the policy objective, it is important that the benefit should exceed the costs. The options addressing the problem should provide certainty to manufacturers and suppliers, and not increase their regulatory burden or compliance costs unnecessarily.

To address the defined problem, this RIS chapter explores three options:

- **Option 1:** maintain the status quo.
- **Option 2:** increase the threshold from \$40,000 to \$100,000 in the definition of 'consumer'.
- **Option 3:** increase the threshold from \$40,000 to \$100,000 in the definition of 'consumer' and apply indexation.

OPTION 1: MAINTAIN THE STATUS QUO

38. If the status quo is maintained, current laws would continue to operate. All purchases of goods or services ordinarily acquired for domestic, personal or household use will remain covered. A purchase will be outside the definition of 'consumer' when that purchase is 'not ordinarily for domestic, personal or household use' and in excess of the monetary threshold amount of \$40,000, and will not be covered by the ACL consumer guarantee protections.

Impact analysis

39. A benefit to both businesses and consumers if the status quo is maintained is that it offers legal certainty as there is no change to the existing law, contractual arrangements or warranties. Businesses would not have to take any action to reflect an increased monetary threshold amount in their transactions.
40. As outlined in the 'Problem' section, consumers would continue to be excluded from the ACL protections which rely on the definition of 'consumer' where their purchase of commercial products exceeds the \$40,000 monetary threshold amount. These consumers would need to consider alternative, non-ACL legal redress or compensation.
41. There may also be issues about whether the threshold remains fit for purpose into the future as the price of goods and services continues to change over time.

BENEFITS	COSTS
<ul style="list-style-type: none">• Certainty for businesses and consumers as the law maintains the status quo.	<ul style="list-style-type: none">• Consumers are not able to access the ACL's protective regime if their purchase of a commercial product exceeds the \$40,000 monetary threshold.
<ul style="list-style-type: none">• Businesses do not need to adjust compliance mechanisms.	<ul style="list-style-type: none">• Consumers would need to consider protection or legal redress outside the ACL's consumer guarantee regime.

FOCUS QUESTIONS

For everyone

- Is the current monetary threshold a barrier to consumer access to the ACL regime?
- Are there any other benefits associated with maintaining the status quo?
- What are other potential costs to industry, consumers and businesses if the status quo was maintained?
- How many purchases have you made for a commercial product costing above \$40,000?
- If you have been excluded from the ACL's regime as a result of the current monetary threshold amount, what means have you adopted to protect or enforce your rights? Please discuss costs, resources required and experiences in this context.

OPTION 2: INCREASE THE THRESHOLD IN THE DEFINITION OF CONSUMER FROM \$40,000 TO \$100,000

42. This option would increase the monetary threshold in the definition of 'consumer' from \$40,000 to \$100,000, thus restoring the real value of the threshold and achieving parity in protection available when the current threshold was established in 1986. An amendment would be made to the ACL to increase the threshold.

Impact analysis

43. This option ensures that the definition of 'consumer' is fit for purpose and consistent with the original policy intent for ACL protections to extend to consumers, including small businesses. The real value of commercial purchases would be more accurately reflected, providing individual and small business consumers with the confidence that their purchases will be protected under the ACL regime so long as they fall under the \$100,000 threshold amount and are not otherwise excluded (for example, by being for the purpose of resupply). Search costs may also be reduced as consumers will not need to expend further cost and effort in seeking non-ACL forms of protection or redress, including reliance upon common law actions grounded in contracts or tort law, which are unclear in operation and uncertain in outcome.
44. This option is not without potential compliance costs to suppliers of such goods. Such suppliers may need to invest in updating record keeping mechanisms to ensure that future sales of goods or services reflect the new threshold amount, and ensure they meet any consequential obligations. Further training of staff to assist them in understanding updated legal obligations may also be necessary. On the other hand, the ACL regime has been in operation for almost seven years. If only the threshold *amount* is increased, but the law is otherwise unaffected, the costs associated with compliance and education initiatives may be minimal.
45. While businesses of all sizes would benefit from increased protections when purchasing goods and services, there is also the potential financial loss faced by businesses in the supply of goods and services for commercial use due to the wider range of purchases protected by the ACL. Such costs could result from increased claims, compensation and other forms of redress and insurance premiums.

46. It is also acknowledged that the real value of the threshold will decrease in value as the costs of certain goods increase over time and may need to be updated again.

BENEFITS	COSTS
<ul style="list-style-type: none"> The real value of the threshold is maintained. 	<ul style="list-style-type: none"> Compliance costs to ensure and maintain updated record keeping.
<ul style="list-style-type: none"> The original policy intent of the monetary threshold within the definition of consumer is maintained in protecting small business consumers, and reducing search costs for businesses of all sizes. 	<ul style="list-style-type: none"> For businesses: training costs to understand and comply with legal obligations under the increased monetary threshold.
<ul style="list-style-type: none"> Small businesses receive maintained protection under the ACL. 	<ul style="list-style-type: none"> Potential for increased financial loss due to the wider range of products covered by the ACL.
<ul style="list-style-type: none"> ACL protection may lead to increased small business demand because of increased purchasing confidence. 	<ul style="list-style-type: none">

FOCUS QUESTIONS

For everyone

- To what extent would consumers and businesses, especially small businesses, be better protected under the ACL if the threshold amount was increased to \$100,000?
- Does increasing the threshold also result in increasing the potential class or categories of products that would not have been covered by the ACL regime under previous thresholds?

For businesses

- Would your costs for compliance and training purposes increase if the threshold amount was increased to \$100,000? By how much?
- What are other potential costs (such as compensation and insurance coverage) to businesses if the monetary threshold was increased from \$40,000 to \$100,000?
- Are there other benefits, costs or difficulties for your business if the monetary threshold was increased from \$40,000 to \$100,000 that should be considered?

OPTION 3: INCREASE THE THRESHOLD IN THE DEFINITION OF CONSUMER FROM \$40,000 TO \$100,000 AND APPLY INDEXATION

47. This option builds upon Option 2 by initially increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000, with a provision in the law to allow for indexation or other adjustments to this figure at regular intervals. The amount could be reviewed by using the Producer Price Indexes (PPIs), which measure changes in the prices received by businesses for categories of goods and services they produce. This option would only apply to goods not ordinarily purchased for personal, domestic or household use.

Impact analysis

48. The benefits and costs are the same as those identified in Option 2. An additional benefit under this option is that the threshold will be reviewed more frequently so that it reflects the real value of goods more accurately. It ensures that the law does not become significantly out of alignment with the original policy intent.
49. An additional cost to this proposal is the potential increase in uncertainty, due to the threshold being regularly reviewed and amended. Purchasers may also find it more difficult to recall and assert their consumer guarantee rights if the threshold changes regularly. Suppliers may have difficulty in complying with regular amendments, potentially resulting in an increase in compliance and administrative costs as they will be required to update their records on a regular basis.
50. Given that the inflation rate in Australia is sufficiently low 'that it does not materially distort economic decisions in the community'¹², there is a possibility that the costs of this option may significantly outweigh associated benefits.

BENEFITS	COSTS
<ul style="list-style-type: none"> The real value of the threshold is maintained. 	<ul style="list-style-type: none"> Increased uncertainty as the threshold amount will regularly change.
<ul style="list-style-type: none"> The original policy intent of the ACL regime is maintained in protecting small businesses in particular, and reducing search costs for businesses of all sizes. 	<ul style="list-style-type: none"> Compliance costs to ensure and maintain updated record keeping on a more regular basis.
<ul style="list-style-type: none"> The threshold continues to increase in line with appropriate indexation, maintaining the real value of the goods entitled to protection under the ACL. 	<ul style="list-style-type: none"> For businesses: training costs to understand and comply with legal obligations under the increased monetary threshold.
	<ul style="list-style-type: none"> Potential for increased financial loss due to the wider range of products covered by the ACL.
	<ul style="list-style-type: none"> Potential for greater confusion among consumers about their rights under the ACL, and whether their purchase is covered.

12 Reserve Bank of Australia, *Inflation Target* <https://www.rba.gov.au/inflation/inflation-target.html>.

FOCUS QUESTIONS

For everyone

- Should the threshold amount be reviewed or indexed? If so, how regularly and through what mechanism should this review or indexation occur?
- Would Producer Price Indexes (PPIs) be an appropriate form of indexation? Are there any other indexes which could be applied?
- Are there any other regulatory mechanisms where units are indexed or adjusted which could be applied or used as guidance in the consumer law framework?
- Does this option offer any additional and/or significant benefits as compared to Option 2?
- Are there any particular goods, services or industries that would significantly benefit from a threshold amount that is reviewed and amended on a regular basis? Please describe.

For businesses

- As a supplier, would your costs for compliance and training purposes increase if the threshold amount was reviewed and amended on a regular basis? By how much?
- What would be the differences in cost between options 2 and 3?
- Are there other benefits, costs or difficulties for your business if the monetary threshold was increased from \$40,000 to \$100,000 and then reviewed or amended on a regular basis that should be considered?

FOCUS QUESTIONS

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

THE PROBLEM

For everyone

- In your sale and purchase of goods experiences, what purchases of goods or services would have formerly met the requirements of the definition of 'consumer', but are now excluded from this definition due to the decline in the real value of the monetary threshold? Please describe how you have reached this conclusion.

For businesses

- In your experience as a business, how often have consumers bought goods or services which could be used in both a domestic and commercial setting? Can you provide some common examples?
- If you have been excluded from making a claim under the ACL due to the decline in the real value of the monetary threshold, how has this exclusion impacted or affected your business? Please explain the circumstances.

For consumers

- Please describe your experiences as a consumer when you have acquired a good or service that would not ordinarily be acquired for personal, domestic or household use? Why did you make this choice?
- If you have experienced exclusion from the ACL's protective regime due to the monetary threshold, please outline your experience in obtaining redress and remedy. What alternative legal recourse/s did you rely on? What was the cost associated with obtaining this redress?
- What means have you adopted to protect your rights as a consumer? Please discuss costs, resources required and experiences in negotiating and dealing with suppliers (if applicable).

THE POLICY RESPONSE

For everyone

- Is the current monetary threshold a barrier to consumer access to the ACL regime?
- Are there any other benefits associated with maintaining the status quo?
- What are other potential costs to industry, consumers and businesses if the status quo was maintained?
- How many purchases have you made for a commercial product costing above \$40,000?
- If you have been excluded from the ACL's regime as a result of the current monetary threshold amount, what means have you adopted to protect or enforce your rights? Please discuss costs, resources required and experiences in this context.
- To what extent would consumers and businesses, especially small businesses, be better protected under the ACL if the threshold amount was increased to \$100,000?
- Does increasing the threshold also result in increasing the potential class or categories of products that would not have been covered by the ACL regime under previous thresholds?
- Should the threshold amount be reviewed or indexed? If so, how regularly and through what mechanism should this review or indexation occur?
- Would Producer Price Indexes (PPIs) be an appropriate form of indexation? Are there any other indexes which could be applied?
- Are there any other regulatory mechanisms where units are indexed or adjusted which could be applied or used as guidance in the consumer law framework?
- Does Option 3 offer any additional and/or significant benefits as compared to Option 2?
- Are there any particular goods, services or industries that would significantly benefit from a threshold amount that is reviewed and amended on a regular basis? Please describe.

For businesses

- Would your costs for compliance and training purposes increase if the threshold amount was increased to \$100,000? By how much?
- What are other potential costs (such as compensation and insurance coverage) to businesses if the monetary threshold was increased from \$40,000 to \$100,000?
- Are there other benefits, costs or difficulties for your business if the monetary threshold was increased from \$40,000 to \$100,000 that should be considered?
- As a supplier, would your costs for compliance and training purposes increase if the threshold amount was reviewed and amended on a regular basis? By how much?
- What would be the differences in cost between options 2 and 3?
- Are there other benefits, costs or difficulties for your business if the monetary threshold was increased from \$40,000 to \$100,000 and then reviewed or amended on a regular basis that should be considered?

CONSULTATION REGULATION IMPACT STATEMENT

CHAPTER TWO

Australian Consumer Law Review: Clarifying the consumer guarantees remedies

**Consumer Affairs Australia and New Zealand
2018**

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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.

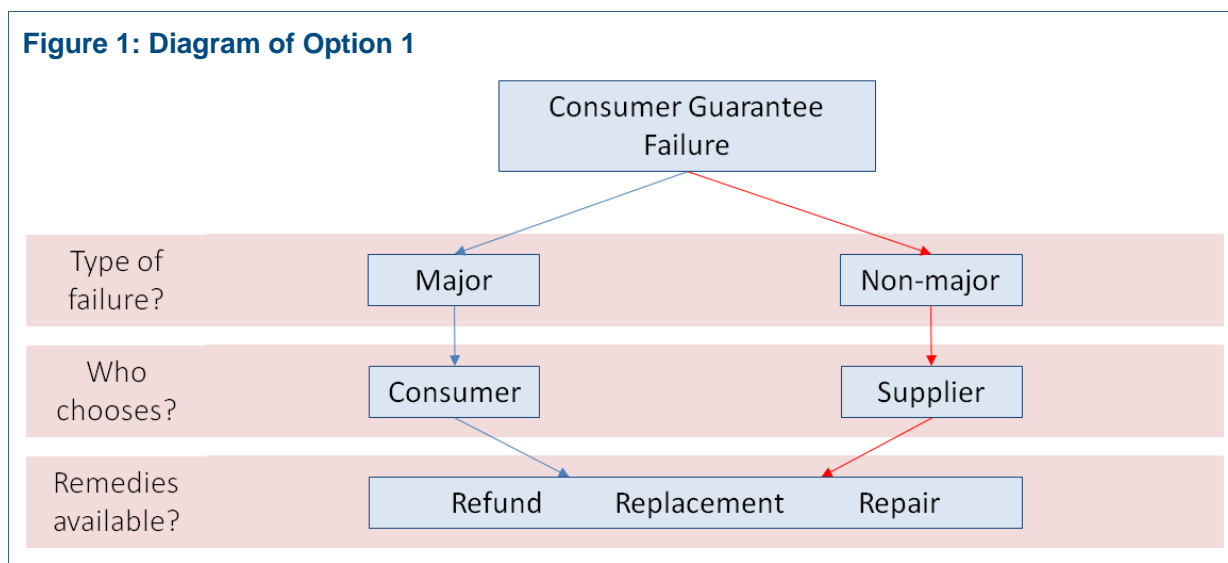
27. The broadly-framed, principles-based provisions of the status quo provide scope for redress in most of the circumstances a consumer would expect. The law allows for consideration of all relevant factors and determine whether a reasonable consumer would have purchased the good had they known about 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
<ul style="list-style-type: none"> Consumers and businesses would not have to familiarise themselves with a change to the law. Traders have greater flexibility to negotiate and offer a repair, rather than a refund or replacement. 	<ul style="list-style-type: none"> Costs associated with unnecessary disputes and litigation. 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)?

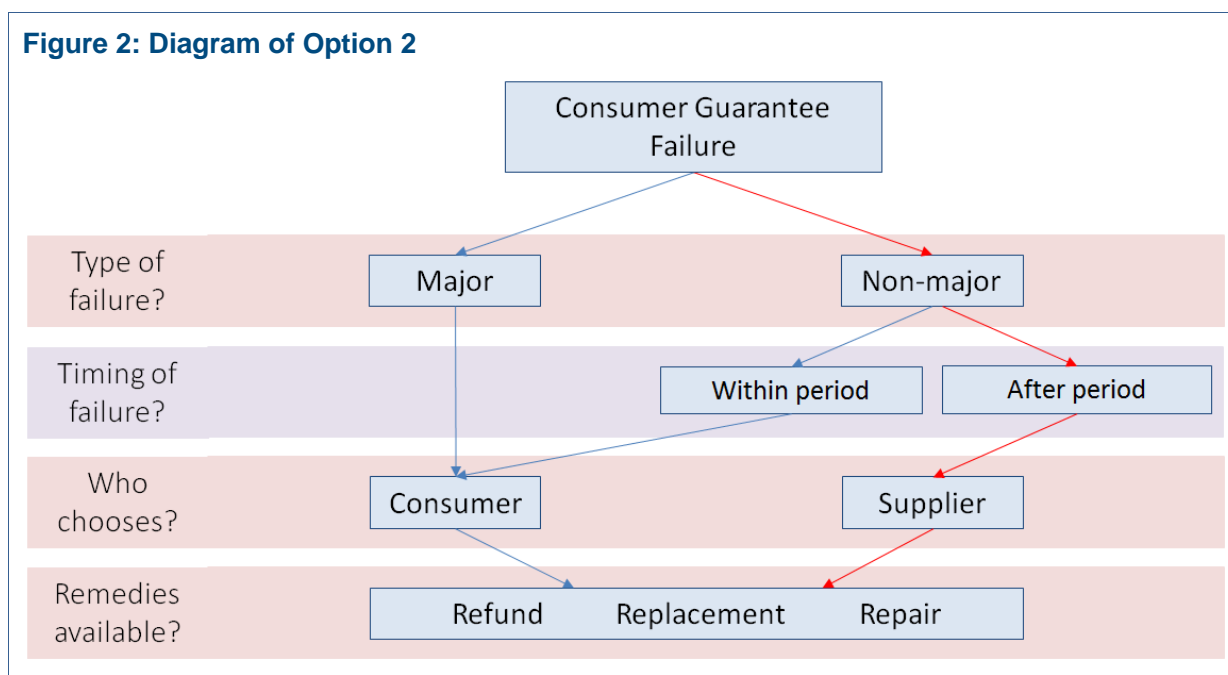
Option 2: Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure

- 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.
- 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 Responses*, 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.

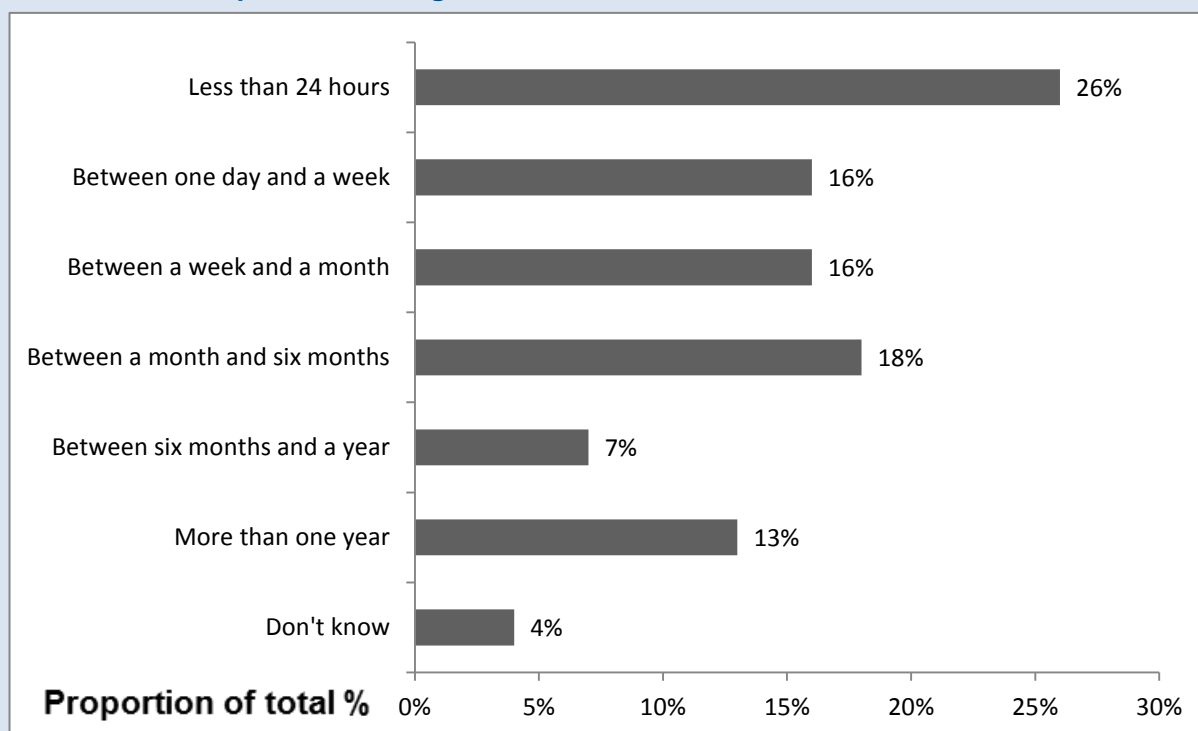
International approaches

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
<ul style="list-style-type: none"> More efficient resolution of consumer guarantees disputes. 	<ul style="list-style-type: none"> Costs for businesses of learning the short specified period and adjusting customer service practices and training staff.
<ul style="list-style-type: none"> Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs. 	<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods. 	<ul style="list-style-type: none"> Costs associated with the increased potential for consumers to overestimate their rights.
<ul style="list-style-type: none"> Potential improvements in the quality and safety of goods. 	<ul style="list-style-type: none"> Costs associated with some increased waste.
<ul style="list-style-type: none"> Greater consumer confidence and willingness to purchase substitute products. 	
<ul style="list-style-type: none"> Easier for ACL regulators and consumer advocates to provide advice on the application of the law. 	
<ul style="list-style-type: none"> 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
<ul style="list-style-type: none"> More efficient resolution of consumer guarantees disputes. 	<ul style="list-style-type: none"> Substantial costs for businesses of learning the new law and adjusting customer service practices and training staff.
<ul style="list-style-type: none"> Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs. 	<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods. 	<ul style="list-style-type: none"> 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.
<ul style="list-style-type: none"> Improvements in the quality and safety of goods in the market. 	<ul style="list-style-type: none"> Greater likelihood of costs associated with consumers overestimating their rights.
<ul style="list-style-type: none"> Greater consumer confidence and willingness to purchase substitute products. 	<ul style="list-style-type: none"> 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
<ul style="list-style-type: none">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.	<ul style="list-style-type: none">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).
	<ul style="list-style-type: none">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.
	<ul style="list-style-type: none">Inconsistency with the current economy wide approach of the law.
	<ul style="list-style-type: none">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 guarantee, 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
<ul style="list-style-type: none"> Consumers and businesses would not have to familiarise themselves with a change to the law. Further judicial interpretation would allow the law to continue to develop and adapt to consumer expectations. 	<ul style="list-style-type: none"> Costs associated with unnecessary disputes and litigation.

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
<ul style="list-style-type: none"> • More efficient resolution of consumer guarantees disputes. 	<ul style="list-style-type: none"> • Minor costs for businesses to familiarise themselves with the clarified law.
<ul style="list-style-type: none"> • Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs. 	
<ul style="list-style-type: none"> • Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods. 	
<ul style="list-style-type: none"> • Easier for ACL regulators and consumer advocates to provide advice on the application of the law. 	
<ul style="list-style-type: none"> • Potential for improvements in the quality and safety of goods in the market. 	
<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none">• More efficient resolution of consumer guarantees disputes.	<ul style="list-style-type: none">• Substantial costs for businesses of learning the new law and adjusting customer service practices and training staff.
<ul style="list-style-type: none">• Less time and money spent by consumers, businesses and tribunals on unnecessary disputes and litigation, including legal costs.	<ul style="list-style-type: none">• Costs for businesses of providing a replacement or refund, rather than a repair, in circumstances where a repair is the most economical remedy.
<ul style="list-style-type: none">• Easier for businesses to negotiate indemnification under the ACL from manufacturers for faulty goods.	<ul style="list-style-type: none">• Cost for government and ACL regulators of regular review of the law to ensure thresholds stay current, as well as additional education and enforcement.
<ul style="list-style-type: none">• Potential for improvements in the quality and safety of goods in the market.	<ul style="list-style-type: none">• Costs of record keeping, to track and verify failures in more detail.
<ul style="list-style-type: none">• 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?

CONSULTATION REGULATION IMPACT STATEMENT

CHAPTER THREE

Australian Consumer Law Review: Enhanced disclosure for extended warranties

Consumer Affairs Australia and New Zealand
2017

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EXECUTIVE SUMMARY

Extended warranties are optional products that consumers typically purchase for an additional amount around the time of purchasing the primary product to which the extended warranty applies. The warranty provider generally agrees to repair or replace, or cover the cost of repairing or replacing goods (or parts of components), if a defect occurs within a specified time period. Extended warranties are separate to a consumer's statutory rights and any manufacturer's warranty provided. Although consumers may perceive extended warranties to be a 'feature' of the primary product to which the extended warranty applies, extended warranties are themselves a separate product.

Extended warranties are frequently offered to consumers when they purchase expensive or complex consumer goods, such as white goods and electrical products. Extended warranties can be attractive to consumers because they offer consumers the 'peace of mind' that they do not have to worry about paying for the unexpected costs of repairing or replacing a product. They can also make the process of obtaining a refund, repair or replacement easier for consumers because the consumer does not have to establish a breach of the Australian Consumer Law (ACL).

However, in some cases it may be difficult for consumers to determine if an extended warranty offers value for money and provides the additional protection they seek. Extended warranties may not always offer significant benefits over and above a consumer's statutory rights or manufacturer warranty rights. Consumers may have difficulties making informed decisions about buying an extended warranty if they:

- are not aware of their existing rights under the ACL or any applicable manufacturer's warranty,
- have trouble understanding the terms and conditions of an extended warranty,
- are not able to compare an extended warranty with their rights under the ACL and under any manufacturer warranty,
- are influenced by behavioural biases,
- are under time pressure, and/or
- have trouble comparing different extended warranties (or don't compare them).

Although there is evidence that there is a problem that may warrant regulatory intervention, there is currently a lack of data about the size of this problem. Consultation will gather further information on the identified problem. This chapter is a consultation regulation impact statement (RIS) on options that would assist consumers to make more informed purchasing decisions with regard to extended warranties.

In 2017, the ACL Review Final Report (the Review) recommended enhancing disclosure in relation to extended warranties by requiring:

- agreements for extended warranties to be clear and in writing,
- additional information about what the ACL offers in comparison, and

- a cooling-off period of ten working days (or an unlimited time if the trader has not met their disclosure obligations) that must be disclosed orally and in writing.

This recommendation is one of the options considered in this RIS chapter (Option 2), along with maintaining the status quo (Option 1), or disclosure and an opt-in process (Option 3). Views are sought on these options – including whether they would address the problem, how effective they would be and what impacts they would have. Consumer Affairs Australia and New Zealand (CAANZ) also welcomes views on any alternative options for helping consumers make better decisions about purchasing extended warranties.

INTRODUCTION

EXTENDED WARRANTIES

1. Extended warranties are optional contracts that consumers typically purchase for an additional amount around the time of purchasing the product to which the extended warranty applies (the primary product). The warranty provider generally agrees to repair or replace, or cover the cost of repairing or replacing the primary product (or parts of components), if a defect occurs within a specified time period. They are separate to a consumer's statutory rights and any protections provided in any manufacturer's warranty. In addition to offering repair or replacement, extended warranties also frequently advertise added benefits or remedies, such as protection for accidental damage, priority customer treatment and technical support. In some cases, extended warranties have a delayed commencement date, providing cover only after the manufacturer's warranty has expired.
2. Many retailers of expensive consumer goods (such as cars, whitegoods, televisions and appliances) offer extended warranties. They are also available from manufacturers and insurance companies.
3. Although extended warranties may appear to 'extend' a manufacturer's warranty, extended warranties are actually a separate product and in some cases, may be an insurance product. In addition to being a separate product, extended warranties are often provided under a separate contract. Extended warranties are generally entered into at the same time, or shortly after, the sale of the primary product.
4. Consumers typically purchase extended warranties to minimise any costs associated with a product breaking down or having faults during the warranty period. The main perceived benefit of an extended warranty is that they provide consumers with 'peace of mind' that they do not have to worry about the unexpected costs of repairing or replacing a product (for a particular period). Consumers who buy extended warranties can also benefit from not having to invest time to search for a company to repair a product.
5. Extended warranties can also make the process of gaining a refund, repair or replacement easier, compared to relying on statutory rights. Retailers may be more willing to provide refunds and replacements and may have more convenient or straightforward processes where a consumer is able to rely on an extended warranty.

OTHER TYPES OF WARRANTIES

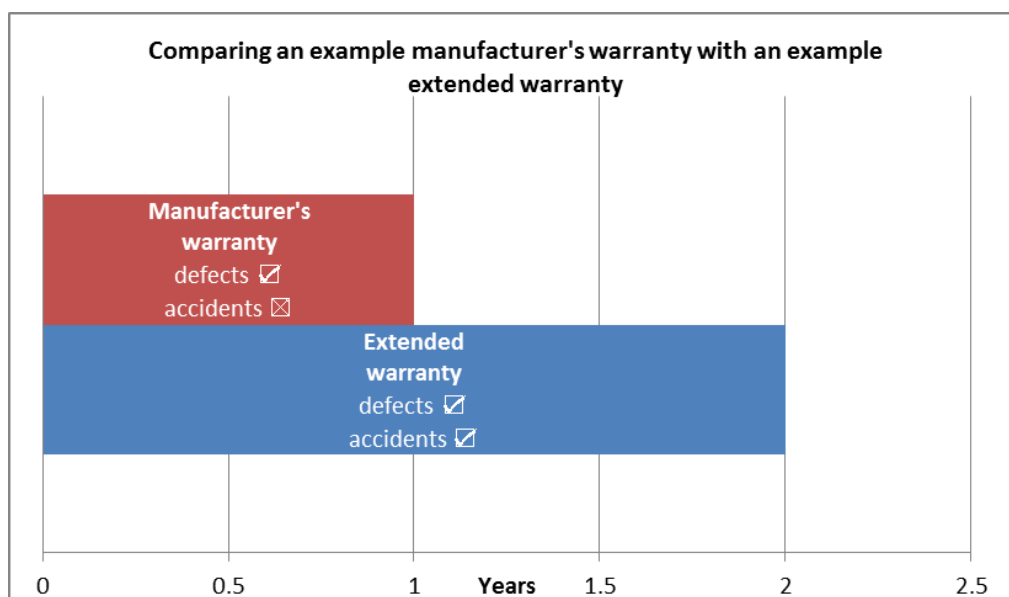
6. Consumer products generally come with other types of warranties, called express warranties and warranties against defects. These are different to extended warranties. Express warranties and warranties against defects are provided to consumers for no additional cost. In contrast, extended warranties are warranties offered to consumers that the consumer pays for, separately to payment for the primary product.

Express warranties

7. An express warranty relates to the quality or standard of a product. It is a promise about what a product can do, in terms of its characteristics, performance, quality and/or the action that will be taken if the product is faulty. Under the consumer guarantees, suppliers and manufacturers are required to comply with the terms of any express warranty.¹ For example, if a supplier sells a book shelf that is advertised as holding up to 80 kilograms this is a statement about what the product can do and the shelf must meet this standard.
8. Suppliers who do not honour express warranties can also be liable under other provisions of the ACL, such as for making a false or misleading representation about the effect of any warranty.

Warranties against defects

9. Suppliers and manufacturers often provide an express 'warranty against defects' for a specified period of time. The time period is often one to three years. Warranties against defects are also known as manufacturer's warranties. Warranties against defects are representations that a supplier or manufacturer will (unconditionally or on specified conditions): repair or replace products (or part of them), resupply or fix a problem with services (or part of them), or provide compensation to the consumer.²
10. If a supplier or manufacturer chooses to provide a warranty against defects then the warranty document must comply with specific information requirements, including mandatory text.³



Note: this is an example only. The coverage and duration of extended warranties and manufacturer's warranties varies.

1 *Competition and Consumer Act 2010* (Cth) ('Competition and Consumer Act'), Schedule 2, Australian Consumer Law ('ACL') section 59.

2 ACL section 102(3).

3 ACL section 192; *Competition and Consumer Regulations 2010* (Cth) regulation 90.

THE PROBLEM

OVERVIEW

A lack of clear and accessible information, behavioural biases and time constraints can make it difficult for consumers to make informed decisions about whether to purchase an extended warranty. Consumers may not always be aware of their existing rights or may experience difficulty comparing the protections offered under an extended warranty with their existing rights. This may make it difficult for consumers to determine if an extended warranty provides value for money and the additional protection they seek. Additionally, consumers may be unlikely to compare extended warranties offered by a retailer with extended warranties available elsewhere.

Although there is evidence that this problem may warrant regulatory intervention, there is currently a lack of data about the size of this problem. Consultation will gather further information on the identified problem.

SCOPE OF THE PROBLEM

11. Extended warranties do not always provide consumers with significant benefits over and above a consumer's existing rights. This RIS chapter identifies that it can be difficult for consumers to make informed decisions about extended warranties, due to a lack of information, time constraints and behavioural biases.
12. This RIS chapter is not directed at issues of unconscionable or misleading conduct by traders in relation to the sale of extended warranties. Unconscionable conduct and misleading or deceptive conduct is already prohibited under the consumer law.

CONSUMER AWARENESS OF THE ACL

13. The 2016 Australian Consumer Survey found that 90 per cent of consumers are aware that laws exist to protect consumer rights when purchasing products or services.⁴ However, consumers may have a general awareness of consumer protection laws but not have specific knowledge about the consumer guarantees. Additionally, some consumer groups have lower reported awareness of consumer laws, including females, younger respondents, those living outside of a capital city and those who speak a language other than English at home.⁵

4 The Australian Treasury on behalf of Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016*, May 2016 ('Australian Consumer Survey'), page 21.

5 Australian Consumer Survey, page 21.

14. A study of the former *Trade Practices Act 1974* found that a lack of awareness of statutory rights was driving the demand for extended warranties.⁶ Where consumers are not aware of their statutory rights under the ACL, including the consumer guarantees, they may be more inclined to consider that they should purchase an extended warranty, and may be more susceptible to purchasing an extended warranty that offers no real benefit above the ACL.

CONSUMER UNDERSTANDING OF EXTENDED WARRANTIES

15. Consumers may experience difficulties reading and understanding the terms and conditions of extended warranty contracts and may not always have an adequate opportunity to read the contractual terms before purchasing an extended warranty. The contracts can be lengthy and difficult to understand, and consumers may have limited time to read and properly understand a contract. Consumers may be unlikely to read in full an extended warranty contract, especially for lower cost extended warranties.

FOCUS QUESTIONS – UNDERSTANDING EXTENDED WARRANTIES

For consumers

- Have you ever been offered or purchased an extended warranty? Did the business explain the difference between the extent of coverage under the extended warranty, the consumer law and any manufacturer's warranty provided?
- If you have purchased an extended warranty, did you understand the terms and conditions of the warranty when you purchased it?
- If you have purchased an extended warranty, why did you decide purchase it?
- If you have been offered an extended warranty and chose not to purchase it, what factors affected your decision?

16. A lack of clear information may make it difficult for consumers to compare the protections offered by an extended warranty with their existing consumer rights.⁷ While statements to encourage consumers to take up an extended warranty must not be misleading, there is no positive obligation upon traders to provide information comparing rights under an extended warranty with a consumer's existing rights under the ACL or under any manufacturer warranty. There may also be no strong market incentive for provision of this information, because a trader is unlikely to obtain any additional benefit from providing consumers with comparison information, unless the extended warranty offers clearly superior protections or features compared to a consumer's existing rights. In some cases this may mean there is an information asymmetry between consumers and traders which may result in consumers purchasing extended warranties on an uninformed basis that are not right for them.

6 National Education and Information Taskforce, *National Baseline Study for Statutory Warranties and Refunds*, Research Paper No 2, October 2009.

7 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017 ('ACL Review Final Report'), page 27.

FOCUS QUESTIONS – UNDERSTANDING EXTENDED WARRANTIES

For businesses

- For businesses, what training do you provide to assist salespersons to explain the benefits of an extended warranty compared to rights available to consumers under general consumer laws and any manufacturer's warranty provided?
- For businesses, what additional protections do you offer through extended warranties that are over and above the rights a consumer has under the ACL and any applicable manufacturer's warranty?
- For businesses, how do you ensure that the extended warranties you sell provide additional protection or features over and above the rights a consumer has under the ACL and any applicable manufacturer's warranty?

17. Consumers may be unlikely to compare different extended warranties to find the best deal before choosing to purchase one. Retailers may benefit from situational monopolies at the point of sale, meaning a consumer may purchase an extended warranty on the spot without conducting further research into other extended warranties that may be available elsewhere.
18. Market research from the United Kingdom indicates that consumers typically do not shop around for an extended warranty for electrical products, despite a range of providers offering extended warranties.⁸ Consumers may perceive extended warranties to be a 'feature' of the product for which the warranty is bought, rather than a separate product that they can potentially purchase elsewhere. It is also generally more convenient for a consumer to purchase an extended warranty at the same time that they purchase the primary product.

FOCUS QUESTIONS – COMPARING DIFFERENT WARRANTIES

For consumers

- If you have considered purchasing an extended warranty, what sort of research have you done to help you make your decision?
- If you have purchased an extended warranty, did you buy it at the same time that you purchased the product to which the extended warranty applies?
- Have you ever compared extended warranties from different businesses to find the best value extended warranty?

For businesses

- For businesses, do you offer a number of different extended warranties for any one product? If yes, how do you assist consumers to choose between extended warranties? How do these different warranties vary in terms of the protections or features that they provide?

8 UK Office of Fair Trading, *Extended Warranties on Domestic Electrical Goods: Final Decision on a Market Investigation Reference*, June 2012, paragraph 4.13.

19. In circumstances where extended warranties are provided by third parties (not the retailer or manufacturer of the primary product), consumers may not always be aware that the retailer is not the provider of the extended warranty.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S *NEW CAR RETAILING INDUSTRY* MARKET STUDY, DECEMBER 2017:

The Final Report of the Australian Competition and Consumer Commission (ACCC) study into the new car retailing industry found that:

- Consumers are not being provided adequate information about the consumer guarantees at the point of sale of a new car and many consumers face difficulties understanding how the consumer guarantees apply and the distinction between consumer guarantees and warranties.
- These difficulties affect the ability of consumers to accurately evaluate the value of extended warranties compared to the rights consumers already have under the consumer guarantees or the manufacturer's warranty.
- Where dealers are remunerated on a commission basis, they have a commercial incentive to maximise their sales of extended warranties.

BEHAVIOURAL BIASES

20. Behavioural biases can affect the purchasing decisions of consumers. Retailers typically offer extended warranties to consumers when the consumer has already decided to purchase the primary product to which the extended warranty would apply. In this sales environment, consumers may feel pressured to make a quick decision. Consumers who are risk adverse may also be more inclined to consider the purchase of an extended warranty for 'peace of mind'.
21. As extended warranties tend to be sold for expensive products, the high cost of the primary product can create a reference point for a consumer. At the time, the cost of the extended warranty may seem small in comparison. Where consumers have purchased an expensive primary product, they may be more inclined to purchase an extended warranty due to the fear of losing time and money if the primary product breaks down (loss aversion). Consumers that attach a higher value to the primary product may be more inclined to purchase an extended warranty to protect the perceived value of the primary product.
22. In some cases, consumers may have also spent significant time and cognitive resources on the primary purchase, and may experience decision fatigue at the point when they are offered the extended warranty.
23. Together, these behavioural biases can affect the ability of a consumer to make an informed decision about purchasing an extended warranty.

MAKING AN INFORMED PURCHASING DECISION

24. It can be difficult for consumers to determine if an extended warranty offers value for money and the additional protection that the consumer seeks due to the difficulties outlined above with understanding the terms and conditions of an extended warranty, comparing rights under an extended warranty with existing rights, comparing different warranties and behavioural biases. These factors can prevent consumers from making informed decisions about extended warranties.
25. This conclusion is supported by the ACCC's New Car Retailing market study, which found that inadequate information makes it difficult for consumers to accurately evaluate the value of an extended warranty (see box above). Indeed it is largely self-evident that if a consumer does not have sufficient information about how an extended warranty compares to their existing rights, they will not be able to make an informed purchasing decision.

FOCUS QUESTIONS – INFORMED DECISIONS

For consumers

- How would you prefer to receive information about extended warranties (that is, written, oral or both)?

For businesses and other stakeholders

- What factors can help or hinder consumers to make informed decisions about extended warranties?

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION'S CONSULTATION PAPER 294: *THE SALE OF ADD-ON INSURANCE AND WARRANTIES THROUGH CARYARD INTERMEDIARIES*, AUGUST 2017:

The Australian Securities and Investments Commission (ASIC) examined the sale of extended warranties in caryards and reported that:

- Extended warranties for cars can be structured to avoid being classified as insurance, meaning providers do not need to comply with the requirements of the *Insurance Contracts Act 1984*.
- In relation to dealer warranties, the risk of poor sales practices is increased as providers do not comply with the licensing or conduct obligations of the *Corporations Act 2001* (Corporations Act), while consumers cannot take action against misconduct at the point of sale by complaining to an external dispute resolution scheme.
- There are some systemic unfair practices in the warranty add-on market, including: sales of warranties that provide unnecessary cover, the absence of any contractual right to a rebate if the warranty is cancelled before the end of its term, and unfair arrangements that increase the price of warranties for financially vulnerable consumers.

LACK OF CLARITY IN THE LAW

26. A related problem for consumers making informed decisions about extended warranties is that in some circumstances there can be a lack of clarity as to the meaning and scope of the existing law, particularly around the triggers for when they have a right to a refund, replacement or repair.
27. Where there are grey areas in the law it can be difficult for consumers to determine how their statutory rights apply to a particular product. Consumers may also be hesitant to rely on statutory rights where there is any real or perceived lack of clarity or difficulty in enforcing their rights. For example, a consumer may decide to purchase an extended warranty because they believe the warranty provides certainty that a defect in a product will be remedied.

HOW SIGNIFICANT IS THE PROBLEM?

28. The Review reported that many consumer stakeholders suggest that a lack of clear information can prevent consumers from comparing an extended warranty with the ACL to determine if the extended warranty provides value for money.⁹ The Review found that legislative change is needed to ensure consumers receive adequate disclosure and can make informed purchasing decisions about extended warranties.¹⁰ This conclusion is supported by the findings from the ACCC's study into the new car retailing industry and ASIC's paper on the sale of add-on insurance and warranties through caryard intermediaries (both outlined above).
29. These findings indicate that there is a problem that may warrant regulatory intervention, however there is a lack of data about the size of the problem. Consultation will gather further information on the identified problem. Specifically, there is a lack of data about the size of the extended warranty market and the proportion of extended warranties that offer tangible benefits over and above a consumer's existing rights.

9 ACL Review Final Report, page 23.

10 ACL Review Final Report, page 24.

THE EXISTING LEGISLATIVE FRAMEWORK FOR EXTENDED WARRANTIES

OVERVIEW

The Australian consumer protection framework includes the ACL and the consumer protection provisions contained in the *Australian Securities and Investments Commission Act 2001* (ASIC Act).¹¹ The ACL applies to goods and services, whereas the ASIC Act applies to financial products and services. The consumer protection provisions in the ASIC Act largely mirror the provisions in the ACL.

In most, if not all cases, extended warranties come within the definition of a 'financial product' because they are facilities through which a person manages a financial risk.¹² This means that extended warranties are generally subject to the consumer protection provisions in the ASIC Act, rather than the ACL.¹³ However, the ACL applies to the primary product for which an extended warranty is bought. Furthermore, conduct that relates not only to the extended warranty, but also to some characteristic of the primary product to which the warranty applies, may be actionable under both the ASIC Act and the ACL.

Currently, there are no targeted laws applying only to extended warranties. Instead, traders are subject to generic consumer protection requirements, reflecting the economy-wide application of the consumer law. The consumer protection provisions particularly relevant to the sale of extended warranties are:

- misleading or deceptive conduct,¹⁴
- unconscionable conduct,¹⁵ and
- false or misleading representations.¹⁶

Importantly, extended warranties do not override a consumer's statutory rights, including the consumer guarantees that apply to the primary product for which an extended warranty is purchased.

In some circumstances, extended warranties are also subject to the Corporations Act, which imposes additional licencing and disclosure requirements on traders.

11 *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') part 2, division 2.

12 ASIC Act sections 12BAA(1) and (5); *Corporations Act 2001* (Cth) ('Corporations Act') sections 763A and 763C.

13 Competition and Consumer Act section 131A.

14 ASIC Act section 12DA; ACL section 18.

15 ASIC Act sections 12CA and 12CB; ACL sections 20 and 21.

16 ASIC Act section 12DB; ACL sections 29(1)(n) and 151(1)(n).

THE REGULATION OF EXTENDED WARRANTIES AT STATE AND FEDERAL LEVEL

30. Under Commonwealth legislation, extended warranties are subject to the ASIC Act rather than the ACL.¹⁷ However, extended warranties are subject to the ACL at a state level. Regardless, the same consumer protection requirements apply.

EXTENDED WARRANTIES AS FINANCIAL PRODUCTS

31. There are different ways in which extended warranties may be provided to consumers, which can affect the regulatory requirements that apply. Extended warranties can be offered by a supplier, a manufacturer, or a third party. A table comparing the regulatory framework applying to different types of extended warranties is below (see **Table A**).
32. Extended warranties are generally regulated as financial products because they are facilities through which consumers manage financial risks.¹⁸ This means the consumer protection provisions in the ASIC Act apply.¹⁹ These consumer protection requirements are set out below at paragraph 38.
33. In some circumstances, an extended warranty can amount to a contract of insurance under the Corporations Act.²⁰ An extended warranty is likely to be insurance if:
- it is provided by a third party to the sale of the goods, rather than a person who has an existing responsibility for the quality of the goods (such as the manufacturer, retailer or other distributor of the goods),
 - the customer is entitled to the benefits described in the warranty if they have a valid claim, rather than only a right to have their claim considered,
 - it covers additional costs or losses that do not result from defects in, or failure of, the goods and that are beyond the control, or not the responsibility, of the retailer or manufacturer (such as accidental damage or theft), and
 - it covers normal wear and tear.²¹

17 Competition and Consumer Act section 131A.

18 Corporations Act sections 763A and 763C; ASIC Act sections 12BAA(1) and (5).

19 Issuing a financial product, or arranging to issue a financial product, constitutes a dealing in a financial product and therefore amounts to providing a financial service (ASIC Act sections 12BAB(1)(b), (7)(b) and 8). Arranging for a person to apply for a financial product also constitutes the provision of a financial service (ASIC Act sections 12BAB(1)(b), 7(a) and 8).

20 Corporations Act section 764A(1)(d); ASIC Act section 12BAA(7)(d).

21 ASIC, *Information Sheet 198: Extended warranties*, July 2014, <http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/extended-warranties/>.

34. Warranties that are automatically provided to consumers by the supplier of goods as part of a sale of goods, such as manufacturer's warranties, are generally not financial products. This is because the consumer does not take any active steps to acquire them, and so cannot be considered to be 'managing' their financial risks by acquiring the warranty. In contrast, extended warranties are generally acquired by payment of an additional amount to secure the promised cover for a specified period of time, and are acquired to manage the financial risks of a breakdown of the primary product.
35. Additional licensing and product disclosure requirements apply to extended warranties that come within the 'financial product' definition in the Corporations Act. However, some extended warranties that would otherwise be subject to these additional requirements fall within an 'incidental product exemption' and will not be a financial product for the purposes of the Corporations Act.²² This exemption applies where an extended warranty is provided by a retailer at the point of sale, and the warranty only covers the repair or replacement of the purchased primary product in the event of defect or failure. There are no mandatory disclosure requirements for 'incidental products'.
36. Importantly, where extended warranties come within the 'incidental product' exemption from the Corporations Act, they will still be a financial product under the ASIC Act (and be subject to the ASIC Act's consumer protection requirements).
37. There is a lack of data on the proportion of extended warranty providers that are subject to the additional licensing and product disclosure requirements under the Corporations Act. Additionally, it is unclear what proportion of consumers that purchase extended warranties already receive disclosure information as required under the Corporations Act.

FOCUS QUESTION – EXISTING DISCLOSURE REQUIREMENTS

For businesses

- For businesses, are you subject to the disclosure requirements under the Corporations Act for any extended warranties you sell?

(This question is intended to gather information on the proportion of businesses that already provide disclosure information for the extended warranties they sell).

22 Corporations Act section 763E.

Table A: The regulatory framework for extended warranties

Issuer	When/how made available to consumers	ASIC Act - financial product	Corporations Act - financial product	Corporations Act - licensing requirement	Corporations Act - PDS disclosure requirement
Supplier of goods	Available for purchase when goods supplied (for example, retailer issued extended warranties administered by a third party)	Yes	No (if incidental exemption applies)	No	No
Third party	Available for purchase when goods supplied (for example, third party issued warranty distributed by retailer)	Yes	Yes	Yes	Yes
Supplier of goods	Available for purchase after goods supplied (for example, while still within a previous warranty period)	Yes	Yes (likely incidental exemption will not apply)	Yes - unless rely on another exemption, for example, intermediary authorisation exemption	Yes
Third Party	Available for purchase after goods supplied	Yes	Yes	Yes	Yes

THE MIRROR CONSUMER PROTECTION PROVISIONS IN THE ACL AND ASIC ACT

Consumer guarantees

Guarantees applying to the primary product

38. The consumer guarantees in the ACL provide consumers with a set of automatic rights for the goods and services they acquire. Under the consumer guarantees:
- Suppliers and manufacturers guarantee that goods are: acceptable quality, will match any description provided, and that any express warranties will be honoured.
 - Suppliers guarantee that a consumer is buying goods that: have clear title (unless otherwise stated), do not have undisclosed securities, are fit for any disclosed purpose, have a right to undisturbed possession and match the sample or demonstration model provided.
 - Manufacturers guarantee the availability of repairs and spare parts (other than for auctioned goods) for a reasonable period after the goods are supplied.

39. Importantly, consumers may be entitled to a repair, replacement or refund for a defective product under the consumer guarantees in the absence of an extended warranty or even after an extended warranty has expired.
40. The guarantee as to acceptable quality provides the consumer with a statutory right, which can mean that a consumer may decide that they do not need to purchase an extended warranty. However, it can be difficult for consumers to determine the actual length of protection provided by this guarantee.
41. Extended warranties apply in parallel to a consumer's statutory rights: they do not override or alter the consumer guarantees in the ACL, or affect a trader's responsibility to meet these statutory requirements. This means that a consumer may be entitled to a remedy under the consumer guarantees even if they have no remedy under their extended warranty. Additionally, the consumer guarantees cannot be excluded by contract.²³
42. Extended warranties should provide additional rights over and above the consumer guarantees. A trader must not represent to a consumer that they are required to pay for any rights that are equivalent to a consumer guarantee (see *False or misleading representations* at paragraph 47).

Guarantees applying to extended warranties (except contracts of insurance)

43. Extended warranties that are not contracts of insurance are subject to guarantees relating to the supply of services.²⁴ These are that services will be rendered with 'due care and skill'²⁵ and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.²⁶ Traders providing extended warranties (except insurance contracts) to consumers must do so with 'due care and skill' and ensure the extended warranty service is fit for purpose.
44. Additionally, if a consumer makes known to the trader any particular purpose for which the services are required, or the result the consumer desires from the services, there is a guarantee that the services supplied and any materials supplied in connection with the services are reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result. The exception to this is if the consumer does not rely, or it is unreasonable for the consumer to rely, on the trader's skill or judgement in providing the service.²⁷

23 ACL section 64.

24 ASIC Act section 12ED.

25 ASIC Act section 12ED(1)(a).

26 ASIC Act section 12ED(1)(b).

27 ASIC Act section 12ED(2).

Misleading or deceptive conduct

45. A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.²⁸ This means that traders must not mislead consumers about the need for an extended warranty or the benefits of an extended warranty. Similarly, traders must not mislead consumers about the scope of the rights automatically provided by the consumer guarantees in the course of selling an extended warranty.
46. For example, it would be misleading for a trader to suggest to a consumer that they can only have a faulty product repaired or replaced if they purchase an extended warranty.²⁹ In *ACCC v Fisher & Paykel Customer Services*, an extended warranty letter prominently represented to consumers that they would not be protected against repairs after a period of two years from the date of purchase unless the consumer purchased an extended warranty. This was found to be misleading and deceptive conduct and a false or misleading representation, despite references to the ACL in the fine print.³⁰

False or misleading representations

47. Similarly, a person must not, in trade or commerce, make a false or misleading representation.³¹ This includes false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy,³² or about the need for any services.³³
48. This prohibition also includes false or misleading representations concerning a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person has under the law of the Commonwealth, a state or a territory.³⁴ This clause is directed at traders of extended warranties.³⁵
49. Traders that sell extended warranties that offer anything less than or simply mirror a consumer's existing entitlements risk misleading consumers into thinking they are receiving additional benefits when they are not. For example, if a telecommunications provider offered to consumers a mobile phone on a two year plan and offered an extended warranty to repair or replace the phone in the event of a defect in the first year, this would likely be a false or misleading representation as the extended warranty provides less than the protections already available to consumers.³⁶

28 ASIC Act section 12DA; ACL section 18(1).

29 *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393.

30 *Ibid* (consent orders January 2015).

31 ACL section 151(1)(n), section 29; ASIC Act section 12DB.

32 ACL section 29(1)(m); ASIC Act section 12DB(1)(i).

33 ACL section 29(1)(l); ASIC Act section 12DB(1)(h).

34 ACL section 29(1)(n); ASIC Act section 12DB(1)(j).

35 Stephen Corones, 'Getting what they paid for: Consumer guarantees and extended warranties' (2011) 39 *Australian Business Law Review*, page 346.

36 *Ibid* page 348.

50. Unlike misleading or deceptive conduct, these provisions only apply where there has been an express or implied 'representation'. However, the same conduct may constitute misleading and deceptive conduct and also be a false or misleading representation.

Unconscionable conduct

51. A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.³⁷ This is relevant where the consumer is at a 'special disadvantage'.³⁸
52. Similarly, a person must not, in trade or commerce, engage in conduct that is, in all the circumstances, unconscionable.³⁹ This statutory provision applies where conduct is more than simply unfair and goes against conscience as judged against the norms of society.
53. In sales of extended warranties without any unfair or high pressure sales tactics, these protections are less likely to be relevant. In any case, these protections do not directly assist consumers to understand the contract or their statutory rights before making a purchase.

37 ACL section 20; ASIC Act section 12CA.

38 *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292.

39 ACL s 21; ASIC Act section 12CB.

POLICY OBJECTIVES

54. The policy objective is to ensure that consumers are able to make more informed decisions about whether to purchase an extended warranty. To make informed decisions about an extended warranty, consumers need to be aware of their existing rights under the ACL and under any manufacturer warranty and understand what a particular extended warranty offers in comparison. This information helps consumers to determine if the extended warranty offers value for money and provides the additional protection they seek.
55. The options to address the identified problem would seek to improve incentives for traders to provide clear information about extended warranties and thereby assist consumers to make more informed purchasing decisions.
56. In achieving this objective, it is important that benefits should exceed costs.
57. In addition, options for addressing the problem identified would seek to provide certainty for traders as to the application of any laws applying to extended warranty contracts.

OPTIONS AND IMPACT ANALYSIS

OVERVIEW

Through the policy development and consultation processes of the Review, CAANZ identified and assessed a range of options to help consumers make informed decisions about whether to purchase an extended warranty.

To address the problem defined, this RIS explores three options:

Option 1: Maintain the status quo.

Option 2: A legislative amendment comprising the following three elements.

Cooling-Off Right: a requirement for traders to provide a cooling-off period of ten working days from the time the consumer receives the written agreement. Where a trader does not meet disclosure requirements (set out below) the cooling-off period would be unlimited.

Oral Disclosure: a requirement for traders to provide oral advice, where reasonably practicable, about the consumer's cancellation rights before entering into a contract.

Written Disclosure: a requirement for traders to provide a written agreement containing:

- all the terms and conditions, including:
 - the rights and obligations of the warrantor and the consumer (including the cooling-off right),
 - the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made),
 - the total price payable under the agreement,
 - the date of the agreement,
- information on the front page of the agreement, including:
 - a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by any extended warranty agreement (this may be in the form of a table or diagram),
 - a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects,
 - the warrantor's name, street address, telephone number and email address.

Sub-options under Option 2 are to have a disclosure regime only, or a cooling-off right only.

Option 3: Oral and written disclosure with an opt-in process. That is, a requirement for consumers to confirm the extended warranty after a specified period.

OPTION 1: STATUS QUO

58. Option 1 would maintain the existing regulatory regime for extended warranties.
59. The existing safeguards for consumers would remain in force, including the generic protection against misleading and deceptive conduct. Further, regulators would continue to promote awareness of rights and obligations and take enforcement activity where appropriate.
60. Under this option, traders would continue to be prohibited from misleading consumers. The consumer guarantees would continue to apply to the primary product for which the extended warranty is bought. Furthermore, traders would continue to be prohibited from making false or misleading representations concerning requirements to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person has under the law.
61. As Option 1 maintains the status quo, it is unlikely to address any of the concerns outlined in the problem section. As a result, some consumers may continue to have difficulties with making informed decisions about extended warranties and some may be induced to purchase extended warranties that they would not otherwise have bought.
62. Non-regulatory options, such as regulator guidance and education, could be pursued and improved under the status quo. However, regulators already prepare guidance and educational material for consumers and traders on the interaction between the consumer guarantees and extended warranties.⁴⁰
63. Education campaigns typically work more effectively in confined markets for a target group of consumers, rather than as a broad campaign attempting to educate consumers generally. Accordingly, this RIS does not propose an education campaign as an option. Regulators would update existing guidance material if one of the regulatory options proposed in this RIS was implemented, which would assist consumers and traders to understand the new law.

Impact Analysis

64. As Option 1 does not change the current regulatory environment, it would not result in new benefits or costs for consumers, traders or other stakeholders. Traders would not have to make any changes to practices for the sale of extended warranties or amend standard extended warranty contracts.
65. As discussed in the '*Problem*' section, some consumers experience difficulties making informed purchasing decisions about extended warranties, and would continue to do so under this option. Some consumers would continue to pay 'economic rent' for their existing rights.

40 ACCC, *Warranties*, <https://www.accc.gov.au/consumers/consumer-rights-guarantees/warranties#extended-warranties-or-care-packages>; ASIC, *Extended warranties information sheet 198*, <http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/licensing-certain-service-providers/extended-warranties>; The Checkout, ABC1, *Extended Warranties*, 2 May 2013, <https://www.youtube.com/watch?v=NrxzsaBkC4>.

BENEFITS	COSTS
<ul style="list-style-type: none"> No additional compliance costs are incurred by traders or consumers. 	<ul style="list-style-type: none"> Some consumers continue to have difficulties with making informed decisions about extended warranties.

FOCUS QUESTION – STATUS QUO

For businesses

- For retailers, do you train your staff to promote the additional protections available under an extended warranty compared to the consumer law and any manufacturer's warranty provided? If yes, how much does this training cost?

OPTION 2: COOLING OFF RIGHT WITH ORAL AND WRITTEN DISCLOSURE

66. Under Option 2, transparency around extended warranties would be enhanced through a disclosure regime and a cooling-off right. Option 2 reflects the proposed reform in the Review Final Report (proposal 3) to address concerns regarding extended warranties. This proposal was subject to broad stakeholder consultation as part of the Review. The formulation of the proposal reflects submissions and information received as part of the Review.
67. Traders would be required to provide a cooling-off period of ten working days from the time the consumer receives the written agreement. The cooling-off right means that a warranty would have effect from the time the agreement is made. Within ten working days, a consumer could cancel the agreement and receive a refund. However, where a trader did not meet their disclosure obligations (for example, they do not provide any information or only provide a generic brochure about the ACL), the cooling-off period would apply for an unlimited period of time, meaning the consumer could cancel the extended warranty and receive a refund at any time.
68. A cooling-off period may be particularly beneficial where a consumer has received contrary information or needs time to read and understand the information they have been provided. The cooling-off period may give consumers time to distinguish the purchase of the warranty from the purchase of the primary product and assess the purchase of the warranty on its own merits away from the pressure of a sales negotiation.
69. This proposed cooling-off period is consistent with the existing ten day period for unsolicited consumer agreements under the ACL.
70. Traders would be required to provide oral advice, where reasonably practicable, about a consumer's cancellation rights before entering into the contract. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online.

71. Traders would also be required to provide a written agreement. The agreement would have to include the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer (including the cooling-off right), the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.
72. Traders would also have to include the following information on the front page of the agreement:
 - a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by the agreement (this may be in the form of a table or diagram),
 - a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects, and
 - the warrantor's name, street address, telephone number and email address.
73. The proposed disclosure obligations are broadly modelled on the approach taken in New Zealand, which was discussed in the Review Interim Report and which received general support from stakeholders. The New Zealand regime was introduced in June 2014 and requires disclosure of a number of matters, including a comparison of the consumer's rights under New Zealand law and the protections offered by the warranty. It also creates a five-day cooling off period.⁴¹
74. There is currently no legislative definition of 'extended warranty'. Accordingly, Option 2 would require a definition of 'extended warranty' to be developed.

REGULATION OF EXTENDED WARRANTIES IN NEW ZEALAND

The *Fair Trading Act 1986* (NZ) contains rules for traders that offer extended warranties to consumers. In New Zealand, traders are required to:

- explain the protections that consumers are provided under the *Consumer Guarantee Act 1993* (CGA),
- compare the CGA protections with the protections offered by the extended warranty, and
- explain that if consumers buy an extended warranty, they can change their minds within five days and cancel the warranty and obtain a full refund of the price paid for the extended warranty.

41 *Fair Trading Act 1986* (NZ), Part 4A, Subpart 3.

REGULATION OF EXTENDED WARRANTIES IN NEW ZEALAND (CONTINUED)

Businesses that breach these requirements can be liable to an infringement notice and a fine of \$1,000 for each breach, or to prosecution and a fine of up to \$30,000. Individuals may also be liable to an infringement notice and a fine or to prosecution and a fine of up to \$10,000.

In New Zealand, an extended warranty is defined as an agreement that:

- is between a consumer and a ‘warrantor’ in relation to the purchase of goods or services,
- is entered into around the same time as the goods or services are purchased,
- provides specific warranties, guarantees or undertakings (either directly or through a third person) relating to those goods or services, and
- is purchased at a cost additional to the price paid for the goods or services.

Impact Analysis

75. Consumers would likely benefit from Option 2’s enhanced disclosure and cooling-off right. The additional information may help consumers make more informed purchasing decisions. The cooling-off right would give consumers time to reconsider a decision to purchase an extended warranty. The cooling-off right may mitigate the effects of high-pressure sales techniques and psychological factors that influence decision-making in a sales environment. Option 2 would mean consumers would be less likely to purchase extended warranties that do not offer significant benefits over their existing rights or do not offer value for money, saving them money.
76. Option 2 imposes compliance costs (mostly transitional) on traders that supply extended warranties, in developing and providing the additional information. Compliance costs will be higher if specific, as well as general, information is required (for example, traders could be required to provide specific comparison information or could only be required to specify that coverage under the ACL is ‘a reasonable period of time’ given the nature and use of the particular good).⁴² Traders would need to assess and modify documentation for extended warranties to identify the benefits above the consumer law that the extended warranty provides. Traders would need to ensure that comparisons do not mislead consumers, which may require legal advice. Traders would also face costs associated with administering the cooling-off period, such as amending accounting practices to enable the provision of refunds.
77. A diminished availability of extended warranties is a possible impact of Option 2. However, in the Review, retail stakeholders indicated that many extended warranties offer real and legitimate benefits over ACL rights, including greater coverage of protections, certainty of remedies and streamlined processes. Accordingly, the Review found that clearer explanations of these benefits would be unlikely to diminish the availability or desirability of legitimate extended warranties in the market.

42 ACL Review Final Report, page 25.

78. Option 2 would provide traders with increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties.
79. Compliance costs may be able to be mitigated by a sufficient transition period. Option 2 may also cause reduced compliance costs for other provisions of the ACL. For example, the Review found that ‘the regulator guidance and the new comparison in the warranty document can help traders educate staff on how to make correct representations that do not mislead consumers’.⁴³
80. Option 2 may assist regulators with investigating representations made about extended warranties because regulators could examine the disclosure information that traders would be required to provide.

BENEFITS	COSTS
<ul style="list-style-type: none">Consumers gain additional information that enables them to make more informed purchasing decisions, saving them money.	<ul style="list-style-type: none">Compliance costs (mostly transitional) for traders in developing and providing additional information.
<ul style="list-style-type: none">Consumers gain additional time to consider their purchasing decision and a new right to cancel the purchase and obtain a refund.	<ul style="list-style-type: none">Ongoing costs for traders in administering cooling-off right.
<ul style="list-style-type: none">Regulators are assisted in investigating representations about extended warranties.	
<ul style="list-style-type: none">Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties.	
<ul style="list-style-type: none">The quality of extended warranty products and competition for them increases.	
<ul style="list-style-type: none">Sales of high-quality extended warranties may increase.	
<ul style="list-style-type: none">Potential reduced compliance costs for traders related to other ACL provisions.	

43 ACL Review Final Report, page 26.

FOCUS QUESTIONS – ENHANCED DISCLOSURE AND COOLING OFF RIGHT

For consumers

- Would the proposed disclosure information (as set out in Option 2) be useful for you when you are considering whether to purchase an extended warranty?
- Would the introduction of a right to cancel an extended warranty within ten days of purchase make you more likely to purchase an extended warranty? What period of time would you need to consider whether to opt out once at home? What benefit would you see in ten day period as compared to a five day period?

For businesses and other stakeholders

- What would be the costs to businesses of providing general and specific disclosure (see discussion on general and specific disclosure under Option 2)?
- In your view, would greater and better disclosure change, in practice, outcomes for consumers?
- In considering purchasing an extended warranty, should consumers have access to additional or improved information about rights they have under any manufacturer warranty? Why/why not?
- How much would it cost for your business to develop the written disclosure material?
- For businesses, what differences would arise for you if a five day versus a ten day cooling off period was introduced?

Sub-option 2a: Disclosure regime only

81. This sub-option is the oral and written disclosure regime as set out in Option 2, without a cooling-off right.
82. Traders would be required to provide oral advice, where reasonably practicable, about a consumer's cancellation rights before entering into the contract. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online.
83. Traders would also be required to provide a written agreement. The agreement would have to include the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer, the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.
84. Traders would also have to include the following information on the front page of the agreement:
 - a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by the agreement (this may be in the form of a table or diagram),
 - a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects, and
 - the warrantor's name, street address, telephone number and email address.

85. This sub-option may address some of the concerns set out in the ‘*Problem*’ section by providing consumers with additional information. However this sub-option does not give consumers extra time to process this information through a cooling-off period, which could mitigate any potential benefits of increased disclosure.

Impact Analysis

86. Option 2a would impose similar costs and benefits as Option 2, however Option 2a would likely be of less benefit to consumers without the cooling-off right. Compared to Option 2, there would be less costs for traders as there would be no cooling-off right to administer.

BENEFITS	COSTS
<ul style="list-style-type: none"> Consumers gain additional information that enables them to make more informed purchasing decisions, saving them money. 	<ul style="list-style-type: none"> Compliance costs (mostly transitional) for traders in developing and providing additional information.
<ul style="list-style-type: none"> Regulators are assisted in investigating representations about extended warranties. 	
<ul style="list-style-type: none"> Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties. 	
<ul style="list-style-type: none"> The quality of extended warranty products and competition for them increases. 	
<ul style="list-style-type: none"> Sales of high-quality extended warranties may increase. 	
<ul style="list-style-type: none"> Potential reduced compliance costs for traders related to other ACL provisions. 	

Sub-option 2b: Cooling off right only

87. This sub-option is the cooling off right in as set out in Option 2 without a disclosure regime. This cooling off right would provide less protection compared to the Option 2 cooling-off right that applies for an unlimited period where a trader fails to comply with disclosure obligations.
88. Traders would be required to provide a cooling-off period of ten working days from the time the consumer receives the agreement. The cooling-off right means that a warranty would have effect from the time the agreement is made. Within ten working days, a consumer could cancel the agreement and receive a refund of the cost of the extended warranty (but would not be entitled to a refund for the goods or services to which the extended warranty applied). Traders may need to also be required to inform consumers about the cooling-off period, otherwise it is likely that consumers would not be aware of the cooling-off right.
89. This sub-option may help consumers to make better decisions by giving them more time to consider an extended warranty. However, without the disclosure regime, consumers may not have the necessary information to assess what an extended warranty offers in comparison to their existing rights.

Impact Analysis

90. Option 2b would impose less costs and benefits compared to Option 2. Option 2b would provide consumers with the benefit of a cooling-off right for extended warranties. Without enhanced disclosure, this additional right may not result in a significant benefit to consumers and continues to rely on traders to voluntarily provide information.
91. Option 2b would impose costs on traders that sell extended warranties in providing the additional cooling-off right to consumers.

BENEFITS	COSTS
<ul style="list-style-type: none"> Consumers gain additional time to consider their purchasing decision and a new right to cancel the purchase and obtain a refund, which may save them money. 	<ul style="list-style-type: none"> Costs for traders in administering cooling-off right.
<ul style="list-style-type: none"> Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties. 	
<ul style="list-style-type: none"> The quality of extended warranty products and competition for them increases. 	
<ul style="list-style-type: none"> Sales of high-quality extended warranties may increase. 	

OPTION 3: DISCLOSURE AND OPT-IN PROCESS

92. Option 3 is a disclosure regime and an opt-in process, rather than an 'opt-out' cooling-off period. This Option would include the disclosure regime as set out in Option 2. Traders would need to explain to customers the opt-in process, rather than disclosing a cooling-off period.
93. This Option would require a consumer to confirm an agreement for an extended warranty within a limited period, such as ten business days, before they were required to pay for the extended warranty. As a consequence, a consumer might not be entitled to immediate coverage under the extended warranty because the warranty would only apply once the consumer had opted-in.
94. Traders would be required to provide oral advice, where reasonably practicable, about the opt-in process before entering into the contract. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online. Nonetheless, consumers would need to opt-in to the extended warranty even if purchased online.
95. Traders would also be required to provide a written agreement. The agreement would have to include the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer (including the opt-in process), the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.

96. Traders would also have to include the following information on the front page of the agreement:
- a summary that compares the key features and benefits of the relevant consumer guarantees and the protections provided by the agreement (this may be in the form of a table or diagram),
 - a short prescribed statement that the agreement does not override the ACL consistent with the text for warranties against defects, and
 - the warrantor's name, street address, telephone number and email address.
97. This Option imposes a burden on the consumer to remember to confirm an extended warranty. If a consumer wishes to purchase an extended warranty but forgets to confirm the purchase, they would lose the benefit of the warranty. Under an opt-in model, consumers may also not be entitled to immediate coverage from the point of sale.

Impact Analysis

98. Consumers would likely benefit from increased disclosure and an opt-in process under Option 3. An opt-in process would benefit consumers by ensuring that consumers make an active decision to confirm the purchase of the extended warranty. Option 3 would mean consumers would be less likely to purchase extended warranties that do not offer significant benefits over their existing rights or do not offer value for money, saving them money. However there would be a burden on consumers to opt-in to extended warranties. If a consumer wishes to purchase an extended warranty but forgets to confirm the purchase, they would lose the benefit of the warranty.
99. The impact of Option 3 on traders would be similar to Option 2, however traders would face costs associated with administering the opt-in period. Traders could lose revenue from consumers who forget to opt-in to an extended warranty.

BENEFITS	COSTS
<ul style="list-style-type: none"> Consumers gain additional information that enables them to make more informed purchasing decisions, saving them money. 	<ul style="list-style-type: none"> Compliance costs (mostly transitional) for traders in developing and providing additional information.
<ul style="list-style-type: none"> Consumers have more time to consider and opt-in to an extended warranty. 	<ul style="list-style-type: none"> Ongoing costs for traders in administering opt-in period and potential lost revenue if consumers forget to opt-in.
<ul style="list-style-type: none"> Regulators are assisted in investigating representations about extended warranties. 	<ul style="list-style-type: none"> Burden on consumers to opt-in to extended warranties (time costs).
<ul style="list-style-type: none"> Traders have increased clarity and certainty about the definition of an extended warranty, and therefore of their legal obligations regarding extended warranties. 	<ul style="list-style-type: none"> Consumers who forget to opt-in lose the benefit of an extended warranty.
<ul style="list-style-type: none"> The quality of extended warranty products and competition for them increases. 	<ul style="list-style-type: none"> Consumers who do opt-in may not have immediate coverage from the point of sale of the primary product.
<ul style="list-style-type: none"> Sales of high-quality extended warranties may increase. 	
<ul style="list-style-type: none"> Potential reduced compliance costs for traders related to other ACL provisions. 	

FOCUS QUESTIONS – OPT-IN PROCESS

For consumers

- Would the introduction of a requirement for consumers to confirm the purchase of an extended warranty to within a limited period (such as ten days) make you more likely to purchase an extended warranty? (This would mean you could decide not to go through with the purchase of the extended warranty, but if you did want the warranty you would need to confirm this with the business).

For businesses and other stakeholders

- For businesses, what differences would arise for you if a five day versus a ten day opt-in period was introduced?
- How much would it cost your business to put in place a process to allow consumers to purchase an extended warranty for a good after the point of the sale?

FOCUS QUESTIONS - GENERAL

For consumers

- What is your preferred option? Please explain why.
- Do you believe there are other, better options to help consumers make more informed decisions about extended warranties? If so, please explain what they are and why you believe they are better.
- How likely are you to purchase an extended warranty for a good after the point of sale?

For businesses and other stakeholders

- What is your preferred option? Please explain why.
- What are the costs and benefits or disadvantages associated with the current arrangements and your preferred option?
- Do you believe there are other, better options to help consumers make more informed decisions about extended warranties? What are they and what are the costs and benefits or disadvantages associated with these other options?
- How should extended warranties be defined in the consumer law?
- How many claims are made as a percentage of extended warranties sold and what were the outcomes? How would each of the options affect this?
- How much would it cost for your business to train staff to comply with the proposed options?

FOCUS QUESTIONS

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

THE PROBLEM

For consumers

- Have you ever been offered or purchased an extended warranty? Did the business explain the difference between the extent of coverage under the extended warranty, the consumer law and any manufacturer's warranty provided?
- If you have purchased an extended warranty, did you understand the terms and conditions of the warranty when you purchased it?
- If you have considered purchasing an extended warranty, what sort of research have you done to help you make your decision?
- If you have purchased an extended warranty, why did you decide purchase it?
- If you have purchased an extended warranty, did you buy it at the same time that you purchased the product to which the extended warranty applies?
- Have you ever compared extended warranties from different businesses to find the best value extended warranty?
- How would you prefer to receive information about extended warranties (that is, written or oral)?
- If you have been offered an extended warranty and chose not to purchase it, what factors affected your decision?

For businesses and other stakeholders

- What factors can help or hinder consumers to make informed decisions about extended warranties?
- For businesses, what training do you provide to assist salespersons to explain the benefits of an extended warranty compared to rights available to consumers under general consumer laws and any manufacturer's warranty provided?
- For businesses, do you offer a number of different extended warranties for any one product? If yes, how do you assist consumers to choose between extended warranties? How do these different warranties vary in terms of the protections they provide?
- For businesses, what additional protections do you offer through extended warranties that are over and above the rights a consumer has under the ACL and any applicable manufacturer's warranty?
- For businesses, how do you ensure that the extended warranties you sell provide additional protection over and above the rights a consumer has under the ACL and any applicable manufacturer's warranty?

EXISTING LEGISLATIVE FRAMEWORK

For businesses

- For businesses, are you subject to the disclosure requirements under the Corporations Act for any extended warranties you sell?

(This question is intended to gather information on the proportion of businesses that already provide disclosure information for the extended warranties they sell).

OPTIONS AND IMPACT ANALYSIS

For consumers

- What is your preferred option? Please explain why.
- Do you believe there are other, better options to help consumers make more informed decisions about extended warranties? If so, please explain what they are why you believe they are better.
- Would the proposed disclosure information (as set out in Option 2) be useful for you when you are considering whether to purchase an extended warranty?
- Would the introduction of a right to cancel an extended warranty within ten days of purchase make you more likely to purchase an extended warranty? What period of time would you need to consider whether to opt out once at home? What benefit would you see in ten day period as compared to a five day period?
- Would the introduction of a requirement for consumers to confirm the purchase of an extended warranty to within a limited period (such as ten days) make you more likely to purchase an extended warranty? (This would mean you could decide not to go through with the purchase of the extended warranty, but if you did want the warranty you would need to confirm this with the business).
- How likely are you to purchase an extended warranty for a good after the point of sale?

For businesses and other stakeholders

- What is your preferred option? Please explain why.
- What are the costs and benefits or disadvantages associated with the current arrangements and your preferred option?
- Do you believe there are other, better options to help consumers make more informed decisions about extended warranties? What are they and what are the costs and benefits or disadvantages associated with these other options?
- How should extended warranties be defined in the consumer law?
- What would be the costs to businesses of providing general and specific disclosure (see discussion on general and specific disclosure under Option 2)?
- In your view, would greater and better disclosure change, in practice, outcomes for consumers?

For businesses and other stakeholders (continued)

- For retailers, do you train your staff to promote the additional protections available under an extended warranty compared to the consumer law and any manufacturer's warranty provided? If yes, how much does this training cost?
- How many claims are made as a percentage of extended warranties sold? How would each of the options affect this?
- For businesses, what differences would arise for you if a five day versus a ten day cooling off period was introduced?
- For businesses, what differences would arise for you if a five day versus a ten day opt-in period was introduced?
- In considering purchasing an extended warranty, should consumers have access to additional or improved information about rights they have under any manufacturer warranty? Why/why not?
- How much would it cost for your business to develop the written disclosure material?
- How much would it cost for your business to train staff to comply with the proposed options?
- How much would it cost your business to put in place a process to allow consumers to purchase an extended warranty for a good after the point of the sale?

CONSULTATION REGULATION IMPACT STATEMENT

CHAPTER FOUR

**Australian Consumer Law Review:
Access to consumer guarantees for
goods sold at auctions**

Consumer Affairs Australia and New Zealand
2018

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EXECUTIVE SUMMARY

Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the Australian Consumer Law (ACL) because, typically, consumers purchasing from traditional auctions have had the ability to inspect goods to identify any defects through an inspection.

Auctions that occur in an “online only” manner often do not provide consumers with the ability to inspect goods prior to purchase. However, the traditional rationale for the exemptions is difficult to apply to the online context where consumers usually do not have the opportunity to inspect goods prior to purchase.

The Australian Consumer Law Review (the Review) proposed modernising the ‘sale by auction’ exemption to ensure that the consumer guarantees apply regardless of whether the goods are being sold through an online auction. This chapter canvasses options regarding the appropriateness of the exemptions from certain consumer guarantees for online auctions and whether the remainder of the guarantees should apply.

Views are sought on these options – including whether they would address the problem, how effective they would be and what impacts they would have on consumers and businesses. Views on any alternative options regarding the exemptions auctions have from the consumer guarantees are also welcome.

INTRODUCTION

1. An auction in the ACL covers situations where goods are sold through an auction that is conducted by an agent of a person. This definition covers ‘traditional auctions’¹ where an auctioneer is in a room taking bids on an item and some online auctions where the website operator is acting as an agent for the seller. Many online auction sites, such as EBay, do not fall within the ACL’s definition of auction as the website in that instance is not acting as an agent.
2. Currently, purchases made at auctions (in the scope of trade or commerce) are sold subject to some, but not all of, the consumer guarantees. The consumer guarantees set out certain standards for goods and services that apply automatically, and provide consumers with a basis for seeking redress where suppliers fail to comply with the guarantees. The guarantees apply automatically and cannot be excluded, modified or restricted by any contractual terms.
3. The guarantees that currently apply to auctions are those that ensure that the person selling the goods has the right to sell those goods. They have been considered critical for goods purchased at auction as a physical inspection of the goods would not reveal the existence of undeclared securities, uninterrupted title or undisturbed possession (sections 51, 52 and 53).² The application of these guarantees to purchases made at auction means consumers can make purchases at auction confidently, knowing that there will not be a subsequent attempt to reclaim the goods by another person.
4. Goods purchased at auction are currently exempted from the following guarantees on the basis that consumers should be able to inspect goods prior to the auction:
 - **Section 54** – Guarantee as to acceptable quality
 - Goods supplied must be of acceptable quality, that is, fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe, and durable.
 - **Section 55** – Guarantee as to fitness for any disclosed purpose
 - Goods must be fit to be used for any particular purpose disclosed by the consumer to the supplier, where the consumer relies on, or it is reasonable for a consumer to rely on, the skill or judgement of the supplier.

1 Throughout this RIS chapter ‘traditional auction’ will be used to define an auction that occurs in a face-to-face manner by an agent.

2 Australian Consumer Law, section 51: Guarantee as to title, section 52: Guarantee as to undisturbed possession, section 53: Guarantee as to undisclosed securities.

- **Section 56** – Guarantee relating to the supply of goods by description
 - Goods must match any description of a good made by the supplier prior to the supply.
 - **Section 57** – Guarantee relating to the supply of goods by sample or demonstration model
 - Where goods are sold by reference to a sample or demonstration model, the goods must correspond to that sample or demonstration model.
 - **Section 58** – Guarantee as to repairs and spare parts
 - Spare parts and repair facilities for goods must be available for a reasonable period of time after the supply of the good.
 - **Section 59** – Guarantee as to express warranties
 - Suppliers and manufacturers must comply with any express warranties made when they sell goods to consumers.
5. When there is a failure to meet the guarantees for a good sold by auction, any action to right the failure will need to be pursued against the person who provided the good for auction. Generally, this will be the business putting their good up for auction through the auction house.

FOCUS QUESTIONS

For businesses

- Are you aware that you have obligations under the consumer guarantee framework when selling goods through auction and do you have mechanisms in place to inform consumers of these rights?

For consumers

- Are you aware that you have some consumer guarantee rights when purchasing at an auction?

RELEVANT STATE AND TERRITORY LAWS

6. In addition to the ACL, auctions and auctioneers are regulated by various state and territory laws. The various laws prescribe the conditions under which auctions can be held and the licencing of auctioneers. Many auctioneering laws require that an auctioneer must not knowingly misrepresent their description of the goods being sold.
7. In addition, state and territory regulations may prescribe additional requirements. For example, *The Motor Dealers and Chattel Auctioneers Act 2014* (Qld) also provides consumers with an additional statutory warranty in relation to motor vehicles, including those sold at auction, in certain circumstances.

THE PROBLEM

SUMMARY

Goods sold, in trade or commerce, by auction are currently exempt from the majority of consumer guarantees. The Review reached the conclusion that the “sale by auction exemptions” should be modernised to take account of the increasing number of online auctions which do not allow for prior inspection of goods.

WHAT IS THE PROBLEM?

8. Auctions are a popular way for consumers to purchase goods and for businesses to dispose of goods cheaply and efficiently. Auctions fulfil an important role in the economy by allowing businesses to dispose of goods quickly and without ongoing liabilities. This low cost mechanism is particularly important for businesses in receivership or seeking to dispose of goods at the end of their saleable life.
9. Traditionally, consumers purchasing at auctions would inspect goods prior to the sale so they could make an assessment of the condition of the good.
10. Businesses are not under an obligation to disclose the quality of goods sold at auction and without an inspection it may be difficult for a consumer to determine the various qualities of the good being auctioned.
11. Consumers purchasing goods without the option to inspect are at a significant disadvantage. Over recent years the use of online auctions has increased. For many goods sold through an online auction it is impossible for a consumer to examine and determine the condition of the goods.
12. For auctions occurring in an “online only” manner the sole source of information available to the consumer is the representations made by the seller regarding the quality and nature of the goods. The incidence of consumers being able to bid in a traditional auction online or via the telephone has also increased and may present the same issues with the lack of ability to inspect.

FOCUS QUESTIONS

For consumers

- Have you ever purchased a good from an auction without inspecting the good? If yes, how often, why were you unable to inspect and was a detailed condition report made available?

HOW SIGNIFICANT IS THE PROBLEM?

13. There has been significant growth in the online auction marketplace since the early 2000s. The emergence of online auctions has expanded the number of consumers who purchase goods through auctions. Traditional auction services that offer online sales are also increasingly common in the marketplace. It is unclear how rapidly these services are expanding and the market penetration of online auctions. However, information from online auctioneers, while not comprehensive, provides some indication of the scope of online auctioneering with turnover at major auction services, offering online auctions, estimated at between \$608³ million to \$2.2 billion per year.⁴ It is unclear what proportion of these sales is online only and what proportion is readily available for pre-inspection.
14. Importantly the problem only relates to sites which fall inside the definition of an auction in the ACL. Websites like Ebay and Gumtree are not considered to be auctions under the ACL for reason that both offer a platform for sellers to sell goods, but do not act as agent of the seller. In those circumstances, the full range of consumer guarantees are available on items purchased from businesses sellers.⁵ However, a website like Gray's Online in certain circumstances may be acting as an agent for the seller and in those circumstances, the full range of consumer guarantees will not apply to goods sold by businesses.
15. The ACL Review was not able to identify the level of consumer detriment stemming from the current operation of the exemptions from the consumer guarantees for auctions. However, it recognised the principle that consumers may incur detriment from purchasing in an online auction, where consumers could not rely on the ACL to obtain a remedy for a faulty product, and the difficulty this may cause when consumers do not have an ability to inspect the goods.
16. It is unclear how many goods are being sold that are not fit for purpose and do not have faults disclosed in online auctions. The detriment that arises is from when a consumer is unable to seek a remedy in the event of a product failure after purchasing the article at auction. With the rise of many "online only" auctions where many near new or new products are potentially sold, consumers' expectations for product performance may be higher. In these circumstances where a consumer's expectation is higher, that consumer may experience detriment if a remedy is unavailable in the event of a product failure.

3 <http://www.graysonline.com/aboutus/>.

4 <https://www.pickles.com.au/about>.

5 However, where purchases are not from sellers in trade or commerce, no consumer guarantees will be available.

PREVIOUS CONSIDERATION

17. The rapid emergence of “online only” auctions was not accounted for during the development of the ACL. In 2009, when the Commonwealth Consumer Affairs Advisory Council (CCAAC) conducted its review into statutory implied conditions and warranties, they considered that the exemptions for auctions were appropriate and should apply to both online and traditional auctions.⁶ The review, however, noted that most auction websites operate differently to traditional auctions and the report typically discussed sites such as eBay, which are not considered to be auctions under the ACL. In determining that the existing exemptions were appropriate for online auctions, the report had not envisaged the increase in “online only” auctions that met the definition of an auction in the ACL.
18. The report affirmed that the ability to physically inspect goods is an important feature of traditional auctions and the ability for consumers to inspect goods was the reason that auctions should continue to receive certain exemptions. The report’s assessment of the appropriateness of the existing exemptions from the majority of consumer guarantees no longer captures the range of auctions and auction models that occur in the marketplace.

FOCUS QUESTIONS

For consumers

- What steps do you take to make an informed bid when considering an article at auction if you do not have a reasonable opportunity to inspect the goods?

⁶ Commonwealth Consumer Affairs Advisory Committee, Consumer Rights: Reforming Statutory Implied Conditions and Warranties, 2009, page 124.

POLICY OBJECTIVE

19. The policy objective is to ensure that exemptions from the consumer guarantees framework in the ACL are facilitating the effective operation of the auction market by balancing the needs of businesses to efficiently dispose of a variety of goods and the needs of consumers to have confidence when purchasing those goods.
20. The options proposed seek to improve the operation of the market for consumers who are purchasing through online auctions by ensuring that where they have no ability to inspect goods they will be able to have easy access to remedies in the event something goes wrong.

OPTIONS AND IMPACT ANALYSIS

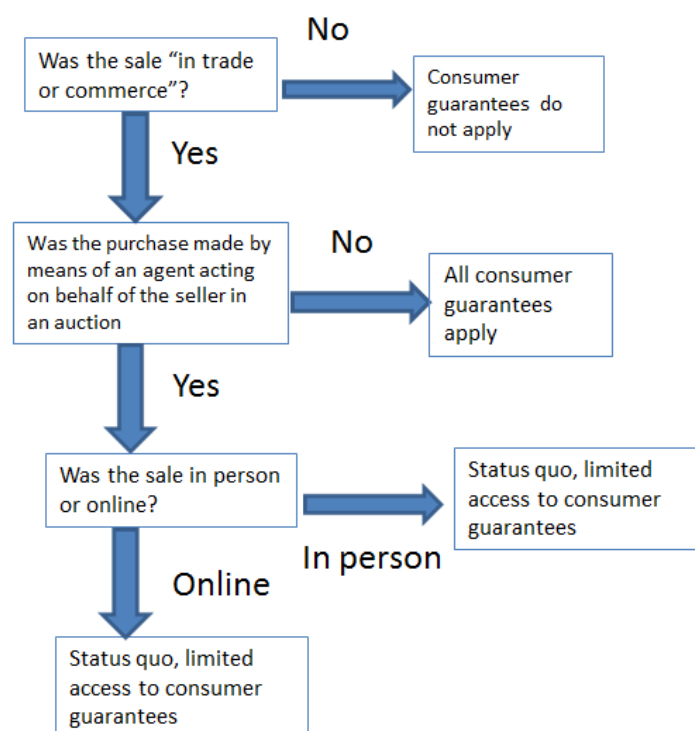
SUMMARY

The consumer guarantees provisions currently exempt goods sold by auction from a number of consumer guarantees. These exemptions may not be appropriate for goods sold through online auctions, as a person is unable to view the goods in order to form a view as to the quality and attributes of goods.

To address the problem, four options are proposed:

- **Option 1:** Status quo.
- **Option 2:** Goods purchased through online auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales). The status quo remains if the auctioneer makes the goods reasonably available for inspection.
- **Option 3:** Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding) receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person.
- **Option 4:** All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

OPTION 1: STATUS QUO



21. In this option consumers that purchase from online auctions will be treated in the same way as those that purchase in person from traditional auctions. That is, they will have consumer guarantee rights that address title, undisturbed possession and undisclosed securities, but not the general guarantees going to quality or fitness of the actual goods. This will not overcome the difficulty of being able to physically inspect goods prior to purchase in all instances, particularly for online auctions.
22. Consumers will continue to place value and rely on information provided by sellers. However, while suppliers are prohibited from making false or misleading representations and may be penalised for doing so, individual consumers will not have direct rights to remedies (such as a repair, refund or replacement) under the consumer guarantees.
23. Sellers in the online auction marketplace may continue to develop alternative approaches to resolving disputes between sellers and customers. For example current approaches include:
 - The auctioneer taking direct responsibility for disputes that arise in relation to the goods sold. The auctioneer's terms and conditions state that they will bear the seller's obligations, provide support and handle disputes about the goods through their own complaints processes. The auctioneer makes the decision whether or not to provide a remedy under the auctioneer's return policy.
 - The auctioneer leaves all disputes to be settled between the buyer and the seller. The auctioneer's terms and conditions seek agreement from the buyer to release the auctioneer from any claim, action, tribunal or court proceedings in respect of an item they purchased through auction. While it is not possible for existing consumer guarantee rights to be written away by a contract, where such rights validly apply, those rights remain the responsibility of the seller and not the auctioneer. Under this model the auctioneer acts solely to facilitate the sale of goods.
24. As the online auctioneering marketplace develops further, businesses may increasingly adopt best practice models to facilitate the sale and purchase of goods. By adopting best practice and facilitating consumers seeking redress when goods are faulty, auction services could facilitate more confident participation in the market.

Impact Analysis

25. Under the status quo, the law would remain as it is, with the existing framework of exemptions from the consumer guarantees for all goods sold at auction. Consumers bidding online without an inspection of goods would continue to determine their bidding strategy with less information than consumers who are able to inspect goods.
26. The status quo continues to offer consumers access to a wide range of products, ranging from goods sold for parts through to brand new stock. While consumers purchasing at auctions do not have access to the majority of the consumer guarantees this is balanced by possibly lower prices.

27. In maintaining the current exemptions from the consumer guarantees framework the status quo allows businesses to continue to have a low cost mechanism to dispose of goods. This will provide businesses with a means to dispose of goods that can be at the end of their saleable life without the ongoing liabilities from the consumer guarantees regime. This ensures that businesses will be able to recoup some benefits from goods where they would not otherwise be able to.
28. Auctioneers will continue to be able to sell the range of new and used goods that they currently do. The possibility exists that traders may provide more information to prospective buyers regarding the condition of their goods to bring about higher bids.
29. Further, auctioneering facilities will be able to compete with each other on the basis of the services that they provide to sellers and consumers. Some online auctioneers may continue to develop alternative ways in which to help resolve disputes between buyers and sellers. This has already occurred with some of the “online only” auction facilities offering dispute resolution services to consumers.
30. The auction market will continue to grow and auctioneers would expect no change to the value of commissions received from individual goods.
31. Most auctions in the Australian marketplace are likely to offer some form of inspection. Consumers are able to inspect in person or have a friend, relative or profession inspect goods on their behalf. If a consumer, seeking to purchase a good at auction, wishes to increase their knowledge about a good the status quo does maintain costs in time and labour to provide additional information. If they do not choose to inspect the good the lack of information available to consumers is likely to factor into the development of their bidding strategy. Where an inspection is not feasible a consumer purchasing goods through an auction will continue to face higher levels of information asymmetry.

BENEFITS	COSTS
<ul style="list-style-type: none"> Sellers and auctioneers could continue to undertake voluntary measures to improve the level of information provided to consumers. 	<ul style="list-style-type: none"> Consumers would continue to not have automatic remedies for defective or unfit goods purchased through auctions.
<ul style="list-style-type: none"> Consumers continue to have access to a wide range of goods at auctions and the possibility of purchasing like for like goods at lower prices than that supplied by traditional retailers. 	<ul style="list-style-type: none"> Consumer confidence for goods purchased at all auctions is unlikely to increase.
<ul style="list-style-type: none"> Businesses continue to be able to access a low cost mechanism to dispose of goods. 	<ul style="list-style-type: none"> Consumers will continue to have search costs if they wish to identify the attributes of a product in developing their bidding strategy.
<ul style="list-style-type: none"> Auctioneers will continue to have access to a wide range of products to sell. 	
<ul style="list-style-type: none"> Auctioneers will continue to compete for both buyers and sellers through offering support to consumers in the event of a product failure. 	

FOCUS QUESTIONS**For consumers**

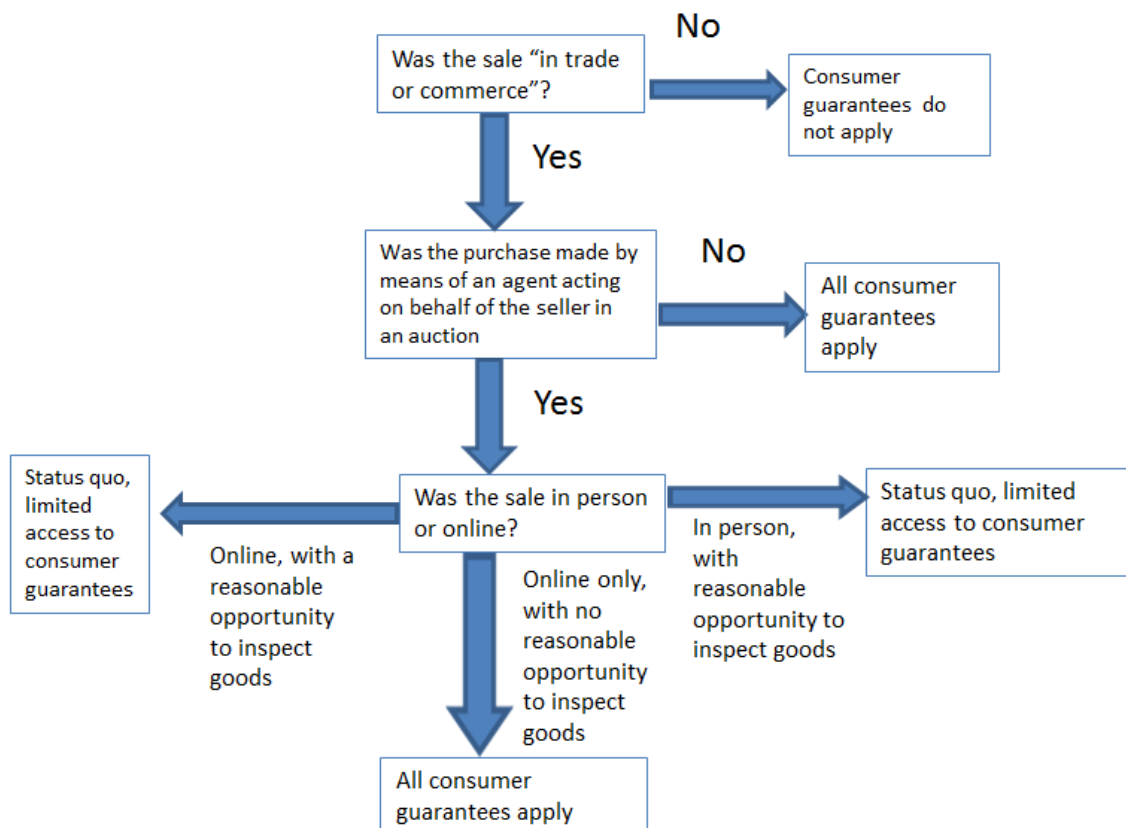
- Do you physically inspect goods before you place a bid? How does it influence your bidding strategy? Do you bid in person or remotely and why?
- Where you have been unable to inspect goods in person, have you ever sought to have someone inspect on your behalf?
- Are you confident placing a bid in an online auction where there is not a reasonable opportunity to inspect the good, if the good has a comprehensive description? Were there opportunities available to seek further details about goods for sale?
- Have you ever purchased a good that did not meet your expectations through an auction? If so how was the problem remedied, and by who?
- Do you have an expectation when purchasing goods from auctions that the seller will assist in the event of a product failure?
- What classes of goods do you purchase at auction (used, new, or refurbished)?

For businesses

- How many goods are sold through your auction house each year? How many of these are: sold only in person; sold only online; or sold in person but with online bidding allowed?
- What is the average value of goods sold through your auction house/platform?
- How many bidders on average are there for each good sold? Does this vary significantly for online as opposed to in person auctions?
- What initiatives is your business taking to increase the confidence of consumers purchasing online, and provide redress when things go wrong?

OPTION 2: GOODS PURCHASED THROUGH AUCTIONS THAT ARE CONDUCTED ENTIRELY ONLINE, WITH NO REASONABLE OPPORTUNITY TO INSPECT GOODS, RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).

The status quo remains if the auctioneer makes the goods reasonably available for inspection



32. Under this model, only purely online auctions that do not allow a person a reasonable opportunity to inspect the goods will have the remaining consumer guarantee rights applied. This follows from the rationale behind the current exemptions that additional consumer guarantees are not necessary when consumers can inspect the goods at auction.
33. A consumer would not receive the remainder of the consumer guarantees if they participated in an auction where there was a reasonable opportunity to inspect goods. This includes both auctions where:
 - a 'traditional auction' operates an online portal for remote bidding, and
 - a website offers auction services with a facility for consumers to inspect goods.
34. Both of these examples allow consumers a reasonable opportunity to view the goods before determining their bidding strategy.

35. A reasonable opportunity for inspection could encompass the approach taken in ‘traditional auctions’ towards the inspection of goods, where goods are available for inspection in a specified place at a specified time. In general, the ACL does not define what ‘reasonable’ is taken to mean and leaves the definition of reasonableness to a court to decide within the context of a given case. This RIS is specifically looking for views on what would constitute a reasonable opportunity to inspect.
36. For “online only” auctions it is proposed that consumers have access to the remainder of the consumer guarantees that are noted in paragraph 4 relating to the quality of goods.
37. The consumer guarantees were designed for consumers purchasing through traditional retail sale mediums. Accordingly, input is sought on what impacts may arise if the full range of consumer guarantees are made available to consumers purchasing through online only auctions where the consumer has not had a reasonable opportunity to inspect the goods.
38. Access to the additional consumer guarantees for goods purchased through “online only” auctions may improve the confidence of consumers purchasing goods through these auctions.
39. Businesses selling goods via auction will continue to have access to an important low cost mechanism for the disposal of goods, while being able to recover costs. Businesses selling through online auctions will have an increase in ongoing liabilities in relation to the possible application of consumer guarantees.
40. Businesses selling goods through auctions need to determine the appropriate auction facility to dispose of their goods. Auction facilities should clearly disclose to the sellers of goods whether they are offering an online only sale or if they have facilities to allow for a reasonable inspection. Auctioneers’ responsibilities will not change in relation to the consumer guarantees as it is the seller of the goods who is responsible for providing a remedy in the event something goes wrong. Auctioneers must not mislead or deceive a consumer in relation to the availability of a consumer guarantee or the goods for sale.

Impact Analysis

41. Compliance costs under Option 2 are expected to be relatively low as this option only affects a limited number of auctions, noting that there is uncertainty as to what proportion of auctions offer inspections. This option does not provide access to the consumer guarantees where there is a reasonable opportunity to inspect the goods. As such, there will only be an increase in costs to businesses that sell goods sold through “online only” auctions.
42. Consumers who purchase goods from “online only” auctions will likely have increased confidence to purchase goods knowing that in the event of an undisclosed product failure they will have access to consumer guarantees. This increased confidence could translate into consumers developing more aggressive biddings strategies.

43. Where the auctioneering facility provides a reasonable opportunity to view goods, consumers are still able purchase the good without a physical inspection. As is currently the case, consumers who cannot physically inspect goods have alternatives to gain information about a product apart from the seller's representations. Consumers may have a friend, family member, or professional inspect the goods on their behalf and provide them with additional information. Alternatively, the consumer may factor this information asymmetry into their bidding strategy. This is currently the case and imposes no additional search costs on consumers above the status quo for purchases at 'traditional auctions'.
44. As Option 2 does not alter the access to consumer guarantees for auctioneering facilities that offer "online auctions" and "traditional auctions" for the same auction it is unlikely to result in a reduction in the number of auctioneering facilities or goods sold at auction. This will ensure consumers continue to be able to purchase goods at low prices from a wide range of auctioneering facilities. This option also ensures that there is a wide range of auctioneering facilities available to have a low cost method of disposing of goods.
45. For regional auctioneering facilities, who offer both "online" and "traditional auctions" for the same auction, this approach ensures that they will be able to continue to have access to a wide range of consumers through their online bidding platforms to encourage competitive bidding on goods.
46. Where a business sells through an "online only" auction house they will need to be aware that they must comply with the full consumer guarantees regime. This will add training costs to staff to ensure that they are aware of this requirement.
47. Businesses that sell through "online only" auctions, may be incentivised to provide better information to prospective purchasers as to the condition of articles for sale under Option 2. Certain consumer guarantees, such as the guarantee relating to spare parts, do not apply if the seller takes reasonable steps to ensure the consumer is aware that repair facilities and spare parts will not be available. Additionally, the guarantee as to acceptable quality takes into account the price, relevant circumstances and any statements made about a good. For example, when a consumer purchases a crate of dinner plates at an auction for \$5 described as being in 'mixed condition' they would not be able to claim there was a failure entitling them to a remedy if many of the plates in the crate were damaged or broken.
48. Accordingly, it is possible that businesses will incur higher costs in providing greater information about the products they sell in "online only" auctions with a view to minimising their consumer guarantee liability.
49. "Online only" auction facilities will be required to update their terms and conditions, develop processes to connect buyers and sellers in the event of product failures and train staff as to their responsibilities under the consumer guarantees regime. This RIS seeks information on the potential costs that would come from implementing these changes to auctioneering facilities.

BENEFITS	COSTS
<ul style="list-style-type: none"> Consumers would be able to purchase goods through online auctions with increased confidence as they will be able to rely on consumer guarantees. 	<ul style="list-style-type: none"> “Online only” auctioneering facilities may need to develop mechanisms to assist consumers to contact sellers in the event of a product failure.
<ul style="list-style-type: none"> Sellers may provide better information to prospective purchasers as to the condition of articles. 	<ul style="list-style-type: none"> Sellers using “online only” auctions are likely to incur additional costs if they provide better information to consumers as to the condition of articles.
<ul style="list-style-type: none"> Consumers may be willing to bid more aggressively on goods due to increased confidence. 	<ul style="list-style-type: none"> There will be training costs to auctioneering facilities as well as for sellers using auctions to be aware of the new requirements for “online only” auctions.
<ul style="list-style-type: none"> Sellers will continue to be able to access local auction facilities (especially in regional areas) that offer online bidding, maintaining their access to the widest pool of consumers. 	<ul style="list-style-type: none"> “Online only” auctioneering facilities will have to upgrade their website’s terms and conditions.
	<ul style="list-style-type: none"> Businesses that sell through “online only” auctions will need to comply with additional consumer guarantees.

FOCUS QUESTIONS

For consumers

- Have you bid through an online portal at a traditional auction? How frequently and on what types of good?
- When purchasing online, without inspecting a good, to what extent does the lack of inspection affect your bidding strategy?
- To what extent are you likely to bid more aggressively when you have access to greater information about the product?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?
- What would you consider to be a reasonable opportunity for inspection?

For businesses

- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- Do you offer an online portal in conjunction to your ‘traditional auction’, and what percentage of your sales go through this mechanism?
- Do you offer the opportunity to inspect goods? If so, for how long are goods generally offered for inspection?

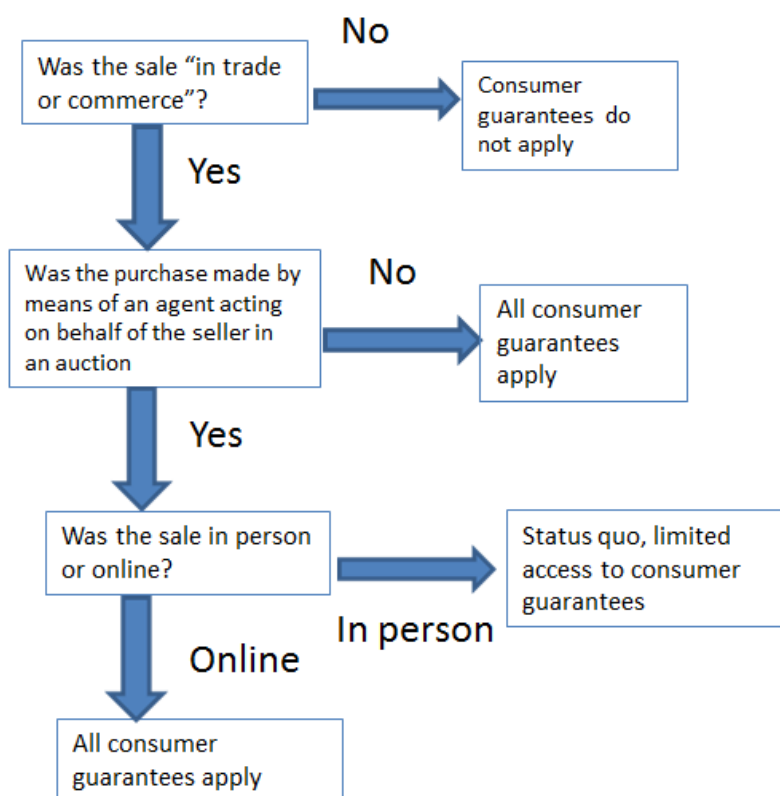
FOCUS QUESTIONS (CONTINUED)

For businesses

- What do you consider a reasonable opportunity for inspection would involve?
- Do you consider that any of the consumer guarantees are inappropriate for goods sold through “online only” auctions, and which guarantees and why?
- Would you look to provide a reasonable opportunity to inspect with a view to reducing the scope of your consumer guarantee liability?
- What costs would you face in updating your website’s terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?

OPTION 3: GOODS PURCHASED THROUGH ONLINE AUCTIONS, REGARDLESS OF THE ABILITY FOR A PRIOR INSPECTION (INCLUDING TRADITIONAL AUCTIONS THAT ALLOW ONLINE BIDDING), RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).

The status quo will remain for consumers who purchase from auctions in person.



50. In this option, when a consumer purchases a good from an online auction (including from traditional auctions in which online bidding is available), in trade or commerce, they will be entitled to the full range of consumer guarantees even if an inspection is possible. This option creates a simple regime for consumers who may be purchasing through online auctions. However, consumers who purchase from auctions in person will not receive access to the remainder of consumer guarantees.

For online auctions it is proposed that consumers have access to the remainder of the consumer guarantees outlined at paragraph four.

51. Similar to Option 2, your input is sought on what impacts may arise if the full range of consumer guarantees are made available to consumers purchasing through online auctions.
52. Option 3 addresses the issue of exemptions from the majority of consumer guarantees for online auctions where it is not possible to inspect goods. This option will allow consumers to confidently bid in online auctions in locations where they are unable to access a viewing – for example, bidding from their home in Perth on an item being sold through the online portal for an auction occurring in Brisbane.

Impact Analysis

53. Compliance costs under option three are expected to be higher than option two as this option affects all auctions that offer an online ability to bid on goods. This option provides access to the consumer guarantees even where there is a reasonable opportunity to view goods, and applies to all goods sold through any online auction platform in trade or commerce.
54. Consumers will be able to make confident purchasing decisions. This confidence may result in consumers developing more aggressive bidding strategies. Sellers of goods through any online auction could experience higher returns on goods and auctioneers may receive higher commissions on those sales. This RIS chapter is seeking evidence on the likelihood that consumers would be willing to pay more for goods sold at auction if they were confident that they would receive access to the consumer guarantees in the event that something goes wrong.
55. It is possible that businesses that sell through online auctions, where the full range of the ACL consumer guarantees apply, will be incentivised to provide better information to prospective purchasers as to the condition of articles for sale. As noted previously in relation to Option 2, this situation may arise as businesses seek to minimise consumer guarantee liability.
56. It is also possible that businesses may seek to avoid selling goods through auction sites that offer any online bidding facilities to maintain their current level of consumer guarantee liabilities to those associated with their right to sell the good.
57. As a consumer would be able to access the full range of guarantees if they bid through an online portal, consumers are likely to seek online purchasing channels over attending traditional auctions, even when they have physically inspected goods. In this event, it is unclear whether sellers would prefer online auctions, which may obtain a greater pool of bidders albeit with the potential for new consumer guarantee liability, or traditional auctions, where their goods may be bid on by a smaller audience generally with less risk of consumer guarantee claims.

58. If business sellers seek to avoid auction facilities with online portals, there may be a significant reduction in the number of goods available through online facilities. This reduction could occur in two ways. The first is that sellers may avoid auction facilities with online portals; and the second is where auction facilities withdraw their online bidding platforms due to reduced demand.
59. There may be significant regional impacts on auctioneering businesses if businesses seek to avoid selling articles through online auctions. At present many auction houses in remote areas are likely to operate an online portal to facilitate bidding in addition to their traditional auctioneering. If sellers become unwilling to sell through these mediums, rather than being incentivised to provide additional information as to the condition of goods, these auction houses may experience a drop in commissions. Sellers may also experience diminished returns through these regional auction houses (where no online portal is subsequently used) as there would be less competition for goods with the pool of consumers being smaller than an online portal allows.
60. Auction houses will be required to update their disclaimer documents and provide training to staff to assist consumers in the event of a product failure. Auctioneers at present are generally not required to assist consumers dealing with sellers of goods and would need mechanisms to assist consumers. There will be additional training requirements for businesses seeking to dispose of goods via auction.

BENEFITS	COSTS
<ul style="list-style-type: none">Consumers can purchase goods through online auctions with increased confidence that they will be able to rely on a relevant consumer guarantee.It will be easier for consumers to know and understand the consumer guarantee regime and when it applies to auctions.Sellers and auctioneers may benefit as consumers could be willing to bid more aggressively on goods.	<ul style="list-style-type: none">All auctioneering facilities offering online portals and sellers of goods through auctions would face staff training costs regarding the new regime.Businesses may seek to avoid their goods being sold through online auctions, decreasing consumer choice and possibly resulting in lower returns for businesses.There could be a reduction in the willingness of businesses to sell through online auctions due to the possibility of additional liabilities.<ul style="list-style-type: none">Businesses may face higher costs to dispose of goods.
<ul style="list-style-type: none">Sellers may provide better information to prospective purchasers as to the condition of articles	<ul style="list-style-type: none">Sellers using “online only” auctions are likely to incur additional costs if they provide better information to consumers as to the condition of articles.Possible business impact on regional auction houses if online auctions are not favoured by sellers.Costs to sellers from the possibility of being liable for a broader range of consumer guarantees.

BENEFITS	COSTS
	<ul style="list-style-type: none"> • All auctioneering facilities offering online portals may need to develop mechanisms to link consumers with sellers in the event of a product failure. • Consumer confusion around the application of the guarantees would remain when purchasing at a traditional auction. • Auctioneering facilities would need to amend their terms and conditions.

FOCUS QUESTIONS

For consumers

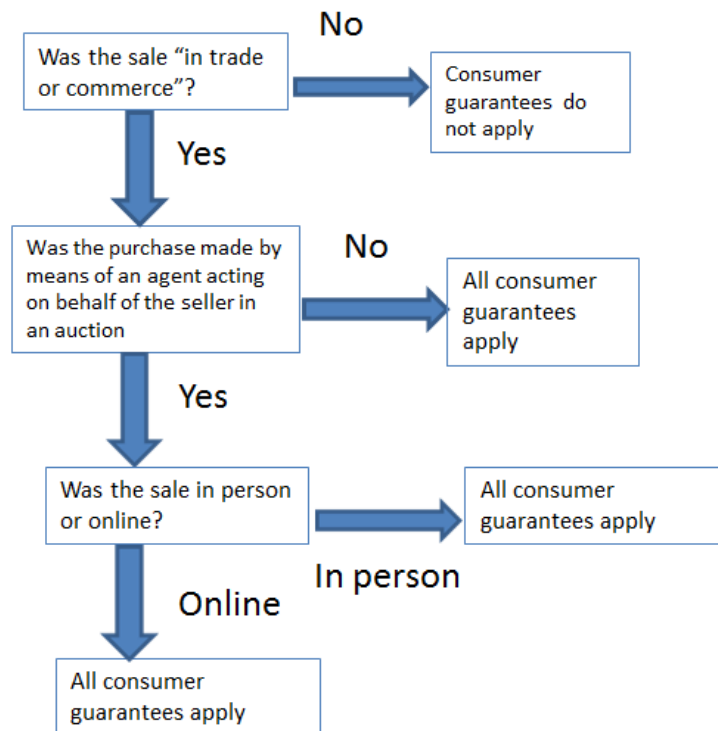
- If the same good was being auctioned in person and online, would you still attend the auction in person?
- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?

For businesses

- Do you offer an online portal in conjunction to your 'traditional auction'? If so, what percentage of your sales goes through this mechanism?
- For regional auctioneers, what percentage of your sales comes from bidders in different locations to the 'traditional auction'?
- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- If all online auctions received access to all consumer guarantees, would you be less willing to auction your goods through an online portal or by a business that offers an online portal?
- What costs would you face in updating your website's terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?

OPTION 4: ALL GOODS PURCHASED THROUGH AUCTIONS WILL RECEIVE ACCESS TO THE REMAINDER OF THE CONSUMER GUARANTEES (THAT ARE AVAILABLE IN THE ACL FOR GENERIC RETAIL SALES).

This option removes all the exemptions in relation to consumer guarantees for goods bought via an auction, no matter the medium of the auction.



61. This option addresses the issue by removing all consumer guarantee exemptions for goods bought through auctions. It would also result in consumers having the same level of consumer guarantee protection when they buy from a business regardless of whether the good was purchased at auction, a traditional retail store or an online trading store.
62. This option will increase consumer protection by ensuring that all goods purchased at auctions in trade or commerce come with access to all consumer guarantees. It will also remove confusion for consumers, auctioneers and businesses by clarifying and simplifying the rights that apply. For example, parties would not need to identify whether or not a sale is by auction (which can be unclear, for example, when some websites offer online auctions combined with 'buy now' options), and then identify whether the auctioneer is acting on behalf of the seller or it is merely an intermediary platform.
63. Further, while the traditional rationale applies in theory to physical auctions, it is not always clear that consumers do, in practice, have a reasonable opportunity to inspect the goods beforehand. This can be due, for example, to limited time to inspect the goods, restrictions on handling the goods, or the number of attendees at a physical auction.

64. Some overseas jurisdictions have already removed exemptions for auctions. In particular, New Zealand removed the exemptions for sale by auction in 2014. The impacts of this change are unclear on the New Zealand auction market in relation to the throughput of goods and the prices paid for goods at auction. These are the types of impacts that this RIS chapter is seeking information on for the Australian context.

CONSUMER GUARANTEES AT AUCTIONS IN NEW ZEALAND

The Consumer Guarantees Act will apply if the seller is in trade and the property is usually purchased for personal, domestic or household use. People are not usually in trade when they sell property they initially bought or acquired for personal use and this is often the case for online bidding sites like Trade Me (A New Zealand auction site).

Under the Consumer Guarantees Act, goods must:

- match their description
- have no undisclosed defects
- be fit for their normal purpose
- be safe, durable, and of a reasonable quality
- be acceptable in look and finish.

65. On the other hand, removing the exemptions may not remove all confusion for a consumer seeking to exercise their rights. The seller (rather than auctioneer, as the seller's agent) would remain responsible for the provision of remedies under the ACL. Some confusion may result for consumers if the responsible party is not made clear.

Impact Analysis

66. Compliance costs under Option 4 would be significantly higher than the other options as this option affects all auctions, regardless of whether they are online or not. This would require all businesses selling goods through auctions to be aware that they have increased responsibilities in relation to consumer guarantees.
67. All consumers purchasing goods at auctions would have increased confidence in determining their bidding strategy. The complete removal of these exemptions would mean that at all auctions consumers would have protections if there is a failure with the goods they purchase.
68. This option would dramatically simplify the consumer guarantees regime for consumers purchasing at auction. Rather than having a mix of exemptions depending on the medium through which an auction occurs they would generally have access to the consumer guarantees.
69. Similarly, for businesses who sell goods at auction and through retail channels, there is the prospect of simplification through one set of rules governing consumer guarantee liability. This may raise the prospect of familiarisation costs being less for such businesses.

70. Confusion may still exist in the auctions regime as many goods sold at auction may not be inside the scope of 'trade or commerce'. That is, in the event of a failure to meet the guarantees, buyers would only have a right to a consumer guarantee remedy against a seller acting in trade or commerce.⁷ It may not be clear to buyers in an auction whether the article has been offered for sale by a person in trade or commerce. A similar observation has been made in the context of New Zealand's repeal of its auctions exemption.⁸
71. Sellers of goods at auctions could experience benefits from the approach in option four if consumers are willing to develop more aggressive bidding strategies. This RIS is particularly interested to identify if consumers are willing to pay higher prices for goods sold at auctions if they came with the full range of consumer guarantees. At present it is unclear that this is likely to be the case. An increase in price for individual goods sold at auctions would also benefit auctioneers through increases in commissions on sales.
72. However it is unclear whether any possible increase in prices could be diffused by a reduction in throughput in auction houses. Sellers may introduce the use of high reserve prices to ensure that any future liabilities are covered. With these increased costs sellers of goods may also seek to use alternative strategies to dispose of their goods resulting in fewer goods entering the auction market. Additionally, if there was a reduction in supply of goods sold at auction consumers may have reduced choice when purchasing at auctions. However, it may also be possible consumers may look to purchase like for like goods equally through auctions and traditional retail outlets.
73. Auctioneers would face significant costs in adjusting to this system. As in options two and three, under this option they would be required to train staff in relation to the new requirements, and they would need to develop systems to connect sellers and consumers in the event of product failure (in the scope of the consumer guarantees).

BENEFITS	COSTS
<ul style="list-style-type: none">• Consumers will be more confident when purchasing at auctions. Consumers can make purchasing decisions in the knowledge that their purchases are protected by consumer guarantees.	<ul style="list-style-type: none">• Increased compliance costs due to the need to be aware of the revised framework, consumer education and the possibility of being liable for consumer guarantees.
<ul style="list-style-type: none">• Simplifies the consumer guarantee framework for all parties using auctions, reducing their search costs to determine if the consumer guarantees apply.	<ul style="list-style-type: none">• Significant likelihood that businesses may begin to introduce reserve prices for goods sold by auctions to cover the potential for future liabilities relating to consumer guarantees.
<ul style="list-style-type: none">• There could potentially be higher prices for individual goods sold at auctions.	<ul style="list-style-type: none">• Possible higher prices for individual goods sold at auctions.

7 This same scenario applies in relation to consumer purchasers from businesses on online platforms like Ebay. At present, it is common for sellers on Ebay to identify themselves as businesses. However this same practice has not emerged for businesses selling via auction. One off sales by individuals are not likely to be in trade or commerce.

8 Kate Tokeley, *When Not All Sellers Are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace*, 2017, 39(1) *Sydney Law Review*, page 59.

BENEFITS	COSTS
<ul style="list-style-type: none"> One level of consumer protection applies across all business sales to consumers. 	<ul style="list-style-type: none"> Possible reduction in the volume of goods sold through auctions as businesses seek other low cost means to dispose of goods, such as dumping or overseas markets.
	<ul style="list-style-type: none"> Possible lower commissions for auctioneering facilities in the event of reduced volume of goods sold through auction facilities.
	<ul style="list-style-type: none"> All auctioneering facilities and sellers of goods would need to provide training to staff regarding the changes.
	<ul style="list-style-type: none"> All auctioneering facilities may need to develop mechanisms to link consumers with sellers in the event of a product failure.
	<ul style="list-style-type: none"> All auctioneering facilities and sellers of goods would need to update their websites regarding the changes.
	<ul style="list-style-type: none"> Sellers of goods would have costs through providing additional information to consumer regarding the nature of their goods.
	<ul style="list-style-type: none"> Possible reduction in choice of goods being sold at auction as business seek other low cost means to dispose of goods, such as dumping or overseas markets.

FOCUS QUESTIONS

For consumers

- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?

For businesses

- What benefits do you see as potentially flowing to your business if goods sold at auction came with the full range of consumer guarantees?
- When disposing of goods via auction, would you seek to introduce reserve prices to cover any potential liabilities from the consumer guarantees?
- Apart from auctions what mechanisms exist for you to dispose of goods that cannot be sold through conventional retail channels? Do these alternatives have higher costs and what are these costs?
- What costs would be associated with removal of the exemptions for auctions from the consumer guarantee framework?

FOCUS QUESTIONS

Throughout this consultation paper there are a number of detailed questions for stakeholders to answer to better define the problem and assess the costs and benefits of the different options. Stakeholders lodging formal submissions are encouraged to refer to these detailed questions in their submissions. The focus questions from throughout this chapter are set out below for ease of reference.

FOR BUSINESSES

- Are you aware that you have obligations under the consumer guarantee framework when selling goods through auction and do you have mechanisms in place to ensure to inform consumers of these rights?
- How many goods are sold through your auction house each year? How many of these are: sold only in person; sold only online; or sold in person but with online bidding allowed?
- What is the average value of goods sold through your auction house/platform?
- What initiatives is your business taking to increase the confidence of consumers purchasing online, and provide redress when things go wrong?
- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- What costs do you see associated with the provision of information regarding the quality of goods?
- How many bidders on average are there for each good sold? Does this vary significantly for online as opposed to in person auctions?
- Do you offer the opportunity to inspect goods? If so, for how long are goods generally offered for inspection?
- What do you consider a reasonable opportunity for inspection would involve?
- Do you consider that any of the consumer guarantees are inappropriate for goods sold through “online only” auctions, and which guarantees and why?
- Would you look to provide a reasonable opportunity to inspect with a view to reducing the scope of your consumer guarantee liability?
- What costs would you face in updating your website’s terms and conditions to adjust to the new regime?
- To what extent are your staff already aware of their responsibilities in relation to consumer guarantees? What costs would be associated with training staff, were the exemptions framework to change as outlined in this option?
- Do you offer an online portal in conjunction to your ‘traditional auction’? If so, what percentage of your sales goes through this mechanism?
- For regional auctioneers, what percentage of your sales comes from bidders in different locations to the ‘traditional auction’?

For Businesses (continued)

- Do you provide a service for consumers to contact sellers of goods in the event of a product failure? If yes, how often is this service used? What costs would you see in developing such a system?
- If all online auctions received access to all consumer guarantees, would you be less willing to auction your goods through an online portal or by a business that offers an online portal?
- What benefits do you see as potentially flowing to your business if goods sold at auction came with the full range of consumer guarantees?
- When disposing of goods via auction, would you seek to introduce reserve prices to cover any potential liabilities from the consumer guarantees?
- Apart from auctions what mechanisms exist for you to dispose of goods that cannot be sold through conventional retail channels? Do these alternatives have higher costs and what are these costs?

FOR CONSUMERS

- Are you aware that you have some consumer guarantee rights when purchasing at an auction?
- Have you ever purchased a good from an auction without inspecting the good? If yes, how often, why were you unable to inspect and was a detailed condition report made available?
- What steps do you take to make an informed bid when considering an article at auction if you do not have a reasonable opportunity to inspect the goods?
- Do you physically inspect goods before you place a bid? How does it influence your bidding strategy? Do you bid in person or remotely and why?
- Where you have been unable to inspect goods in person have you ever sought to have someone inspect on your behalf?
- Are you confident placing a bid in an online auction where there is not a reasonable opportunity to inspect the good, if the good has a comprehensive description? Were there opportunities available to seek further details about goods for sale?
- Have you ever purchased a good that did not meet your expectations through an auction? If so how was the problem remedied, and by who?
- Do you have an expectation when purchasing goods from auctions that the seller will assist in the event of a product failure?
- What classes of goods do you purchase at auction (used, new, or refurbished)?
- Have you bid through an online portal at a traditional auction? How frequently and on what types of good?
- When purchasing online, without inspecting a good, to what extent does the lack of inspection affect your bidding strategy?
- To what extent are you likely to bid more aggressively when you have access to greater information about a product?

For Consumers (continued)

- To what extent are you likely to bid more aggressively at auction if you could rely on consumer guarantees applying to the same extent as if the good was purchased at retail?
- What would you consider to be a reasonable opportunity for inspection? If the same good was being auctioned in person and online, would you still attend the auction in person?
- If you rarely, or do not bid, at online auctions now, would you be more willing to consider bidding if the goods came with the full range of consumer guarantees?
- To what extent would you ever consider seeking to contact a seller of a good from an auction in the event of a product failure?