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24 February 2022

Jasmin Resurreccion  
Consumer Policy Unit  
Market Conduct Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Sent via email to [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Ms Resurreccion

Please find enclosed the ACCC's submission to Treasury's Consultation Regulatory Impact Statement (CRIS) on *Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law*.

The consumer guarantees and supplier indemnification provisions represent some of the most important protections for consumers and small businesses in Australia.

As set out in our submission, the ACCC strongly supports the options set out in the CRIS to introduce prohibitions to underpin the consumer guarantees and supplier indemnification frameworks.

These reforms are critical in order to change business incentives and improve compliance with the Australian Consumer Law.

Should you require any further information, please contact Rami Greiss, Executive General Manager Consumer and Fair Trading Division, by phone on (02) 6243 1226 or by email ([rami.greiss@accc.gov.au](mailto:rami.greiss@accc.gov.au)).

Yours sincerely

Rod Sims  
Chair



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

Consultation Regulation Impact Statement

ACCC submission

February 2022

## Executive summary

The Australian Competition and Consumer Commission (the ACCC) welcomes the opportunity to comment on the Consultation Regulation Impact Statement on 'Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law (the ACL)' (the CRIS). The ACCC strongly supports strengthening the ACL to better protect consumers and adequately incentivise suppliers and manufacturers to comply with their existing consumer guarantee and supplier indemnification obligations.

Consumer guarantee issues are a significant and growing number of the complaints received by the ACCC and state and territory ACL regulators, despite the considerable compliance activity by all ACL regulators.

These issues continue to impose a considerable cost on consumers and small businesses in Australia. Consumers are forced to incur losses for goods or services purchased that do not meet statutorily mandated guarantees because they are unsafe, not reasonably durable or not fit for purpose.

Small businesses face these same costs and more. Some business transactions under \$100,000 are treated the same as consumer transactions under the ACL consumer guarantees, making the consumer guarantees an important protection for small businesses as well. Small businesses also face additional costs as the ineffectiveness of the supplier indemnification provisions means that they are often in a position of choosing to either refuse consumers the remedies they are entitled to, or providing remedies to consumers and incurring the losses associated with not receiving the indemnity they are entitled to from a manufacturer.

While ACL regulators will always have an important role to play in enforcing compliance with the ACL, whether through the ACCC taking on systemic and national conduct, or through the individual dispute resolution work by the state and territory ACL regulators, the consumer guarantees framework needs strengthening to incentivise compliance. The ACL consumer guarantees framework should more effectively support consumers and small businesses to secure their statutory consumer guarantee and supplier indemnification rights without the need for ACL regulator intervention.

For these reasons, the ACCC supports:

- Option 3 of Part A of the CRIS, being the introduction of a prohibition against not providing a remedy for consumer guarantee failures when a business is legally required to do so, and
- Options 3 and 4 of Part B of the CRIS, being the introduction of a prohibition against not indemnifying suppliers where manufacturers are legally required to do so, and a prohibition against manufacturers retaliating against suppliers who request indemnification.

At present, there are little to no incentives in the ACL for businesses to comply with their consumer guarantee or supplier indemnification obligations. This significantly undermines the consumer guarantees regime.

Making both the failure to provide a consumer guarantee remedy and the failure to indemnify a supplier contraventions of the ACL will change businesses incentives and improve compliance with the ACL.

## Part A – Consumer Guarantees

### Key issues with the existing consumer guarantees regime

The ACCC considers there are several issues with the existing consumer guarantees regime, which results in several poor outcomes for consumers and small businesses,<sup>1</sup> and the economy as a whole:

- The current framework lacks sufficient incentives for businesses to comply with the law.
- Non-compliant businesses transfer costs to consumers and small businesses.
- The widespread failure of low-cost goods goes unchecked.
- Non-compliant businesses have a competitive advantage.
- Consumer guarantee laws are subject to little judicial consideration.

#### **The current framework lacks sufficient incentives for businesses to comply with the law**

The ACCC's experience is that non-compliance with the consumer guarantees is widespread, which is reflected in complaints about consumer guarantees consistently featuring as a high percentage of contacts to the ACCC. This is despite the wide availability of guidance materials and resources available, and the compliance and enforcement activities undertaken by the ACCC and state and territory ACL regulators.

##### *Compliance and enforcement activity has been extensive*

Following the introduction of the ACL in 2010, ACL regulators published extensive and detailed guidance on the operation of the consumer guarantees and other ACL provisions on the ACL website ([www.consumer.gov.au](http://www.consumer.gov.au)). These guides are currently in the process of being updated.

Since then, the ACCC and other ACL regulators have undertaken a significant amount of education, compliance and enforcement activities to inform consumers and to try to improve businesses' compliance, and therefore improve consumer guarantee outcomes for consumers.

We disseminate extensive guidance for both consumers and businesses on the operation of consumer guarantees through our website, our social media and in our YouTube videos. In collaboration with the state and territory ACL regulators we have also published more detailed guidance on the 'durability' and 'safe' aspects of the consumer guarantee of acceptable quality, to both better inform consumers and assist businesses to comply. The state and territory ACL regulators and other organisations, such as The Checkout, have also disseminated extensive and accessible guidance to inform consumers about their consumer guarantee rights. However, educating consumers about their rights has a minimal impact on changing businesses' compliance.

Guidance on businesses' consumer guarantees obligations have frequently featured in the ACCC's regular compliance and educative activities, such as our email information bulletins to our small business stakeholders database and franchising stakeholders database (over

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<sup>1</sup> As noted in the CRIS, a purchaser is a 'consumer' for the purpose of the consumer guarantees if the good or service costs \$100 000 or less, or the good or service is of a kind ordinarily acquired for personal, domestic or household use. This definition means that many small business purchases are also protected by the consumer guarantee regime, unless those purchases were for the purposes of re-supply or using them up or transforming them through some form of production. As such, a reference in this submission to 'consumer' includes a reference to businesses, where a business transaction would fall under this definition.

10,000 subscribers), our online [Small Business Education Program](#), and our extensive website guidance.

Further, from 2015 to the current date, the ACCC obtained a significant number of public enforcement outcomes, ranging from court proceedings to administrative resolutions, that related either in whole or in part to consumer guarantees issues.<sup>2</sup>

*ACL regulator actions to attempt to incentivise compliance are indirect and less effective*

A key reason why consumer guarantees non-compliance remains widespread despite this work is that ACL regulators' compliance and enforcement strategies are less effective and less efficient for consumer guarantees compared to other ACL protections. This is because ACL regulators can only take action indirectly, such as where:

- the business has made a false or misleading representation to consumers about their ACL consumer guarantee rights, or
- in rare instances, the business' conduct in not complying with the consumer guarantees reaches the threshold of unconscionable conduct.

These actions do not deal with the core problem of a business refusing to provide the consumer guarantees remedies that consumers are entitled to. A business can be compliant with the ACL while not providing consumers with the remedies they are legally entitled to.

As reflected in the list of compliance and enforcement activities at Appendix A, the vast majority of such actions relate to businesses making false or misleading representations. In many circumstances where consumers suffer from major failures under the consumer guarantees, and are refused the remedies they are entitled to, the conduct is unlikely to reach the threshold of unconscionable conduct. While the ACCC has obtained court orders in relation to unconscionable conduct in a case against Ford, these were by consent and in subsequent court actions against Mazda and Jayco, their conduct, including in relation to how they dealt with consumer guarantee rights, was found not to be unconscionable.

The ACCC has also repeatedly seen circumstances where a business is manifestly unreasonable in its refusal to remedy a failure in one of its goods or services; but has not made any misleading or deceptive representations. For example, a business may simply inform a consumer who is legally entitled to a remedy: "We have decided not to give you a refund, repair or replacement". This statement would not currently contravene the ACL.

If the ACL was amended to enable ACL Regulators to take action where a business fails to provide a remedy in accordance with the consumer guarantees obligations, businesses would instead need to consider their compliance more broadly than just in terms of what representations are made to consumers about consumer guarantee rights and whether those representations are misleading.

Given the indirect way of approaching enforcement actions for consumer guarantees issues, ACL regulators' actions in response to consumer guarantees non-compliance also frequently involve trying to assist particular consumers to resolve their disputes with businesses. A fundamental part of the state and territory ACL regulators' business-as-usual work involves assisting consumers to negotiate consumer guarantees outcomes with businesses, and some jurisdictions are also able to compel businesses to attend conciliation conferences to resolve such disputes. However, while such an approach may result in resolutions for those specific consumers, it has limited impact on the broader compliance culture of the businesses involved.

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<sup>2</sup> See Appendix A for details of these enforcement outcomes.

Introducing a prohibition such as proposed in Option 3 of Part A of the CRIS would significantly change the compliance incentives for businesses, and increased compliance by businesses would minimise the need for regulator intervention through enforcement actions or conciliation work.

#### *Reasons for businesses non-compliance with the consumer guarantees*

A lack of adequate incentives to ensure compliance with the consumer guarantees can result in non-compliance for a range of reasons.

In the ACCC's experience, some businesses simply do not take the time to adequately consider and understand the ACL consumer guarantee regime and its application to their products. This is particularly prevalent with multi-national companies that import policies and procedures from overseas jurisdictions that do not reflect the requirements of the ACL. These processes frequently focus on consumer goods by reference to the manufacturer warranty. This warranty is, in many cases, shorter than the 'reasonable time after purchase' relevant to a consumer guarantee assessment, or the warranty comes with caveats and restrictions that do not apply the consumer guarantees.

For instance, the ACCC was successful in court action against Valve Corporation (Valve) for making false or misleading representations about consumers' rights to obtain a refund for online games if they were not of acceptable quality. When transacting with Australian consumers, Valve had used the same policies, procedures and contracts it had in place in the country in which it was based, and failed to account for the requirements of the ACL consumer guarantees. The relevant contracts had unlawful 'no refund' clauses that were enforced by Valve employees, even when consumers specifically cited their ACL rights.

The ACCC has also seen instances where non-compliance with the consumer guarantees arises from businesses being overly cynical about consumers' claims despite having no basis for believing the consumer is approaching the issue other than in good faith. Such businesses view all consumer claims about their products from a basis of presuming there is no problem with their product and the consumer is instead unfairly trying to obtain their money back or a new replacement product. However, in the ACCC's compliance and enforcement experience, the overwhelming majority of consumers just want to get what they paid for and not have to deal with any consumer guarantees claim whatsoever.

Finally, the ACCC frequently receives reports of businesses that simply do not engage with consumers that approach them with consumer guarantee failures. This non-engagement may be where a business is unaware of, or does not understand its obligations, or it may be in circumstances where a business deliberately chooses not to comply with the consumer guarantees obligations. Either way, this constructive refusal leaves the consumer with few, if any, options but is still unlikely to constitute a breach of the ACL in most cases.

#### **Non-compliant businesses transfer costs to consumers and small businesses**

As discussed in Part B below, the consumer guarantees and supplier indemnification framework is intended to allocate risk and responsibility for failures to the appropriate party in any given supply chain. At present, the current consequence of most non-compliance with the consumer guarantees is that the consumer or small business that is entitled to a remedy is instead left wearing the cost of a particular good or service failing. This is despite the clear legal framework that places the cost of these failures on a supplier and, in the case of a good, ultimately, a manufacturer. Further, even when a consumer does receive a remedy, the small business that provides it may be forced to wear the cost because the manufacturer refuses to indemnify them.

Non-compliance in relation to consumer guarantees is hard for an individual consumer or small business to challenge. The costs of taking action in a court or tribunal can be

considerable, especially relative to the cost of many of the goods or services in question. Further, the ACCC notes that there is limited effectiveness to such court or tribunal actions as consumers may not be granted the full remedy they are entitled to (this is discussed further below in the context of judicial consideration).

Most consumers will simply accept that they will not be receiving a remedy and will incur the losses associated with this. Across the economy this amounts to a considerable loss to consumers and small businesses and a windfall gain to non-compliant businesses.

### **Widespread failures of low-cost goods go unchecked**

The overwhelming majority of consumer transactions in Australia relate to goods or services that are sufficiently low cost such that legal action for issues with them is unlikely. While most states and territories have tribunals with low fees for small claims, the time, energy, and other secondary costs of taking action are often still too high to justify action. For example, in the NSW Civil and Administrative Tribunal the minimum fee to bring an action is \$52 before any secondary costs are taken into account. As such, it is unlikely any consumer would take action in relation to any low value goods and services. Instead, most consumers will simply accept that they will incur the loss of a consumer guarantee failure and take no further action.

Many consumers are also not equipped with the relevant background, information or experience to take action. They are unlikely to understand the evidentiary requirements and the legal process can be daunting (even in a less formal tribunal setting). The ACCC is aware that some tribunals still require high-cost evidence such as expert reports to resolve disputes. Expert reports can run to hundreds of dollars and most consumers would struggle to even locate an expert to provide relevant evidence.

As a result, most private consumer guarantee legal actions relate to high-value goods such as motor vehicles or caravans. This means that if a specific low-cost good is consistently failing and a business is refusing to provide an appropriate remedy under the consumer guarantees, it is unlikely that the business will be held to account for those failures. While the cost to each individual consumer with a failed good may be quite low, if many consumers are experiencing the same failure the cost, in the aggregate, can be significant and is a windfall gain to the business responsible for the failure.

### **Non-compliant businesses have a competitive advantage**

The consumer guarantee regime is designed to allocate risk and responsibility for failures to the party best equipped to have prevented the failure in the first place. In the case of goods, this will frequently be the manufacturer with respect to most consumer guarantees. In most cases a consumer guarantee failure is attributable to an inherent fault that the good had prior to the supplier or consumer taking possession.

If the consumer guarantee regime was operating as intended, it should incentivise manufacturers to ensure better quality goods and/or develop efficient ways of remedying defective goods. Manufacturers who do not do so should face higher costs in the form of high numbers of remedies for the issues with their products. However, without a clear and direct consequence for non-compliance, some manufacturers may choose to minimise costs on manufacturing and accept a high incidence of failure.

Meanwhile, the manufacturers that do comply with their consumer guarantee obligations will have made investments in their products to ensure a lower failure rate and/or they will have included the cost of remedying failures in the price at which they sell their goods. Both of these can put them at a competitive disadvantage to non-compliant rivals.

## Consumer guarantee laws are subject to little judicial consideration

One of the criticisms frequently levelled at the consumer guarantee regime is that it is too uncertain in its application. This is a common criticism of principle-based consumer protections. In the case of other principle-based provisions, subsequent judicial consideration of the provisions has provided greater certainty regarding their application. However, due to the problems discussed above, judicial consideration of the consumer guarantee regime by superior courts has been very limited.

In most jurisdictions private consumer guarantee issues are ordinarily heard by administrative tribunals, many of which cannot provide binding jurisprudence on the law and many of which do not publish outcomes or reasons. Further, in many tribunal considerations, the focus can be on determining some resolution to the dispute involving compromise, usually by consumers, rather than necessarily following the parties' entitlements and obligations under the law. For example, many tribunal decisions on consumer guarantees claims include deductions from refunds to account for the consumer's prior use of the good – despite this not being provided for in the ACL and despite clear Federal Court authority that the ACL does not allow for such deductions.<sup>3</sup> These issues mean that many tribunal decisions result in inconsistencies not only between decisions and the ACL, but also between different tribunal decisions on similar facts.

If the ACL regulators were able to take enforcement actions that went to the heart of the issue (i.e. the failure to provide a remedy in accordance with the consumer guarantees obligations), there would be more judicial consideration and precedents from higher courts of the different aspects of the consumer guarantees regime, such as principles around assessing whether or not a failure is major. This in turn would be incorporated into guidance and education to assist businesses to comply, and such precedents could also assist consumers in negotiating remedies with businesses, as well as in any actions they take in lower courts and tribunals to enforce their rights through private action.

## Principal consumer guarantee recommendation

The ACCC supports Option 3 of Part A of the CRIS, being the introduction of a prohibition against not providing a remedy for consumer guarantee failures when a business is legally required to do so. The ACCC considers that for the prohibition to be effective it should be accompanied by penalties that would provide a sufficient deterrent effect. The range of other remedies and investigation and enforcement mechanisms available for other prohibitions in the ACL should also accompany such a prohibition.

Introducing a prohibition would help address the issues set out above. Introducing such a prohibition would help incentivise suppliers to comply with the consumer guarantees and ensure that consumers and small businesses can more readily access their consumer guarantee rights. This view is supported by Deloitte's cost benefit analysis as quoted in the CRIS, which notes a significant likely net benefit from this reform.

## Part B – Supplier indemnification

The ACCC supports the introduction of a prohibition against a manufacturer failing to indemnify a supplier (the retailer from whom the consumer purchased the good) that has appropriately provided a consumer with a remedy for a failure to comply with a consumer guarantee, where the manufacturer was responsible for that failure. The ACCC also supports the introduction of a prohibition against manufacturers retaliating against suppliers seeking indemnification.

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<sup>3</sup> See *Australian Competition and Consumer Commission (ACCC) v Jayco Corp Pty Ltd* [2020] FCA 1672, and more recently *Australian Competition and Consumer Commission (ACCC) v Mazda Australia Pty Ltd* [2021] FCA 1493



A supplier indemnification prohibition is a critical complement to a consumer guarantee prohibition. The current supplier indemnification framework lacks any real incentives for manufacturers to comply with the law. The consumer guarantee regime is intended to allocate risk and responsibility for failures to the appropriate party in any given supply chain. Without a supplier indemnification prohibition, suppliers, including small business retailers, will continue to either:

- disproportionately bear the costs of providing remedies to consumers in circumstances where many of these costs should be borne by the manufacturer, or
- avoid providing consumers with the remedies they are legally entitled to.

## Key issues with the supplier indemnification provisions

As with the consumer guarantees regime, the ACCC considers there are several issues with the supplier indemnification status quo which creates a number of poor outcomes including:

- The current framework lacks sufficient incentives for manufacturers to comply with the law.
- Suppliers are inappropriately bearing the cost of providing consumer guarantee remedies to consumers.
- Suppliers are disincentivised to provide remedies to consumers because they know they will inappropriately bear the cost, or they do not have certainty that they will be appropriately reimbursed by manufacturers.
  - This in turn contributes to the broad non-compliance with the consumer guarantees discussed earlier in this submission. For example, the ACCC's [2017 New Car Retailing Market Study](#) noted that reluctance by motor vehicle dealers to offer and provide remedies to which consumers are entitled was to a large extent influenced by structural disincentives in their relationships with manufacturers and/or simply insufficient confidence that they would obtain reimbursement from manufacturers.
- Manufacturers who do appropriately indemnify suppliers face higher costs than their non-compliant competitors.
- Supplier indemnification provisions are subject to little judicial consideration.

The consumer guarantees supplier indemnification obligation provides a private right enforceable by a supplier against a manufacturer.<sup>4</sup> In practice, to take action to enforce this right, most suppliers face similar challenges as those faced by consumers and small businesses seeking to enforce their consumer guarantee rights. Suppliers may face an additional challenge in that seeking indemnification may risk them facing adverse consequences. For example, manufacturers may threaten to cease a supply relationship, or may make the supply terms less favourable. For this reason, the easier path may be to deny a remedy to the consumer.

As is the case with the consumer guarantees, ACL regulators are only able to take enforcement action to the extent that a manufacturer misleads a supplier about their entitlement to a remedy or indemnification, or to the extent that the manufacturer's conduct may constitute unconscionable conduct.

The ACCC receives very few reports from suppliers about the indemnification obligation, and where we have received such reports, suppliers are generally reluctant to provide the information the ACCC would require to pursue enforcement action for fear of any adverse consequences from the manufacturer learning the supplier had complained to the ACCC.

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<sup>4</sup> A 'manufacturer' in the ACL includes an importer in circumstances where the manufacturer does not have a place of business in Australia at the time of importation.

For example, the ACCC has heard reports from various motor vehicle dealers that they are concerned that seeking indemnification from manufacturers could mean their dealer agreements will not be renewed, or renewed on less favourable terms.

The inability for suppliers to obtain reimbursement for remedies provided to consumers can also lead to increased retail prices. The ACCC has heard reports of businesses – even large businesses with some degree of bargaining power in most contexts – choosing to build into their retail prices the cost of providing remedies to consumers, instead of seeking indemnification from large manufacturers due to either fear of retaliation, or to avoid the costs associated with taking action against the manufacturer to obtain the indemnity. This imposes a cost on both consumers and the supplier despite a statutory framework that clearly intends this cost should be borne by the manufacturer. This means that the manufacturer who is best placed to manage those failures no longer has any incentive to do so.

## Principal supplier indemnification recommendation

For the reasons discussed in Part A, the ACCC also supports Options 3 and 4 of Part B of the CRIS, being the introduction of a prohibition against failing to indemnify suppliers where manufacturers are legally required to do so, and a prohibition against manufacturers retaliating against suppliers seeking indemnification. The ACCC considers that for the prohibition to be effective it should be accompanied by penalties that would provide a sufficient deterrent effect. The range of other remedies and investigation and enforcement mechanisms available for other prohibitions in the ACL should also accompany such a prohibition.

Introducing a prohibition would help address the issues set out above. Introducing such a prohibition would help incentivise manufacturers to indemnify suppliers and thereby reduce the disincentives on suppliers to provide remedies to consumers in accordance with their consumer guarantees obligations. This view is supported by Deloitte's cost benefit analysis as quoted in the CRIS, which notes significant likely net benefits from these reforms.

## Other considerations

### Motor vehicles

The ACCC considers that the issues set out in the CRIS and this submission apply to consumer guarantees issues across all goods and services. The ACCC considers that the proposed prohibitions should apply to the consumer guarantees and supplier indemnification regimes across all goods and services, rather than only being implemented in relation to the supply of motor vehicles.

If the proposed prohibitions were to apply only to the supply of motor vehicles it could lead to adverse outcomes in which two different businesses may engage in identical conduct, but the one supplying motor vehicles faces a pecuniary penalty but the other does not. Or considerable, widespread losses may result from the conduct of the non-motor vehicle business and it does not face a potential penalty, while only limited losses arise from the motor vehicle supplier's conduct and it does face a potential penalty.

The ACCC's view is that the fundamental aspects of the consumer guarantees regime should apply equally across all goods and services. If any adjustments are made specifically to the consumer guarantees regime with respect to the motor vehicle sector, they should be very limited in nature and determined according to need.

## Deductions from refunds

In the ACCC's experience, it is not common that consumers who experience a consumer guarantees failure have an extended period of trouble-free use of a product before experiencing that failure, particularly when that period is considered against the likely period for which the product should be reasonably durable under the acceptable quality consumer guarantee. In many cases, consumers either experience a major failure after only a short period of trouble-free use (particularly relative to the likely reasonable durability period), or experience a period of multiple attempts to repair a recurring problem before a consumer guarantees failure is recognised by a supplier.

The ACCC does not support the introduction of a framework to provide for deductions from refunds as queried in the CRIS. Significant issues would arise in creating any such framework. For example:

- what would be an appropriate definition or framework for determining what constitutes a period of "trouble-free use"?
- how would an appropriate period of time for "trouble-free use" be determined in each case?
- how would any deduction amount be fairly determined and who would make that determination?

The ACCC is concerned that such a proposal could greatly add to the complexity of the consumer guarantees regime. We are also concerned that some options previously suggested by stakeholders (as noted in the CRIS) would lead to unfair outcomes. For example, we consider it is inappropriate to link the any reduction in refunds to the depreciated value of the good, as the front-loaded nature of depreciation would not be an accurate reflection of the value the consumer obtained from the good in the "trouble-free use" period.

## Quantum of penalty

If prohibitions are introduced, the maximum available penalty for breaching the prohibitions must be sufficiently high to ensure that it acts as a genuine disincentive for non-compliance and is not perceived as an acceptable cost of doing business. Given the prohibitions will apply to the supply of goods and services economy-wide, it must provide this genuine disincentive for *all* businesses ranging from sole traders to large multi-national corporations.

The ACCC considers that the same maximum as currently applies to other core prohibitions under the ACL (i.e. the greater of \$10 million, three times the benefit received or, if the benefit cannot be calculated, 10% of annual turnover in the preceding 12 months) would do this. We consider that the \$50,000 maximum penalty used as an alternative example in the CRIS would not provide the disincentive required for the range of businesses that may engage in this conduct.

Courts take into account a number of well-established factors when determining whether it is appropriate to impose a penalty, and when calculating an appropriate penalty, including:

- the nature and circumstances of the conduct
- the corporate culture of compliance
- the deliberateness of the contravention
- the harm suffered because of the conduct, and
- the proportionality of any penalty relative to that harm.

It is highly unlikely, therefore, that a court would impose a significant penalty for conduct that caused consumers a low amount of harm and when the business has taken reasonable steps to remedy the situation, without serious exacerbating circumstances.

If the maximum penalty is set too low, there is a considerable risk that many businesses will continue to see the risk of a significant penalty as so low as to not warrant taking the necessary steps to ensure compliance.

### **ACCC approach to new prohibitions**

The ACCC's primary interest is to promote compliance with the law for the benefit of consumers. To do so, we take a flexible and integrated approach which encompasses both informing consumers and businesses about their rights and responsibilities under the ACL, and enforcement of the law. The ACCC considers compliance and enforcement responses that are proportionate to the conduct and the resulting or potential harm.

If the ACL was amended to introduce these prohibitions, the ACCC would undertake education, outreach and compliance activities regarding the changes to the ACL, including engagement with stakeholders and updating guidance material.

Following this initial compliance focus, the ACCC and other ACL regulators would move to a business as usual compliance and enforcement approach, but this would be enhanced by the increased incentive on businesses to comply. Enforcement of the law spans resolution of possible contraventions both administratively and by litigation and other formal enforcement outcomes. Over time, it would also result in new jurisprudence that ACL regulators and businesses could integrate into their compliance approaches.

As is reflected in the approach set out in the [ACCC's Compliance and Enforcement Policy](#), the ACCC would not become involved in every individual consumer guarantees dispute. Instead we would focus on systemic issues and conduct involving widespread consumer detriment. Individual instances and less widespread or localised issues would be considered by state and territory ACL regulators. Consumers and business would still be able to take their own legal actions or engage other dispute resolution mechanisms (for example, small businesses may seek assistance from the Australian Small Business and Family Enterprises Ombudsman).

## **Conclusion**

The ACCC strongly considers the consumer guarantees and supplier indemnification regimes need to be strengthened by making it a contravention of the ACL, subject to penalties, for:

- businesses failing to provide a remedy to consumers when legally obliged to do so under the consumer guarantees, and
- manufacturers to fail to indemnify suppliers when legally obliged to do so.

We consider these reforms are critical to making a real difference in improving compliance with the consumer guarantees and supplier indemnification regimes in order to better protect consumers and small businesses.

## Appendix A – ACCC enforcement action related to ACL consumer guarantee rights from 2015 to current

### ***Concluded court cases***

[Fisher & Paykel and Domestic & General to each pay \\$200,000 for false or misleading extended warranty misrepresentations](#)

[Electronic Bazaar operator to pay penalties of \\$100,000 for misleading consumers](#)

[Harvey Norman franchisee ordered to pay penalties of \\$52,000](#)

[MSY Technology ordered to pay penalties of \\$750,000 for consumer guarantee misrepresentations](#)

[Valve to pay \\$3 million in penalties for misrepresenting gamers' consumer guarantee right](#)

[Thermomix ordered to pay penalties of more than \\$46 million](#)

[iPhone and iPad misrepresentations costs Apple Inc \\$9 million in penalties](#)

[Jetstar to pay \\$195 million for false or misleading claims on refunds](#)

[LG to pay \\$160,000 for misleading representations to two consumers](#)

[Sony to pay \\$3.5 million penalty for misrepresenting PlayStation gamers' rights](#)

[Mosaic Brands pays \\$630,000 in penalties over COVID-related 'health essentials'](#)

[Court orders Ford to pay \\$10 million penalty for unconscionable conduct](#)

- The ACCC alleged that Ford was aware of widespread quality issues with the PowerShift transmission of particular vehicles, yet repeatedly refused drivers remedies and told them that the problem with the vehicle was attributable to the driver's operation of the vehicle. Despite some consumers even referencing their rights under the ACL consumer guarantees, Ford forced owners to pay for replacement vehicles rather than providing the remedy they were entitled to.
- In April 2018 the court declared, by consent, that Ford engaged in unconscionable conduct in the way it dealt with complaints about PowerShift transmission (PST) cars, and ordered Ford to pay \$10 million in penalties.<sup>5</sup>

[Jayco to pay \\$75,000 for misleading a consumer about consumer guarantee rights](#)

- In *ACCC v Jayco Corp Pty Ltd*<sup>6</sup> (Jayco), the ACCC alleged that Jayco had made false or misleading representations and had acted unconscionably towards four consumers, by denying them refunds or replacements for their defective caravans. The Federal Court found that the failures relating to three of the four consumers were major failures, and therefore entitled those consumers to a replacement or refund, and that Jayco had made one false or misleading representation to one consumer. However, the Court considered the circumstances around dealing with those consumers in relation to each of those major failures did not amount to unconscionable conduct.

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<sup>5</sup> *Australian Competition and Consumer Commission (ACCC) v Ford Motor Company of Australia Ltd* (2018) 360 ALR 124

<sup>6</sup> *Australian Competition and Consumer Commission (ACCC) v Jayco Corp Pty Ltd* [2020] FCA 1672

## [Mazda misled consumers about their rights over refund or replacement for faulty cars](#)

- In *ACCC v Mazda Australia Pty Limited*<sup>7</sup> (Mazda), the ACCC alleged that Mazda had made false or misleading representations to consumers, and that Mazda's repeated refusal to remedy consumer guarantee failures amounted to unconscionable conduct.
- In November 2021 the Federal Court found that Mazda had made false or misleading representations in relation to specific consumers' ACL consumer guarantees rights, including that Mazda did not have reasonable grounds to make the representations that the faults with the vehicles were not major failures under the consumer guarantee provisions of the ACL. However, the Court found the conduct did not amount to unconscionable conduct. Justice O'Callaghan noted that while Mazda's conduct amounted to "appalling customer service" it could not be considered unconscionable.

## ***Court enforceable undertakings***

[Electronic Arts undertakes to provide refunds to consumers](#)

[Lumley undertakes to help improve extended warranty selling practices](#)

[VSC undertakes to help improve to help improve extended warranty selling practices](#)

[Yoogalu and Domestic General Services gives undertakings to ACCC](#)

[Holden undertakes to comply with consumer guarantees](#)

[Catchdeal, Tchrific and BecexTech to offer refunds](#)

[WA building company amends unfair contracts](#)

[Belkin undertakes to honour lifetime warranties](#)

[Hyundai to improve consumer guarantees approach](#)

[Netgear likely misled customers](#)

[Fitbit misled customers about faulty products](#)

[Volkswagen undertakes to fix consumer guarantees approach](#)

[Wiggle pays penalty for misleading consumers about their rights](#)

[Jetstar, Tigerair, Qantas and Virgin Australia to fix refund policies](#)

[Pandora to fix its consumer rights practices](#)

[Big W will address customer complaints about faulty Dyson appliances](#)

[Target will address customer complaints about faulty Playstations](#)

[Zenimax to refund consumers for the Fallout 76 game](#)

[Toyota undertakes to improve consumer guarantees compliance](#)

[EB Games undertakes to refund consumers for the Fallout 76 game](#)

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<sup>7</sup> *Australian Competition and Consumer Commission (ACCC) v Mazda Australia Pty Ltd* [2021] FCA 1493

### ***Infringement notices***

[Clothing retailer Sportscraft pays penalties of \\$21,600 for alleged misleading consumer guarantee representations](#)

[Ozsale pays \\$10,800 penalty of alleged consumer guarantee misrepresentation](#)

[Lululemon pays infringement notices](#)

[Jenny Craig pays penalty for “10kg for \\$10” ads](#)

[Big Warehouse pay penalty and compensates customers](#)

[Freedom Furniture pays penalties for allegedly misleading consumers about rights to refunds](#)

### ***Public administrative resolutions***

[AirAsia X commits to process for customers affected by cancelled Kuala Lumpur and Denpasar flights](#)

[Yale Prima agrees to provide remedies for JVC branded television sold by Dick Smith](#)

[National warranty company agrees to change extended warranties](#)

[AFL and NRL clubs fix refunds and returns policies](#)

[Audio company Please Hold removes alleged unfair contract terms for small business customers](#)