

CHOICE



WEstjustice

11 FEBRUARY 2022

**Improving the effectiveness of the
consumer guarantee and supplier
indemnification provisions**

Submission to the Treasury on the Consultation
Regulation Impact Statement

ABOUT US

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and to support our campaigns, sign up at www.choice.com.au/campaignsupporter

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Consumer Credit Legal Service (WA) Inc.

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit specialist community legal centre based in Perth and servicing the State of Western Australian. CCLSWA specialises in the areas of credit, banking and finance, and Australian Consumer Law. CCLSWA operates a free telephone advice line service which allows consumers across Western Australia to obtain information and legal advice in the areas of banking and finance, and consumer law. CCLSWA also provides ongoing legal assistance and representation to consumers by opening case files when the legal issues are complex. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

CCLSWA's mission is to strengthen the consumer voice in Western Australia by advocating for, and educating people about, consumer and financial, rights and responsibilities.

WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in

Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.

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INTRODUCTION

Consumers expect to purchase products that work, and when they don't work people should be easily able to enforce their consumer guarantee rights.

We welcome the opportunity to provide comments to the Commonwealth Treasury's Consultation Regulation Impact Statement ('**CRIS**') on options for improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law ('**ACL**').

We support improvements to the Australian Consumer Law that ensure people are able to exercise their consumer guarantee rights. The current system is flawed and regularly results in consumers:

- paying for their own repairs or replacements;
- continuing to use faulty goods;
- not having a working product that they have paid for; or
- disposing of products early because they are faulty.

Many consumers are let down when things do go wrong with a good or service they have purchased. Currently, consumers have to spend considerable amounts of time and money to enforce their consumer guarantee rights. Despite this, many never receive a remedy they are legally entitled to. Instead, people have to continue using faulty products, purchase new products, or go without the product entirely. The loss of essential goods and services, such as a car, mobile phone, fridge, or laptop can have an immediate financial impact and, at times, a lasting impact on a person's quality of life.

We strongly support the introduction of a civil prohibition for failing to provide a consumer guarantee remedy - outlined in Option 3 in Part A of the CRIS. Civil penalties must be strong enough to act as a deterrent to businesses that through design or neglect, do the wrong thing by consumers when products have major faults. Businesses are incentivised to not provide people with a timely refund, repair or replacement, as they know there are no meaningful penalties for inaction. The prohibition and penalties must also be economy-wide. It is essential to ensure that people can exercise their consumer rights to a repair, replacement or refund regardless of the nature of the faulty product or service.

While the focus of our joint consumer submission is largely on Part A of the consultation, we support Options 3 and 4 in Part B of this consultation. Specifically, we support a whole of economy civil prohibition for:

- failing to indemnify suppliers where a consumer guarantee failure falls within the responsibility of a manufacturer or importer; and

- manufacturers or importers retaliating against suppliers for seeking to enforce their indemnification rights:

This consultation is an opportunity for the Australian Government to incorporate a strong prohibition and penalties into the ACL to deter those businesses who are inclined to do the wrong thing. These options are what CHOICE, Consumer Action, CCLSWA and WEstjustice think should be put forward in the final Regulatory Impact Statement (RIS) as the solution to address the harms that consumers face under the status quo.

This joint consumer submission is guided by a range of consumer surveys conducted by CHOICE. In January 2022, CHOICE surveyed 9785 members and supporters about their experiences with getting a refund, repair or replacement. Over 2,000 people shared stories of having problems with getting a remedy for a major fault or who were forced to accept a repair for a major fault when they wanted either a replacement or refund. 99.6% of survey respondents said that companies should be penalised for failing to refund, repair or replacement where required by the Australian Consumer Law.

In June 2021, CHOICE undertook a nationally representative survey about people's experiences with their consumer guarantee rights that confirms the findings from the survey CHOICE members.¹ This survey found that 23% of people had problems with their products in the past 12 months. 55% of those problems were with products that were under 1 year old.

CHOICE also conducts annual product reliability surveys of its members to quantify the reliability of everyday goods and services. These surveys highlight the current weakness in the consumer guarantees framework and the need for strong civil penalties for businesses who fail to comply.

¹ This survey was conducted online between 25-28 June 2021. The survey was designed and analysed by CHOICE and put in the field by accredited research agency Dynata as part of their weekly "Omnipulse" omnibus. 1,005 people completed the survey, data has been weighted to ensure it is representative of the Australian population based on the 2016 ABS Census.

Recommendations

Recommendation 1: That consumer guarantee refund rights remain as is, and appreciation or depreciation are not considered when determining a refund.

Recommendation 2: That any education and guidance campaign be considered in addition to Part A Option 3, but not as a stand-alone option as it will not avoid consumer harms or result in any meaningful increase in people being able to enforce their consumer guarantee rights.

Recommendation 3: That the final Regulatory Impact Statement (RIS) adopt Part A, Option 3 - a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms as the preferred policy option.

Recommendation 4: That the final Regulatory Impact Statement (RIS) adopt Part B, Option 3 – a prohibition against not indemnifying suppliers, supported by penalties and other enforcement mechanisms and Option 4 - a prohibition against manufacturers retaliating against suppliers who request indemnification.

Response to key questions - PART A: Receiving remedies

Consumers aren't always given the remedies they are entitled to

1. Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled

CHOICE has conducted a number of surveys into consumers' experiences of receiving a refund, repair and replacement. According to a June 2021 survey undertaken by CHOICE, 23% of people had a problem with an item they purchased.² Yet, depending on the product, between 18% and 24% of respondents who have a faulty product sought a remedy.³ This means that over 80% of people are not even trying to enforce their current ACL rights for certain consumer products. This number is too low, but it is understandable given people's experiences when trying to enforce their consumer guarantee rights.

Businesses put up barriers that limit people from being easily able to enforce their consumer guarantee rights. Misleading information on what people's rights are, as well as who is responsible for a remedy, makes it difficult and time-consuming for people to enforce their rights. The way that some businesses act means that people sometimes stop trying to enforce their rights, and either spend money on a completely new item, or continue to use a product that is faulty.

Case study - Sophia's additional costs of repair

"Bought lawn mower, engine stopped working in 2 weeks' time, I took it back to Bunnings, they sent it to supplier, took them 9 weeks to repairs, whereas I preferred a refund to buy another one instead, for 9 weeks I had to pay someone else to mow the lawn at least 4 times which I had to pay for even though I paid almost \$500 for a new lawn mower"⁴

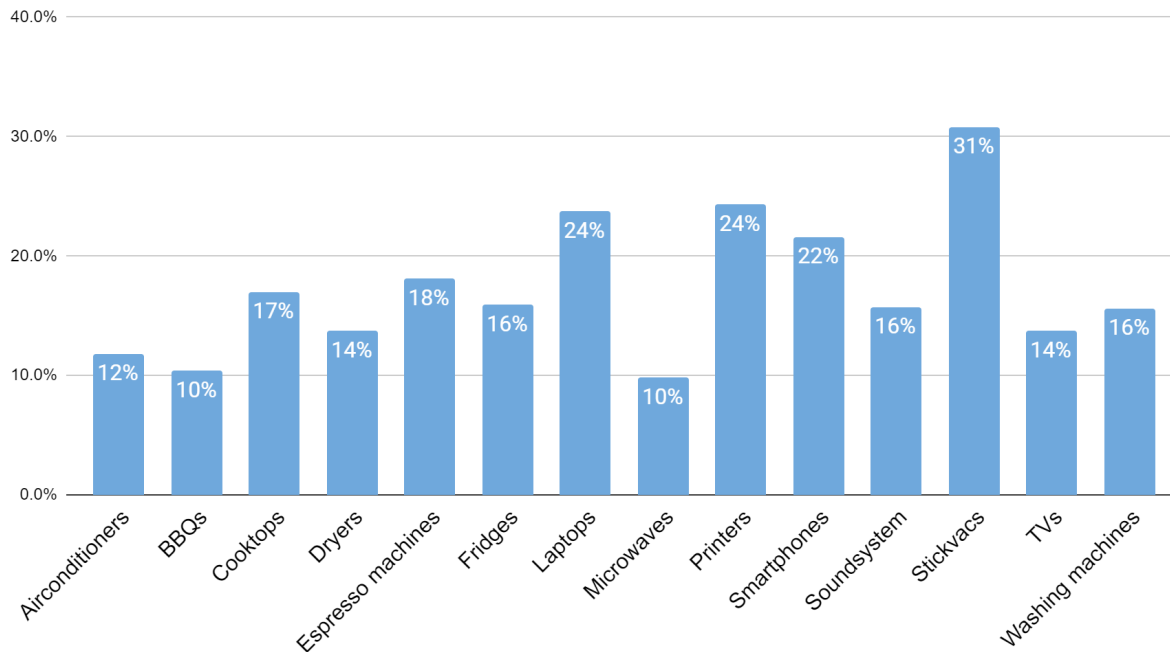
² This survey was conducted online between 25-28 June 2021. The survey was designed and analysed by CHOICE and put in the field by accredited research agency Dynata as part of their weekly "Omnipulse" omnibus. 1,005 people completed the survey, data has been weighted to ensure it is representative of the Australian population based on the 2016 ABS Census.

³ *ibid.*

⁴ CHOICE Improving Consumer Guarantees survey completed by 9785 people in January 2022. People's names have been changed.

In CHOICE's product reliability surveys, up to 31% of people experienced a fault with an item in the 12 months before they completed the survey. More than one in five new Stick Vacs, laptops, printers and smartphones have a fault, the highest rates of faults amongst common household appliances.⁵

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



Source: *Choice reliability surveys (2019-2020)*, responses sourced from over 5,000 CHOICE members.⁶

But not everyone tries to get a remedy for their fault. Among survey respondents, less than a quarter of respondents who had a faulty product (that was under 5 years old for small appliances or under 8 years old for larger appliances) attempted to get a remedy. According to a survey of CHOICE members:

- 24% of people who had a faulty washing machine tried to get a remedy;
- 15% of people with a faulty TV tried to get a remedy;
- 19% of people with a faulty microwave tried to get a remedy; and
- 18% of people with a faulty lawnmower tried to get a remedy

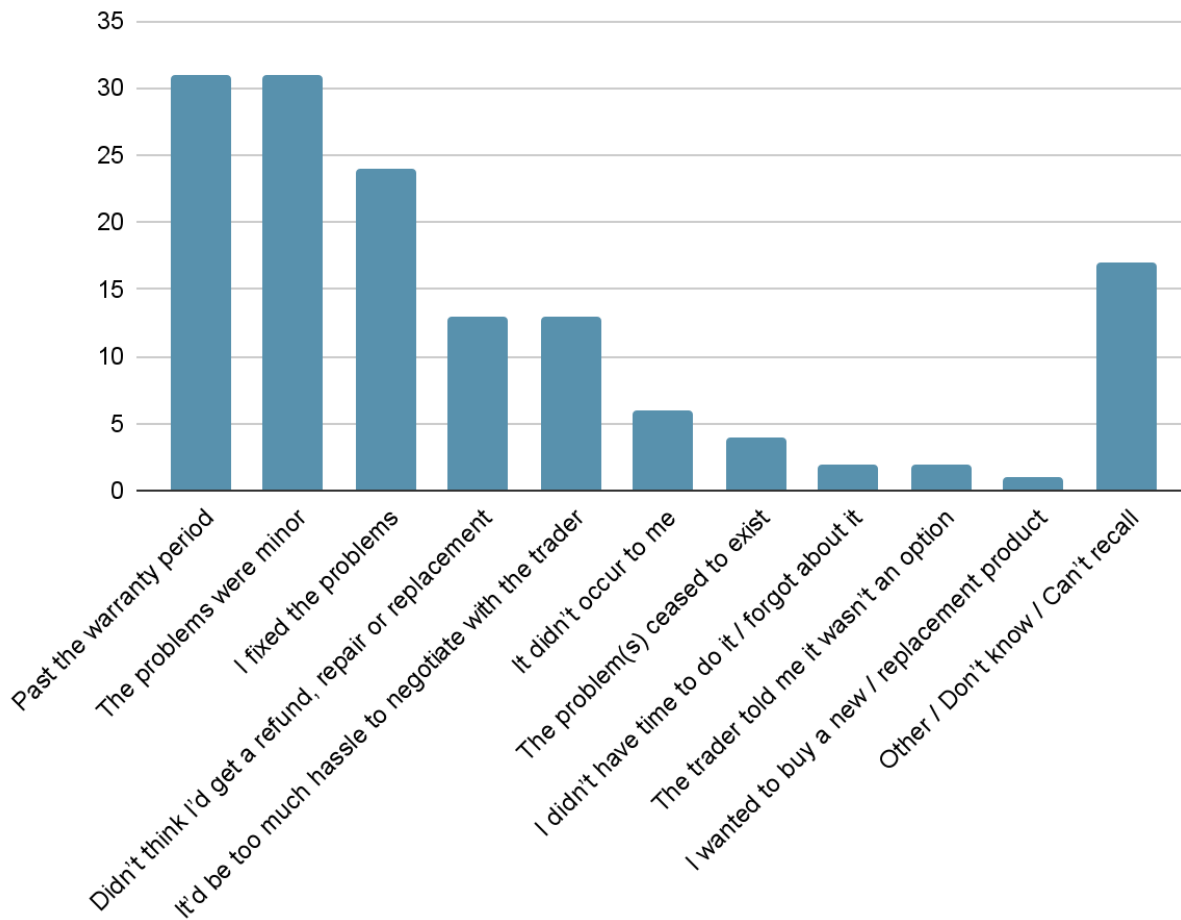
This means that in most cases over 80% of people with faulty goods are not being served well by the current consumer guarantee framework. 31% of people didn't attempt to get a repair as

⁵ CHOICE Product Reliability surveys (2019-2020), responses sourced from over 5,000 CHOICE members.

⁶ *ibid.*

they thought the product was out of the warranty period, even though the consumer guarantee period was likely longer than the manufacturers' warranty. 13% of people didn't think they would be successful in getting a refund, repair or replacement from the retailer or manufacturer, and another 13% of respondents thought that it would be too much hassle to even attempt to enforce their consumer guarantee rights. Another 2% of people were told by the retailer or manufacturer that a repair, replacement or refund wasn't an option.

Reasons for not attempting to get a remedy



This data varies from the results of the Australian Consumer Survey ('ACS').⁷ One likely reason for this difference is that the ACS sought people's intentions if a theoretical problem arose. The CHOICE survey asked people about their actions when an actual fault arose.

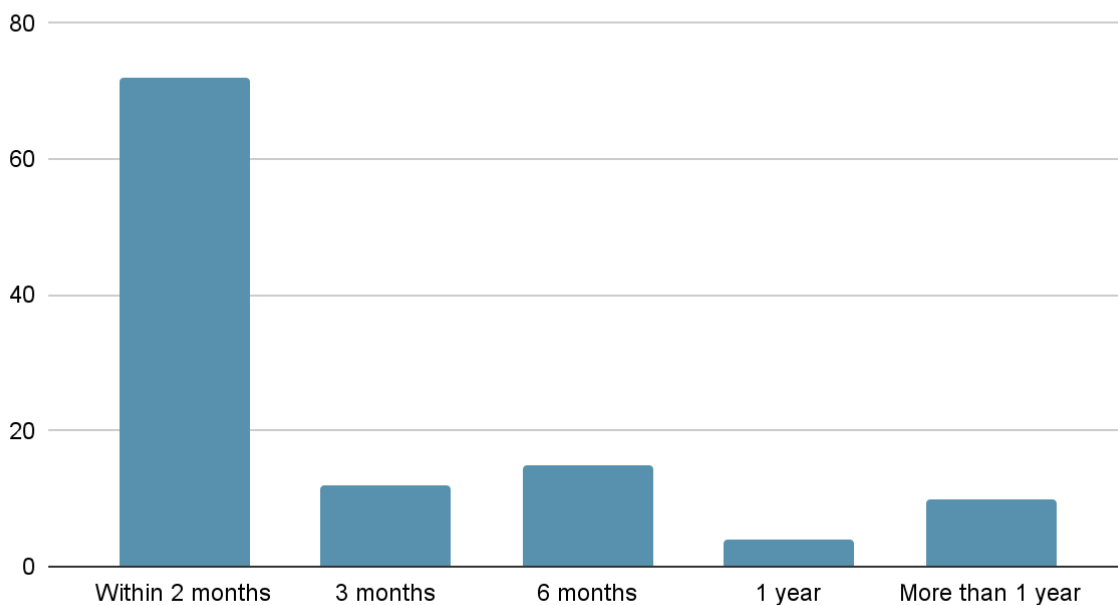
⁷ As quoted in the Consultation Regulation Impact Statement, Improving the effectiveness of the consumer guarantee and supplier indemnification provisions, the Australian Government The Treasury, December 2021, p18.

New vehicles

2. Do you have any information on consumers claiming refunds for new motor vehicles? If so, please provide details on how long after purchase refunds are requested, and the prevalence of such requests.

Two-thirds of people surveyed in 2016 by CHOICE experienced a problem with their new car within five years of purchase.⁸ People mostly experienced faults with their new car in the six months after purchase. 63.7% of respondents to a 2019 CHOICE survey of consumers who had experienced problems with their new cars first had problems within 2 months of purchasing their new car.⁹

When did the fault first occur in your new car?



Over a third of people who bought a new car had what would be considered a major fault under the current provisions in the ACL, that came into effect in 2020.¹⁰ With 14% of respondents reporting major problems, while a further 21% reported a series of different problems which may constitute a major fault if they would have led a reasonable person to not purchase the car had they known about the faults.

⁸ CHOICE, 2016 Lemons into Lemonade: Consumer experiences in the new car market.

⁹ CHOICE, Lemon Cars Supporter Survey, completed by 113 people in May and June 2019.

¹⁰ CHOICE, 2016 Lemons into Lemonade: Consumer experiences in the new car market.

Refunds are uncommon for people who have faults with their new cars. Only 3% of people who had a problem with a car got a refund, though 15% of people were yet to have their problem resolved at the time of taking the survey. 57% of people had their fault resolved by getting a repair.¹¹

Case Study – Scarlett’s story

Scarlett lives in a rural township and solely relies on the Disability Support Pension. Scarlett relies on a scooter for mobility.

In 2015, Scarlett purchased a new 4WD vehicle for about \$60,000. She had disclosed to the salesperson she needed a vehicle to be modified with a scooter hoist. This modification was covered by one-off NDIS funding.

Just 64,000 km later and less than 10 months out of the three-year manufacturer’s warranty period, the car broke down. It had been regularly serviced, and had already had a few repairs while it was still in warranty.

Scarlett had the vehicle towed and enquired about repairs but was asked to pay thousands for repairs that weren’t guaranteed to fix the issue. She couldn’t afford this so was effectively housebound without being able to transport her mobility scooter.

With our assistance, Scarlett applied to the Victorian Civil and Administrative Tribunal (VCAT) for a ‘major failure’ of her consumer guarantees. Consumer Action covered the approximate \$3,000 cost for evidence from an expert mechanic (and towing to the assessment).

Scarlett’s priority was having a working vehicle so she could be mobile again.

We were able to negotiate a settlement for Scarlett around the time of the VCAT hearing. Without community legal support, Scarlett may have been stuck at home with a broken-down expensive car that was four years old.

Case study provided by Consumer Action Law Centre

3. Do you have any information or data to support the view consumers are ‘gaming’ the system to obtain replacement new motor vehicles or refunds?

¹¹ CHOICE, 2016 Lemons into Lemonade: Consumer experiences in the new car market.

We are not aware of any data that would support the claim that there is a pattern of people gaming the system to obtain replacements or refunds on faulty motor vehicles. Our 2016 report *Turning Lemons into Lemonade* found people were mostly struggling to get what they were entitled to under the ACL.¹² If anything, our research suggests that some car retailers are “gaming” the system to prevent people from receiving consumer guarantees they are legally entitled to. Consumer Action’s 2018 report, *Lemon-Aid*, had similar findings with consumers experiencing:

- Evidentiary burdens in ‘proving’ the product is subject to a ‘major failure’
- Complaint fatigue, having to engage in numerous discussions and processes with suppliers
- A culture of repairs and warranties, with consumers encouraged to think about repairs through the lens of manufacturer warranties or supplier policies.¹³

Case Study – Lucinda’s story

Consumer Action is assisting Lucinda, a single parent and a victim survivor of family violence. She works in a role that requires her to travel to different locations.

Lucinda spoke to our solicitors about a used car she purchased in 2020 from a dealership that advertised on social media. She paid more than \$10k for the car through a loan.

The dealer informed Lucinda that the car came with a statutory warranty that expired on the earlier of 1-month or 1,000 km after purchase under the applicable state laws. A document provided by the dealership to Lucinda about its breakdown, warranty and repair procedure did not include the prescribed text about the Australian Consumer Law.

After around a month after delivery, Lucinda discovered an issue with the engine and attempted to contact the dealership, then drove the car to a mechanic. The mechanic found the engine was faulty and quoted approximately \$4,000 for repairs, which was unaffordable for Lucinda so have not been completed.

The dealership staff told Lucinda there was nothing they could do because the car was now out of warranty, despite acknowledging a problem with the car. Lucinda said she was in tears talking to the dealership staff who told her “not my problem” because she didn’t have an extended warranty. Lucinda said she is experiencing severe depression, exacerbated by her faulty car problems and her difficulty to get to work, but that this car was important for her safety.

¹² CHOICE, 2016 *Lemons into Lemonade: Consumer experiences in the new car market*.

¹³ Consumer Action, 2018, *Lemon-Aid: Why it’s time for Australia to introduce ‘lemon laws’*.

Lucinda wanted to keep the car and just wanted the dealership to repair it. She has continued to repay the car loan, despite not driving the car for over 9 months and not being able to pay for other essential services.

We are continuing to assist Lucinda with this matter. To date, the dealership has rejected our request to resolve this matter in accordance with the Australian Consumer Law and we have been unsuccessful in our attempts to engage in discussions to resolve the dispute.

The dealership has since sent correspondence to all customers stating that it has stopped operations and is no longer selling vehicles or offering repairs, and that all customers are likely outside the timeframe for repairs under statutory warranty coverage. The communication did not reference the Australian Consumer Law or consumer guarantees.

The matter has not yet been resolved. It has continued to be difficult for Lucinda to be able to get to work and to pick up her children from school.

Case study provided by Consumer Action Law Centre

Consumers are also spending money to enforce their ACL rights when their new car has a fault. In 2016 CHOICE found that consumers were spending on average \$1295 and spending 31 hours to get a remedy. If this time was calculated to cost the same as the Australian Consumer Survey 2016¹⁴, this 31 hours would be priced at \$899. The combination of this and the monetary outlay would mean that the average cost to an individual to enforce their consumer guarantee rights for a faulty car is \$2194. There is also no guarantee that despite outlying this time and money consumers will receive an outcome in their favour.

We have not seen evidence to suggest that this is a problem so widespread that it warrants government intervention. Yet there is plenty of evidence of businesses not providing remedies or even correct information about people's ACL rights and that does warrant government intervention.

¹⁴ EY Sweeney, Australian Consumer Survey 2016.

4. Do you consider it appropriate for factors such as a depreciation deduction (a reduction in the value of a refund for usage) to be considered relevant in determining a refund amount? In what circumstances do you consider this would be appropriate? How would a reduction work? How should post-purchase increases in value be factored in? Please detail reasons for your position.

No, depreciation deductions are not appropriate for consumer guarantee refunds. The intention of the ACL legislation is to address the nature of remedies in the event of failure to comply with guarantees – not to provide a process for determining any consumer contract for the supply of goods (or goods connected with services) on the basis on whether the consumer derived benefit from a good, and if so in what form.

Significantly, the recent case of *Wyzenbeek v Australasian Marine Imports Union Pty Ltd (in Liq)* [2019] FCAC 167 (**'Wyzenbeek'**), has affirmed the principle that it is not appropriate to make a deduction for 'use benefit' from an award of damages made on a 'no transaction' basis.

In *Wyzenbeek*, the appellants were induced by misleading representations by the respondents to purchase a ship (**'Cadeau'**). Ultimately, the *Cadeau* could not be used by the appellants for the purpose for which they had purchased it (trans-ocean voyages), but could (and was) used for other sailing in between the date of purchase and the date of trial. The Full Court of the Federal Court considered whether, in calculating loss and damage to the appellants, a deduction to the sum paid to the plaintiffs should be made in respect of the benefit the appellants received (ie., the non-trans-ocean sailing for which the *Cadeau* was in fact used). It found bluntly:

"Nor should any allowance or deduction be made for the uses to which Mr and Mrs Wyzenbeek have put Cadeau" (at [114]) and, "In any event, at common law no such deduction is available" (at [115], citing the Earl of Halsbury LC in The 'Mediana' [1900] AC at 117).

This approach has been confirmed in the recent Federal Court decisions of *ACCC v Mazda Australia Pty Ltd* [2021] FCA 1493 at [119] ("there is no scope of reduction of the amount paid on account of depreciation, or any use of the goods by the consumer or the like. The position is the same if the consumer seeks replacement") and *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [51] (Wheelahan J) ("The imperative terms of the statutory obligation under s 263(4)(a) do not authorise any abatement or adjustment of the amount paid on account of depreciation, or any use of the goods by the consumer...").

The ACL, like its predecessor legislation the Trade Practices Act 1974 (Cth) is beneficial legislation intended to protect consumers. As a general principle of statutory interpretation,

beneficial legislation should be given an interpretation favourable to the class of persons intended to be protected.

Any deduction calculated on the basis of how long a consumer has been in possession of the car would clearly act as a further disincentive on traders from dealing with the matter quickly or efficiently.

Recommendation 1: That consumer guarantee refund rights remain as is, and appreciation or depreciation are not considered when determining a refund.

Part A, Option 1 - status quo

6. Are there any other benefits associated with maintaining the status quo?

No, there are no benefits to maintaining the status quo. People would continue to face harm, such as spending money and taking up their time trying to enforce their consumer guarantee rights. People may also not have a functioning product, or continue to use faulty products.

Maintaining the status quo would be especially harmful to consumers who reside in states where the ACL regulator does not have compulsory direction powers.

Consumer Action, CCLSWA, and WEstjustice are overwhelmed by consumers seeking their help when new and used car dealers regularly ignore consumers raising consumer guarantee issues. These dealers, like other businesses across the country, know that they can get away with denying people their rights. This must change and Part A, Option 3 provides the strongest solution currently under consideration.

7. If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?

Were the current system to be maintained, people would continue to face barriers in enforcing their rights, and people would continue to be forced to spend considerable amounts of their money and time trying to get remedies. This is not in line with the objectives of the ACL.

Based on the data provided in the cost benefit analysis, individual consumers and the economy more broadly will miss out on the benefits to the economy that were outlined in the cost benefit analysis undertaken by the Treasury for this C-RIS.

The current system also undermines traders who develop or sell high quality goods and who meet their obligations to consumers by providing refunds, replacements or repairs in a fair way. This results in lower consumer confidence in the market as a whole.

Case study - The status quo will fail to protect consumers like James*

James purchased a second-hand car from a dealership in Perth for approximately \$12,000. Within 7 months of purchase, it broke down. He contacted the dealer who re-directed him to contact the warranty he had also purchased. The car was towed to a local mechanic who told James that the engine needed replacing and that there was substantial damage which likely pre-dated his purchase.

The dealership denied this. The car required approximately \$10,000 in repairs, but the warranty only paid out \$3,000 and James had to pay the difference.

James had made multiple unsuccessful attempts to resolve the issue directly with the dealership but they were unwilling to cooperate or engage in discussion with James to resolve the matter. James then sought assistance from CCLSWA.

CCLSWA initiated correspondence with the dealer saying they had failed to comply with Australian Consumer Law by failing to provide the consumer guarantee that the vehicle was of acceptable quality, that this was a major failure and seeking damages. The dealer also failed to respond to CCLSWA's initial complaint or further letters of demand.

CCLSWA then lodged a complaint with the Consumer Protection division of the Department of Mine, Industry Regulation and Safety WA on James' behalf. However, they determined that, based on the information available, they were unable to assist.

James' only remaining option was to pursue the dealer for damages in the Magistrates Court. James, frustrated and disenfranchised, ceased to instruct CCLSWA.

**name changed to maintain client's privacy*

Case study provided by CCLSWA

Part A, Option 2 - an education and guidance campaign

An education and guidance campaign alone will not solve the majority of problems consumers face when they are trying to enforce their consumer guarantee rights. The overarching problem is that businesses are ignoring consumer guarantee provisions, not consumers lacking information about their rights.

Consumer groups have a role in informing consumers about their rights and how to get help when they have a faulty product. Many CHOICE members tend to be more engaged on consumer rights issues than the wider population. Yet in the results of the CHOICE product reliability research, we see a sizable number of members who do not seek a remedy. This small scale shows that an education and guidance campaign is not enough to fix the problems that the Consumer Affairs Forum (CAF) has recognised, which has led to this consultation RIS.

Recommendation 2: That any education and guidance campaign be considered in addition to Part A Option 3, but not as a stand-alone option as it will not avoid consumer harms or result in any meaningful increase in people being able to enforce their consumer guarantee rights.

Part A, Option 3 - a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms.

The introduction of a prohibition against not providing a repair, replacement or refund, supported by penalties that act as a strong deterrent, is the only option in the CRIS that will significantly reduce the consumer harms associated with the status quo. Without strong civil penalties and rigorous regulatory enforcement, some businesses will continue to be incentivised to ignore providing consumers with consumer guarantees they are entitled to.

Recommendation 3: That the final Regulatory Impact Statement (RIS) adopt Part A, Option 3 - a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms as the preferred policy option.

Infringements, penalties and injunctions.

8. What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.

Penalties must be strong enough to act as a deterrent to businesses that through design or neglect, do the wrong thing by consumers when products have major faults. The penalties should be the same as for other major breaches of the ACL, which are:

- for individuals: \$500,000 for individuals, and
- for corporations: the greater of the following: \$10 million, three times the value of the benefit received, or where the benefit cannot be calculated, 10 per cent of annual turnover in the preceding 12 months.¹⁵

Any concerns about the size of these penalties can be easily allayed by two points. The first is that businesses will be able to avoid them by doing the right thing by consumers. Many businesses already do, and they will not be affected by these penalties. Second, these are maximums and courts have well-established protocols for implementing these penalties in other areas of the ACL. Courts will be able to develop similar guidance for this new prohibition and take into consideration factors like the size of the consumer harm and the number of times a business has failed to give people an appropriate remedy.

¹⁵ACCC, Fines and Penalties, <https://www.accc.gov.au/business/business-rights-protections/fines-penalties> accessed on 1 Feb 2022

Setting the penalties lower would send the wrong message to businesses and allow larger businesses to factor in small fines to their cost of doing business and consumers would continue to face the harms they too regularly experience under the status quo.

9. What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.

Infringement notices for businesses that fail to provide a consumer guarantee remedy should be set to the same level as other common contraventions in the ACL. Currently, the most common infringement notices are:

- \$2,664 (12 penalty units) for an individual, or
- \$13,320 (60 penalty units) for a business.¹⁶

Setting the infringements at this level would make penalties the same amount as they are for contraventions of the ACL relating to unconscionable conduct, false or misleading conduct and pyramid selling.

Effective implementation of a civil prohibition

10. What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?

The most effective way to implement a civil prohibition that ensures people are able to enforce their consumer guarantee rights is to amend the ACL to include economy-wide civil penalties and infringement notices. Currently, the ACL provides that a court may make pecuniary penalties for a range of contraventions of the ACL but not for failure to comply with consumer guarantees. Granting the ACCC the power to serve infringement notices to businesses that do the wrong thing by consumers is a quick and efficient way to deter this bad behaviour.

The ability of courts to consider breaches of the law and to hand down fines in line with other breaches of the ACL will add extra pressure to businesses to do the right thing and provide a repair, replacement or refund when people buy products or services with faults. This will help more people to enforce their ACL rights and act as a deterrent to businesses from doing the wrong thing. Because regulators have limited resources which they must use strategically, we

¹⁶ACCC, Fines and Penalties, <https://www.accc.gov.au/business/business-rights-protections/fines-penalties> accessed on 1 Feb 2022

believe a civil penalty should be implemented so as to be more easily sought in proceedings by an affected individual consumer.

An economy-wide civil prohibition will have a positive impact on the economy, in addition to the benefit it will have on individual consumers. The cost-benefit analysis in the CRIS paper shows that an economy-wide application has a net benefit of \$4.6 billion over 10 years.¹⁷ This is a much stronger positive impact than limiting these changes to the new car market, which would only see a \$413 million benefit.

Penalties need to be accessible and should be issued by a competent court or tribunal on application by any party, not just a regulator. This would be analogous to powers under the Fair Work Act and the National Credit Code. Otherwise, penalties won't be as effective as they could be, much like pecuniary payments under many state and territory residential tenancy legislation.

Cost benefit analysis - economy wide or just new cars?

We support an economy-wide civil prohibition for failing to provide a consumer guarantee remedy. There is no clear justification for why this prohibition should apply only to new motor car traders. It is confusing for consumers to have different rules for different consumer markets. Further, our consumer surveys show that businesses across the marketplace, not just motor car traders fail to provide consumer guarantee remedy. For example, Consumer Action data shows that, where issue type was recorded for calls to our legal advice lines, approximately 25-30 per cent of calls about consumer guarantees relate to motor vehicles.¹⁸

It would also fail to give protection to consumers who purchase used cars from traders. Our experience is that these are typically the most exposed class of vehicle buyers, who presently face habitual breaches of their guarantees in relation to the supply of used vehicles and lack effective and timely remedies and access to justice.

WEstjustice is one of a number of legal centres that assists with consumer disputes in relation to used motor vehicles across Australia's outer suburbs and regional areas. These clients are frequently on low incomes or pensions (meaning a new car is out of the question), have low levels of mechanical knowledge (they are therefore absolutely dependent on a trader's representations) and either live in areas where there is little to no public transport or have members of a household who require private transport including due to disability.

Most clients who come to WEstjustice with these cars have issues which, even having mind to the car's age and mileage, are major failures developing very soon after purchase which render

¹⁷As quoted in the Consultation Regulation Impact Statement, Improving the effectiveness of the consumer guarantee and supplier indemnification provisions, the Australian Government The Treasury, December 2021, p47.

¹⁸For example, of the 431 calls about consumer guarantees in the 2020-21 financial year, 117 of those (27.1%) were about faulty motor vehicles.

them not fit for the reasonable purpose for which they would have been purchased, and above all unsafe.

It is common for the traders Consumer Action and WEstjustice deal with in casework to:

- insist in the first instance that a ‘statutory warranty’ (provided by obligations in section 54 of the Motor Car Traders Act 1986 (Vic)) is the consumer’s sole legal entitlement (these generally do not apply to older and/or used cars);
- sell or package add-on junk insurance products that offer limited coverage for major failures within the meaning of the ACL, then direct a consumer to this products’ head office for all disputes; and
- refuse to negotiate or acknowledge duties in response to ACL arguments or representations, taking a ‘see you in court’ approach.

We believe that many traders are aware of the benefits of this approach. Getting to a civil or administrative tribunal or court, such as VCAT in Victoria, is a costly and arduous process. A person is almost certainly likely to be unsuccessful without an expert report that conforms to prescriptive evidentiary requirements, and these can cost thousands of dollars with very limited and complicated options to subsidise or cover this cost.

Even once they have obtained a report, extensive court and tribunal backlogs mean a person could be waiting up to two years for a hearing and judgment. Even with an expert report at VCAT, there are multiple risks and pitfalls. A self-represented consumer may be overwhelmed by complex legal or procedural arguments and may ultimately fail to get their hearing up if the trader has arranged its affairs to make service complex.

It is at the end of this process where, in a best case scenario, a recalcitrant trader may be asked to pay the cost of the vehicle as purchased only, without any other costs or damages. From our experience only a small proportion of consumers ultimately pursue their rights all the way to such a judgement and have seen a number who simply decide they do not want to take their matters further or settle for paltry sums. In WA a consumer's only option is to bring a claim in the Magistrates Court, as there is no alternative forum such as a tribunal. CCLSWA’s experience is that consumers are generally reluctant to bring a claim in the Magistrates Court as they are deterred by the formality of the process and procedures.

This state of affairs favours serial sellers of ‘lemon’ vehicles, while creating an imbalance for those traders who choose to act fairly and responsively. Firms who do the right thing are bearing an ongoing cost of doing business in line with the ACL which their counterparts are evading with little to no financial consequence. A civil penalty prohibition, properly enforced, would attach a risk to acting this way. Traders who explicitly flout or avoid their ACL rights should be the ones who face greater financial costs than those trying to do the right thing.

The below composite case study highlights the problems WEstjustice clients have faced in these matters:

Case study - Remi's story

Remi is a single mother of three children living in community housing in Melbourne, and a victim-survivor of family violence. She purchases a second-hand vehicle to allow her to get to her casual cleaning shifts (which are late at night and not near public transport), take her children to school, and comply with conditions requiring her to let her ex-partner see the children each weekend across town. Remi separately obtained vehicle finance to get the car, and paid extra at the car yard for what the trader said was a 1 year Gold Standard Warranty.

Soon after purchasing the car, it begins to overheat after approximately 10 minutes on the road and cut out. Remi learns that her Warranty does not cover a full radiator replacement, but she pays for this at her own cost when a mechanic suggests this may address the problem. However, the problem continues and the mechanic subsequently determines that there is a major failure with the head gasket. He quotes her thousands of dollars for the parts and labour. The Warranty she bought has a limit of \$1000 on any work.

The trader initially tells Remi not to speak to him and to only go through the Warranty Company, saying they are now the only people that can deal with car problems. When Remi becomes upset and says she has read a brochure that says she has consumer rights, the trader threatens to call the police on her.

Remi gets advice from a community legal centre that there is likely a major failure entitling her to reject the car. The community lawyer speaks to and writes to the trader, who is adamant Remi has 'driven the car wrong' and that he will 'see her in court if that's what she wants'. The lawyer is apologetic to Remi – unfortunately, now her only option is to try and go to VCAT.

Remi cannot afford an expert report by herself and has to gather a large number of financial statements and records to establish that she is poor enough to be eligible for her expert report to be paid for by the Attorney-General's Department. She organises an expert report from one of a very few in Victoria who are willing to do them at cost or a discount as the Department's money does not go far. However, because the independent expert is in demand this report takes several months. Due to Covid, she learns that VCAT will not be hearing the case until late 2023.

In the meantime, Remi has spent thousands of dollars on a finance contract for a car she can't use until she eventually seeks a hold due to her desperate hardship. She has to drop casual work as it is too hard to get there. Because she can't afford to leave the car unregistered on the street and risk a fine, she moves it to her rental property's front lawn. Her community housing provider begins to send her warning notices that the broken car constitutes a nuisance, jeopardising her secure housing. Meanwhile, because Remi struggles to get her kids to her ex-partner on time, he is threatening fresh Family Court proceedings.

Source: WEstjustice

11. Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services, and how the trader dealt with your issue?

Businesses far too regularly refuse to provide the requested remedy for a major fault. In early 2022, CHOICE surveyed over 9,000 consumers and collected over 2,000 stories of people who had problems with getting a remedy for a major fault or who were forced to accept a repair for a major fault when they wanted either a replacement or refund.¹⁹

Below are a sample of the experiences that consumers shared with us.

Juan didn't receive a remedy for a major fault

"We purchased some turf and chose a product mid-range, not the cheapest, but not the most expensive. When the product arrived, it had runners all throughout the turf. Within a week, the turf - which was supposed to be more resistant to weeds - had all kinds of weeds growing from it. We complained and they sent someone out to have a look. That person agreed that it shouldn't look like that. I followed up multiple times after that, but they just ignored my calls."

Daiki was given store credit instead of a refund

"I purchased a tablet from JB Hi Fi and it was faulty within 6 months of purchase. I was told I was not covered by a warranty, but they would generously give me an in store credit for the cost."

¹⁹ CHOICE Improving Consumer Guarantees survey completed by 9785 people in January 2022. People's names have been changed.

Li felt they had no option but to purchasing a replacement after repairs failed

“it was a new Haier washing machine. I reported it to the manufacturer initially and got loads of fluff about how great their products are. Eventually a grumpy repair guy came looked at it and left. I contacted Harvey Norman who followed up. After a few weeks of constant follow-up I received a replacement washing machine. The machine I believe still wasn't working properly. I follow-up up again and Fisher Paykel refused to accept my complaint... The spin dry didn't spin dry the clothes properly. In the end I bought another washing machine which has worked perfectly.”

See Appendix A for more examples.

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

a. What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?

b. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?

c. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicles)?

When a consumer experiences a major fault with a product, they are entitled to ask for their choice of a repair, replacement or refund. Consumers shared with CHOICE examples where they had a product with a major fault and asked for a refund or replacement, but the trader only offered a repair. Below are a snapshot of stories shared to CHOICE:

Fatemeh spent their own money for repairs they didn't want

“240 volt 125mm Martarbo grinder. The particular grinder I purchased when using this grinder operating normal circumstances did not have any energy to actually operate. I had to return at my own cost, I was then provided with another grinder that was completely different, then there was a recall on the second grinder as the guard did not comply with Australian Standards. Had to return that particular grinder, & remained

without a replacement for 2 months. Then I received another replacement grinder that was not the type that I initially purchased.”

Maria gave up after 2 repairs

“A necklace that had the clasp broken they repaired twice as the first repair broke again. They only soldered it. They refused to refund. I gave up when the second repair broke.”

Olivia eventually got what she wanted, but only after too much back and forth.

“I purchased a computer from Harvey Norman some years ago. It didn't work properly from the outset and they initially insisted we have it repaired by the manufacturer. This took ages, was unsuccessful and when we took it back to the store we purchased it from, they gave us a replacement which was what we wanted in the first place. There was no significant cost but it was a present and the delay and frustration were disappointing. Given the eventual outcome it would have saved everyone time and aggravation to simply have replaced it initially.”

For everyone:

14. Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?

Yes. A clear civil prohibition, along with appropriate fines and strong enforcement would deter businesses from denying people their consumer guarantee rights. It will be an improvement on the current situation as people aren't accessing their rights due to the barriers that businesses put in place. Penalties should be set to an adequately high level. This will act as a deterrent to businesses who consider doing the wrong thing.

Currently, the consumer law regulators have limited ability to enforce compliance with consumer guarantees despite it being a high area of complaint. For example, the ACCC reports over 42,000 contacts in 2020-21 relating to consumer guarantees.²⁰ This means that there is limited deterrence. In the past, the ACCC has had to allege businesses are engaging in misleading representations in relation to consumer guarantee rights in order to address breaches of the law. A recent example is *ACCC v Mazda Australia* [2021] FCA 1493. This requires the making of a circuitous legal argument in order to address breaches of consumer guarantees, and acts as a barrier to effective deterrence to breaching the law.

²⁰ ACCC & AER Annual Report 2021, p104.

15. Please provide any relevant information or data on whether non-compliance with the consumer guarantees is a significant problem in the new motor vehicle sector compared to other sectors?

We do not have comprehensive data comparing the experience of non-compliance with consumer guarantee rights in the new motor vehicle sector to other consumer sectors.

The research that CHOICE undertook in 2016 did find that 94% of respondents took action to resolve problems with their new car.²¹ This is a higher rate than for consumer appliances. But 20% of respondents were unsatisfied with the response they received from the trader. However, 15% of people that had problems with their car were unable to resolve the problem.²²

This research also found that 16% of respondents were asked to sign a confidentiality agreement after they received a refund or repair.²³ At the time, CHOICE concluded that:

“This behaviour also implies that remedies are provided at the discretion of the seller when there is a legal obligation for products, including cars, to be of acceptable quality, including being free from defects. The consumer guarantees provide consumers with rights to remedies when their new cars have problems, but requiring them to sign intimidating legal agreements before accessing the benefits of these rights obscures this.”²⁴

This sort of restriction on consumers also makes it hard for organisations like ours to provide accurate comparisons between the new car market and other consumer markets.

Consumer Action’s consumer advice service data suggests that around 25-30% of complaints about consumer guarantees relate to motor vehicles. However, this still leaves 70-75% of consumer guarantee complaints relating to other sectors. After motor vehicles, the most common sectors are electronics, trades, mechanics, travel, furniture. While smaller numbers, other areas of complaint include education, housing, food, storage, telecommunications and postage. It is our view that the barriers to accessing consumer guarantees apply in sectors beyond motor vehicles, so it is imperative that any new civil prohibition be economy-wide.

²¹ CHOICE, 2016 Lemons into Lemonade: Consumer experiences in the new car market.

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

PART B: Supplier indemnification

CHOICE, Consumer Action, CCLSWA and WEstjustice support the implementation of both Option 3 and Option 4 in Part B of the CRIS. Specifically, we support a whole of economy civil prohibition for:

- failing to indemnify suppliers where a consumer guarantee failure falls within the responsibility of a manufacturer or importer; and
- manufacturers or importers retaliating against suppliers for seeking to enforce their indemnification rights:

While we do not have expertise in the details of the issues raised in Part B, we support the introduction of prohibitions and penalties outlined in Option 3 & 4 as it will stop retailers and manufacturers avoiding responsibility.

Some retailers have shown that they will direct consumers to pass their complaint onto the manufacturer, or vice versa, when a fault arises. This leaves the consumer spending more time and money enforcing their consumer guarantee rights. So without the implementation of prohibitions with fines attached, businesses will continue to break the law and consumers will bear the cost.

From CHOICE's survey of consumers, people shared the following experiences about businesses trying to pass responsibility onto other parties.

The manufacturer helped Elias when the retailer wouldn't.

"I bought a HP laptop from Harvey Norman that kept overheating doing basic tasks. Towards the end of its first year, still under warranty, I had to send it to HP in Melbourne for repairs. The problem reoccurred and it had to be sent off again. This was very inconvenient! Finally, by calling HP directly and insisting I speak with someone able to act rather than repeat the same script I'd heard before, I was able to get a store credit (not the refund I wanted) to buy a different laptop from them."

Lida was directed to the manufacturer by the retailer.

"An Asus laptop purchased from Harvey Norman developed a fault on the second day of ownership. The display had a wide white vertical bar in centre of display and other areas were hard to see. Refund or replacement was refused, told repair only on laptops and that I should contact the manufacturer to arrange a repair."

Yulia went back and forth between the trader and manufacturer for months before getting a resolution.

“I bought a robot vacuum cleaner from Kogan. It needed to be charged before use. Problem was, it would not charge. When I contacted them, they said they were only the distributors for the product and that I had to go to the manufacturer directly. I did eventually get my money back, but it took several months and calls and letters and even needing to contact consumer affairs in the process to get this sorted out.”

Recommendation 4: That the final Regulatory Impact Statement (RIS) adopt Part B, Option 3 – a prohibition against not indemnifying suppliers, supported by penalties and other enforcement mechanisms and Option 4 - a prohibition against manufacturers retaliating against suppliers who request indemnification.

Appendix 1: Supporter survey results

The following cases were provided to CHOICE via an online survey conducted from 19th to 30th January 2022. These cases are a sample of the 2310 stories received. We'd happily provide the Treasury with more detail and additional cases if required.

Examples of traders not agreeing to provide a requested remedy for a major failure

Jonathon didn't receive a remedy when they received a t-shirt that was different to what they ordered.

"I rarely purchase clothing online. However, in late 2021, I ordered a Christmas t-shirt, ordered online at a cost of approx \$AUD70, based on a photo of a glittering, sparkly design on that T-shirt. What arrived was a flat, non-shiny design - a very poor imitation! Like a screen-print on the shirt of a photo of the real thing. I emailed the company to complain, including a photo of the postage packing and the T-shirt, etc. They declined to refund anything but offered a small 'compensation' of \$5. I emailed back with my decline to accept their offer and argued the issue of misrepresentation etc. The offer went to \$10. I then emailed, using words about being a member of Choice, that I know the Aust Consumer Law etc. and then they offered \$15. Back I went again and finally they offered \$25. I replied saying that the shirt cost \$70 and that \$25 was no where near a refund etc etc. They said that was their final offer. So I accepted. The refund never arrived in my PayPal (credit card) account."

A retailer referred Emma's faulty computer to Microsoft and has failed to receive a remedy

"I too have had issues with my computer and was referred to Microsoft as a software issue not a computer issue. I felt that I was fobbed off and do not have any confidence in the company's warranty system. Needless to say I have just been putting up with the problem. My computer works like groundhog day, every day is a new day. I have to save any work on an external hard drive as it will not be there the next day. Each day I need to restart programs such as Adobe as if it's the first time I have used it. The computer has 1tb of memory and only a small portion of this is used, so no memory issues."

Manufacturer wouldn't repair Gabriel's differential

"When driving my Subaru Forester on a freeway, it blew a differential and the car was only four years old. There was not much mileage on the car and it was well serviced by my mechanic."

When I asked Subaru if they would cover the cost of the repair (approximately \$2000); they refused to do so because I did not have it serviced by a Subaru dealer (which is ridiculously expensive) and had it serviced by my local mechanic. My view is that if a car is well looked after, Subaru should have covered the cost of the repair especially for a car that is less than 5 years old.”

Lucia was refused a repair, replacement or refund

“The MIMCO necklace (purchased for over \$100) was losing its finish after minimal wear. The company rejected my concern.”

James was forced to spend too much time arguing to get their refund

“I purchased a speed control kit from Jaycar Electronics for a wood router and it failed after a short time. The sales manager claimed I didn't have the skills to assemble the circuit and wasn't covered by any warranty. I informed the manager that I was an electrical engineer and had vast experience with electronic circuits, he still refused a refund. I contacted Fair Trading who approached Jaycar Electronics and within a matter of days I went back to the store and received my refund.”

Liam had to argue to get a trader to apply the ACL

“The product was a reversing camera for my car. The product was only 3-4 months old and stopped working. Company originally offered a refund of 70% of the purchase price. I reread the warranty and it said refunds would be assessed according to applicable national laws. (product supplier was from USA). I send them a copy of the Australian consumer law. They refunded me 100% OF PURCHASE PRICE.”

Louise had to teach the trader about their responsibilities under the ACL

“This has happened so often. Just recently, for example, I had bought my son a pair of soccer boots for \$300 (ouch!) and 4 weeks later there were signs, where the sole-plate meets the upper, that the boot was coming apart. We duly took them back to the retailer. They then got someone to do a returns analysis at the time we returned them to check it was a legitimate claim. We were told it was legitimate 10 minutes later and that we would get a credit for the boots. We explained that my son had already started training and needed boots (the next session for him was the next day actually) so would be happy assuming that these were just a faulty manufacture of good boots and would therefore just take another pair of the same boots

in his size home while they dealt with the supplier. The retailer said that they had no other boots like that left so could only give us credit. I said that we needed boots to train the next day and since they had no boots to replace the faulty ones with then we'd need a refund so that we could race around that afternoon looking for boots from another store as they had no suitable replacement to offer us. The shop assistant said that they couldn't do that and had to give credit instead. I told them that they actually had to give us a refund under ACL in this situation."

Examples of traders providing repairs when replacements or refunds were requested

Jakob was forced to pay for postage to get a repair they didn't want.

"A coffee machine that was unable to handle the pressure required to make coffee espresso, was leaking at the group head. I was offered a repair by the retailer, and this is a difficult resolution when you are in a regional location. I had to provide the return postage, and when the machine was received at the retailer, I was later told that I would get a refund, not including postage. More than a month transpired in which I did not have a functioning espresso machine. I then had to go through the delays involved in receiving the refund, then the purchase process. It is not a seamless process, and the consumer is the last in the chain to receive quality service, if that even exists anymore. The transaction model is now often an adversarial one with varying degrees of discomfort. The retailer/manufacturer holds too many aces."

Nozomi wanted a replacement, instead was without a TV for 6 weeks.

"A Samsung TV flat screen. 2012. Purchased locally. Ceased to function about 1 month after purchase. Wanted a replacement. Obligated to have a repair. Very long wait in a queue of many others. Only one certified repairer in locality. Approx 6 weeks without a TV."

Do-yoon wasn't given a replacement after he made the mistake of wearing his watch.

"A Seiko watch that the metal bands retaining pins kept falling out, took it back for many repairs finally asked for a new band for the watch and request was refused and I was refused further repairs blaming me for wearing the watch."

Ava wanted a replacement tv.

“A Sony TV with issues of switching off randomly from the time we bought it, and we were offered a lesser TV, which we refused, so they sent a repair man. The TV is again switching off randomly but out of warranty.”

Enzo’s laptop failed, then the replacement failed, then was denied a refund.

“Apple Macbook Pro (2014) malfunctioned practically from new and repeated calls to 'Apple (Little) Care' kept assuring me that it was my unfamiliarity with the Apple system. When I returned the product to the retailer (David Jones) with a request for refund, I was told: It doesn't work like that with Apple. However, I refused to accept that Apple was above Australian consumer law and insisted the retailer resolve the issue. I was subsequently asked by an Apple representative by phone to take the product to an authorised repairer and, if the repairer confirmed it was faulty, they would replace the product. It was pronounced faulty with a 'failing' hard disk and replaced with a new laptop. When the replacement laptop also failed only a few months into its warranty period, it, too, failed. This time Apple would not refund the purchase price nor replace the product and offered only repair. At least the repaired laptop has performed well from a hardware viewpoint since.”

Valentina had no luck with Kogan or Nokia, but PayPal refunded the purchase price.

“Purchased a Nokia 6 mobile phone from Kogan. I discovered that it made for the Chinese market and would never be able to receive Android OS and security updates. Nokia Head Office in Finland also confirmed that the phone model should never have been sold in Australia. Kogan refused to acknowledge that there was any issue and would not provide me with a refund. I explained the situation to PayPal and refunded the purchase.”