



Consumer guarantees and supplier indemnification under the Australian Consumer Law

Consultation on the design of proposed new civil prohibitions
and penalties

October 2024

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Media and Speeches Unit
The Treasury
Langton Crescent
Parkes ACT 2600
Email: media@treasury.gov.au

In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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About this consultation process

Background

On 16 October 2024, the Hon Stephen Jones MP, the Assistant Treasurer and Minister for Financial Services, announced that the Government would work with State and Territory Consumer Affairs Ministers and stakeholders to design proposed civil prohibitions and penalties for breaches of the consumer guarantees and supplier indemnification (CGSI) provisions of the Australian Consumer Law.

In 2021, the Consultation Regulation Impact Statement (Consultation RIS) [*Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*](#) sought stakeholder feedback on a range of options to improve CGSI, including the introduction of civil prohibitions and penalties to:

- prohibit suppliers from refusing to provide a remedy specified by the consumer for a major failure under the consumer guarantees,
- prohibit manufacturers from not indemnifying suppliers when requested, and
- make it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification following a consumer guarantees failure.

Current consultation process

This paper builds on the work undertaken in 2021 and seeks stakeholder feedback on the design of proposed new civil prohibitions and penalties. This is to ensure that proposed new penalties and enforcement mechanisms are proportionate and effective in ensuring that consumers and businesses can access the remedies to which they are entitled.

Once the consultation process has concluded, a Decision Regulation Impact Statement (Decision RIS) will be developed to outline the evidence gathered and the preferred policy option for CGSI. This consultation paper and the subsequent Decision RIS will be published by the Office of Impact Analysis on the Department of the Prime Minister and Cabinet website. Options to amend the Australian Consumer Law will be considered and agreed in consultation with states and territories in accordance with the Intergovernmental Agreement for the Australian Consumer Law.

Making a submission

Treasury welcomes written submissions on the issues raised in this supplementary consultation paper. Submissions should be provided to:

Email	consumerlaw@treasury.gov.au
Mail	Director Consumer Policy Unit Market Conduct Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to consumerlaw@treasury.gov.au

Submissions must be received by 14 November 2024.

Information on making a submission is available in Treasury's [Submission Guidelines](#)

Publication of submissions

All submissions to the consultation process will be published, unless authors have indicated they would like all or part of their submission to remain confidential. Specifically, all information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all, or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Anyone who would like part of their submission to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Background

The Australian Consumer Law

The Australian Consumer Law (ACL) is a single, national consumer law that governs consumer protection and fair trading in Australia. It applies consistently in all Australian jurisdictions and is administered jointly by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies.

Each ACL regulator is independent, has its own enabling legislation and exercises its powers and functions accordingly.

Consumer Guarantees

The ACL contains a basic set of guarantees for consumers who buy goods and services from Australian suppliers, importers and manufacturers. These rights are known as the consumer guarantees.

The consumer guarantees apply to products and services bought for personal or household use. They also apply to products and services bought for business use, provided that they cost less than \$100,000 or are commonly bought for personal, domestic or household use.¹ Vehicles and trailers are generally also covered.

When a consumer² buys **goods**:

- the *seller* guarantees that goods will be of acceptable quality, fit for a particular purpose, will match their description and any demonstration model, and will come with full title, undisturbed possession and be free from any hidden debts. Sellers will also honour any express warranties.
- the *manufacturer* guarantees that the goods will be of acceptable quality and will match their description. Manufacturers will also honour any express warranties. Manufacturers will also provide spare parts for a reasonable period of time after purchase (unless the consumer is told otherwise prior to purchase).

When a consumer buys **services**, the service provider guarantees that the services will be provided with due care and skill, will be fit for a particular purpose, and will be provided within a reasonable time.

If a product or service fails to meet a consumer guarantee (a 'failure'), the consumer will be entitled to a remedy such as a refund, repair, replacement, compensation or cancellation of contract. The remedy will depend on whether the failure to comply is a 'major failure' or not. In addition, consumers may also have a right to claim compensation for consequential loss or damage that is reasonably foreseeable and caused by the failure to meet the consumer guarantee.

¹ Consumer guarantees do not apply to goods acquired for resupply, for use or transformation in production or manufacturing, or to repair or treat other goods.

² 'Consumer' is used throughout the paper to also refer to business transactions that are covered by the consumer guarantees.

Major failures³ are:

- where a good or service is unsafe
- where a good or service is significantly different from the description
- where the problem is such that the consumer would not have purchased the good or service if they had known about the problem
- where a good or service is not fit for its stated purpose, and cannot easily be fixed within a reasonable time.

When there is a major failure with a good, the consumer can choose to return the product for a refund or replacement or keep the good and seek compensation for the drop in value caused by the problem.

When there is a major failure with a service, the consumer can choose to cancel the contract and seek a refund for money already paid, less paying a reasonable amount for any work done so far and as expected. Alternatively, they may keep the contract and negotiate a reduced price for the drop in value of the service.

If the failure is not a major failure, the seller or manufacturer can choose to provide a repair, replacement or refund, or, in the case of services, resupply.

Suppliers and manufacturers are not able to exclude, restrict or modify the consumer guarantees by any agreement, contract or warranty. Where a warranty is offered, that warranty will provide rights alongside, or in addition to, the consumer guarantees protections in the ACL.

Supplier Indemnification

The ACL requires suppliers to provide consumers with a repair, replacement or refund when there has been a failure under the consumer guarantees. It also provides that manufacturers are liable for indemnifying (reimbursing) suppliers for the cost of providing the consumer with a remedy where the manufacturer is at fault for the consumer guarantees' failure.⁴ This applies to the consumer guarantees relating to:

- acceptable quality (e.g., where a good contains a design flaw that makes it unsafe)
- descriptions applied to goods by, or with the consent of, manufacturers
- fitness for a purpose, that a consumer makes known to a manufacturer either directly or through a supplier (e.g., where a good does not do what the manufacturer claims it does).

The manufacturer is required to reimburse the supplier for the cost of providing the consumer guarantees remedy, and also any compensation the supplier paid to the consumer for reasonably foreseeable consequential losses.

³ There is a major failure if a good or service has a major failure as described above, or two or more failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the good or service. See sections 260 and 268 of the ACL.

⁴ Where the manufacturer of a good does not have a place of business in Australia, section 7 of the ACL defines the term 'manufacturer' to include a person who imports goods into Australia. A reference to "manufacturer" in this Consultation RIS should be read as including "importer".

Manufacturers cannot contract out of these obligations but may limit their liability in relation to goods which are not ordinarily acquired for personal, domestic, or household use (i.e. certain commercial goods).

False or misleading representations

The ACL prohibits traders from making **false or misleading representations** concerning:

- the existence, exclusion or effect of any consumer guarantees or remedy, or
- a requirement to pay for a contractual right wholly or partly equivalent to a consumer guarantee.

Additionally, traders are prohibited under section 18 of the ACL from engaging in conduct which is misleading or deceptive or is likely to mislead or deceive. The conduct is assessed against whether an ordinary or reasonable member of the relevant class of people to whom the conduct was directed are likely to be misled.

The ACL also prohibits traders from engaging in unconscionable conduct. Statutory unconscionable conduct under section 21 of the ACL is a general ban on conduct which is particularly harsh or oppressive and that goes against good conscience.

Enforcement

The ACL is enforced by the ACCC and state and territory consumer protection agencies (collectively, the ACL regulators) on a 'one law, multiple regulators' model. Chapter 5 of the ACL includes enforcement powers, penalties and remedies that can apply for some breaches or suspected breaches of the ACL.⁵

Each ACL regulator has a compliance and enforcement policy which details the compliance and enforcement powers and tools available to them under the ACL and supporting legislation. These include court action, infringement notices, enforceable undertakings, administrative resolutions, guidance and education, formal written warnings to a business, dispute resolution, and public warnings or other public statements. When enforcing the law, ACL regulators take proportionate action, aiming to ensure compliance with the law and deter offending conduct, encourage the effective use of compliance systems and punish the wrongdoer with penalties when warranted.

ACL regulators may take compliance and enforcement action where they have reasonable grounds to believe that a business has contravened certain consumer protection provisions, including false or misleading representations and unconscionable conduct.⁶ However, it is not a contravention of the ACL for:

- businesses to fail to provide a remedy for consumer guarantees failures, when they are legally required to do so under the consumer guarantees, and
- manufacturers to fail to reimburse suppliers for consumer guarantees failures that the manufacturers are responsible for.

⁵ ACCC, ASIC and the State and Territory consumer protection agencies (2017), [Compliance and enforcement guide](#), Australian Consumer Law [website](#).

⁶ Section 134A(1) of the *Competition and Consumer Act 2010* (CCA).

Rather, the CGSI provisions create rights that are enforceable directly by affected consumers and businesses.

If the law was amended so that failures to comply with CGSI provisions were contraventions of the ACL, the ACL regulators would be able to enforce the CGSI provisions. This would improve businesses' and manufacturers' compliance with the CGSI provisions.

The problem

There is a substantial body of evidence that many consumers are finding it difficult to obtain remedies from suppliers and manufacturers for consumer guarantees failures, with the 2023 Australian Consumer Survey finding that 31 per cent of surveyed consumers have not had their problem resolved, while of the 69 per cent of those whose issues were resolved, a third of those were not satisfied with the resolution.⁷ The survey also highlighted that only 23 per cent of consumers were able to resolve their problem directly with the relevant business.⁸

In 2023, the ACCC received more than 28,000 reports and enquiries about consumer guarantee issues which represents about 30 per cent of the more than 98,000 total reports and enquiries made to the ACCC last year.⁹

Of the consumer guarantee-related contacts received by the ACCC, most contacts related to motor vehicles (24 per cent) and consumer electronics and whitegoods (22 per cent). This was followed by household and homewares (6 per cent), construction (6 per cent), clothing and personal goods (6 per cent) and retail trade sectors (4 per cent). Around half of the consumer guarantee-related contacts received by the ACCC had engaged with the business about their consumer guarantee issues prior to contacting the ACCC.

Similarly, in response to the previous Consultation RIS, CHOICE indicated that their 2022 survey of 9,785 members and supporters found that over 2,000 people experienced difficulties with getting a consumer guarantees remedy for a major fault or did not get the remedy they preferred for a major fault. It notes that 99.6 per cent of respondents reported that businesses should be penalised for failing to provide a refund, repair or replacement where required by the ACL.

Where a business fails to provide a consumer guarantees remedy, consumers can seek to have their rights enforced by a court or a tribunal. However, this process can be difficult and time consuming for consumers and the costs involved may exceed the value of the good or service involved. For low-cost goods, consumers are unlikely to enforce their statutory rights when it is cheaper and easier to 'just buy another one' or to pay for someone to fix it.

For high-value goods such as motor vehicles, many consumers who experience faults with their new or used vehicle can find it difficult to obtain a remedy for a consumer guarantees failure. The reasons for this include:

- difficulty understanding the processes involved in making a complaint

⁷ Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), p 71, Australian Consumer Law website.

⁸ Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), p 74, Australian Consumer Law website.

⁹ ACCC (Australian Competition and Consumer Commission) (2024), [Broken but out of warranty? Your consumer guarantee rights may still apply](#), ACCC website.

- the time-consuming and costly application process for pursuing a complaint through a court or tribunal¹⁰
- the cost and difficulty in gathering evidence that a tribunal will accept, such as expert reports.

The difficulties involved in seeking a remedy can lead to poorer outcomes for consumers and the economy, as non-compliant suppliers and manufacturers transfer costs to the consumer. Even when consumers do succeed in a court or tribunal, the maximum consequence for a supplier or manufacturer would be to provide the consumer with the remedy they are entitled to under the ACL. The business will not receive a penalty or other sanction for failing to provide a remedy, providing limited incentive for suppliers and manufacturers to comply with their consumer guarantees obligations.

Suppliers of goods and services also have a statutory right to indemnification (reimbursement) from manufacturers when the supplier provides a consumer guarantee remedy and the manufacturer was responsible for the failure. Despite this, some stakeholders report that suppliers face difficulty obtaining indemnification, as manufacturers refuse to acknowledge or deny the existence of suppliers' rights to indemnification. Some suppliers may also face retaliatory behaviour, such as termination of contracts, increased prices, withdrawal of supply, or less favourable terms and conditions if they seek indemnification.

2021-22 consultation process

On 14 December 2021, the Government released a Consultation RIS seeking stakeholder feedback on options to improve the effectiveness of the CGSI provisions under the ACL. A total of 46 submissions were received from consumer advocacy groups, consumers, members of the motor vehicle industry and business organisations.

The Consultation RIS sought feedback on options to improve CGSI, including no action (status quo), increased education and guidance, and the introduction of civil prohibitions and penalties.

The number and breadth of stakeholder submissions was relatively small, possibly due to the impacts of the COVID-19 pandemic. However, some key themes emerged from the consultation process.

There was little support for the current regime (status quo), with just 6 submissions in support of the current arrangements. Consumer representatives were particularly supportive of introducing civil prohibitions and penalties, submitting that businesses are not incentivised to provide consumers with a timely refund, repair or replacement as there are no civil penalties for non-compliance. This also received support from regulators, some academics and business stakeholders.

Many business representatives expressed caution about imposing penalties in an area of law that was open to interpretation and disagreement, concerned that penalties would generate uncertainty and undue compliance costs for small business.

The introduction of civil prohibitions and penalties for manufacturers who refused to indemnify suppliers, or engaged in retaliation against suppliers who sought indemnification generated some mixed views. Stakeholders, including some retailers and consumer representatives, indicated that manufacturers fail to comply with their obligations, leaving suppliers to bear the costs of providing a remedy to consumers.

¹⁰ Consumer Policy Research Centre (CPRC) (2023), [Detours and roadblocks: The consumer experience of faulty cars in Victoria](#), CPRC website.

Others submitted that suppliers are appropriately indemnified by manufacturers under the current regime and considered that there is a lack of evidence to justify a new civil penalty provision.

Recent developments

In November 2023, Australian Consumer Ministers agreed that work on CGSI was a consumer policy priority for 2024. Ministers committed to improved consumer protections at a state, territory and national level, as part of a nationally coordinated approach.

Australian Consumer Survey

The [2023 Australian Consumer Survey](#)¹¹ measured the knowledge, awareness and perceptions of the ACL among consumers and businesses, and their experience of dealing with problems when selling or buying goods and services.

The survey showed that 61 per cent of consumers experienced at least one problem when purchasing a product or service between 2021 and 2023 and took some form of action to resolve their issues if their consumer rights were breached. Consumers who migrated to Australia within the last 5 years to 2023 (78 per cent) and First Nations people (72 per cent) were significantly more likely to have experienced problems with purchased products or services. Consumers were also more likely to lodge a complaint if the value of the product or service was significant.

The highest incidence of problems in 2023 related to personal products and services (20 per cent), subscriptions/streaming services (19 per cent), food and drink (18 per cent) and digital products and services and downloads (18 per cent).

Sixty-nine per cent of respondents reported having their most recent problem or issue resolved, with 45 per cent of problems resolved to satisfaction. Twenty-three per cent of consumers had their problems resolved by contacting the business directly to reach some form of agreement, with 10 per cent receiving a refund, replacement or repair. The survey showed that consumers spent an average of 13 hours resolving their problem, with less time spent when problems have been resolved to satisfaction (11 hours), compared to when they have not been resolved to satisfaction (15 hours).

More than half of those surveyed (58 per cent) would be more likely to make a complaint if the value of the product or service was significant, with \$389 or more considered the average significant amount. The preferred avenue for making a complaint was to contact the state regulator (53 per cent), followed by an ombudsman, dispute resolution service or tribunal (33 per cent). While 72 per cent of consumers took action to resolve their problems, of the 28 per cent who did not take action, the majority said it was not worth the effort (36 per cent) or time involved (30 per cent), with the remainder citing a lack of confidence that taking action would solve the problem (27 per cent) or that it was not worth the cost involved (22 per cent).¹²

The survey found that consumers commonly experience problems with receiving repairs or a replacement under warranty or guarantee. The key problems are delays to repairs (35 per cent), ineffective repairs (33 per cent) and being charged additional costs for repairs or replacement (29 per cent).¹³

¹¹ Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), Australian Consumer Law website.

¹² Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), p 65, Australian Consumer Law website.

¹³ Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), p 54, Australian Consumer Law website.

In dealing with issues related to the provision of remedies to consumers, the estimated cost to businesses in terms of the value of time spent was \$3.12 billion per year (this estimate does not reflect the direct costs incurred by businesses such as costs to repair, replace or refund).¹⁴

Developments in motor vehicle regulation

As discussed above, motor vehicles were the most reported category of consumer product about which consumer guarantee issues were raised with the ACCC in 2023.¹⁵

Since the Consultation RIS was published, there have been a number of developments in the motor vehicles industry both at the Commonwealth and at state and territory level. These reforms could interact with the consumer guarantee rights under the ACL by requiring those in the automotive industry, including manufacturers, importers and dealers, to comply with higher regulatory standards.

Commonwealth jurisdiction

At the Commonwealth level, on 1 July 2021, the *Road Vehicle Standards Act 2018* (RVSA) introduced nationally consistent standards for the safety, environmental and anti-theft performance of new and used road vehicles (including cars, trucks, trailers and caravans) being provided to the Australian market for the first time.

The RVSA introduced a Register of Approved Vehicles, which is a publicly searchable online database of new and used vehicles that have met the requirements of the RVSA and been approved for provision to the Australian market. All road vehicles must be entered on the Register of Approved Vehicles before they can be provided to the market for the first time.

State and territory jurisdictions

All states and territories have legislation to provide for the regulation of motor dealers and for related purposes.


In **New South Wales**, the *Motor Dealers and Repairers Amendment Act 2023* is intended to improve consumer protection and deter illegal behaviour when selling, repairing or recycling motor vehicles. The changes seek to improve protections for consumers when purchasing vehicles by allowing for the online end-to-end sale of motor vehicles in NSW, introducing specific consumer protection requirements for online motor dealers and increasing the maximum penalty amounts for various offences to ensure they remain a deterrent for poor conduct in the automotive industry. Part of the amendment also includes inserting a section in the *Motor Dealers and Repairers Act 2013* which outlines that a person who has enforced a consumer guarantee in relation to the condition of, or a defect in a motor vehicle, is not entitled to take action against the motor dealer under the dealer guarantee¹⁶ if the consumer guarantee is fully complied with.¹⁷

¹⁴ Kantar Public (2023), [Australian Consumer Survey 2023 Final Report](#), p 114, Australian Consumer Law website.

¹⁵ ACCC (2024), [Broken but out of warranty? Your consumer guarantee rights may still apply](#), ACCC website.

¹⁶ 'Dealer guarantee' is defined in section 68(1) of the *Motor Dealers and Repairers Act 2013* (NSW) as the obligation on motor dealers, at their own expense, to repair or make good a motor vehicle sold by the motor dealer, if it is a defective vehicle, so as to place the motor vehicle in a reasonable condition having regard to its age.

¹⁷ Parliament of New South Wales (2023), [Motor Dealers and Repairers Amendment Act 2023 \(NSW\)](#), Parliament of New South Wales website.



Following an inquiry into ‘lemon’ laws,¹⁸ in 2019 **Queensland** made amendments to confer the Queensland Civil and Administrative Tribunal with jurisdiction to hear actions for an amount or value of other relief of not more than \$100,000 under the:

- *Fair Trading Act 1989* in relation to the ACL consumer guarantees for the supply of goods or services, where the action relates to a motor vehicle (including a caravan or a motorhome) and
- *Motor Dealers and Chattel Auctioneers Act 2014* in relation to statutory warranties for used motor vehicles (including motorhomes but not caravans).

Amendments were also made to the *Motor Dealers and Chattel Auctioneers Act 2014* to reinstate the statutory warranty for ‘class B’ older second-hand vehicles that operated under the *Property Agents and Motor Dealers Act 2000*.

In 2024, **South Australia** amended the *Second-hand Vehicle Dealers Act 1995* to protect consumers of second-hand vehicles. The changes include increased penalties for odometer tampering and unlicensed dealing, and enabling dealers to disclose defects that would not be subject to the duty to repair if the vehicle is roadworthy.

In **Western Australia**, amendments were recently made to the Motor Vehicle Dealers (Sales) Regulations 1974, requiring dealers to disclose to prospective buyers whether a second-hand vehicle they sell has been listed as a repairable write-off on the written-off vehicle register. Failure to make this disclosure may result in a \$2,000 penalty and any false or misleading statement or representation on the sale form will attract a \$5,000 fine under the new laws.

Recent reforms to state and territory motor dealers’ legislation may contribute to better protection for purchasers of motor vehicles. However, they will not assist consumers and businesses to enforce their rights under the CGSI provisions, or in relation to other types of consumer goods and services.

¹⁸ Parliamentary Committee of Queensland, Legal Affairs and Community Safety Committee (2015), Report No. 17, 55th Parliament, [‘Lemon’ Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles](#), Queensland Parliament website.

Part 1: Prohibitions and penalties for failure to provide a consumer guarantee remedy

In the previous Consultation RIS, stakeholder views were sought on the desirability of introducing prohibitions for traders who do not provide a consumer guarantees remedy when required under the ACL, which could be enforced by the ACL regulators including seeking penalties (Part A, Option 3). The previous Consultation RIS suggested that the possibility of enforcement action by regulators would create an incentive for suppliers and manufacturers to provide a consumer guarantees remedy when a consumer requests and is entitled to one under the ACL.

In estimating the costs and benefits of this option, the Consultation RIS estimated that the proportion of consumers receiving a remedy would increase by 1 per cent per year, from 71 per cent in 2020-21 to 81 per cent in 2030-31. The regulatory cost to business was estimated at \$44.8 million in the first year for retail staff to undergo additional training, with no ongoing costs. These costs would be fully offset by a net benefit of \$4.6 billion over 10 years if applied economy-wide, or \$413 million over 10 years if applied to new motor vehicles only.

Issues for discussion

Clarity in the law

The consumer guarantees regime contains a number of principles-based provisions which include concepts such as 'acceptable quality', 'reasonably durable', and 'major failure'. Some stakeholders have noted that the current principles-based provisions are open to interpretation and consider that greater clarity is required if prohibitions and penalties are to be introduced.

During consultation for the previous Consultation RIS, a number of stakeholders highlighted the difficulties involved in determining whether there has been a failure of a consumer guarantee and whether the failure can be classified as a 'major failure'. Almost half of submissions to the previous Consultation RIS supported the provision of greater education and guidance to consumers and suppliers, either as a stand-alone option or in addition to proposed prohibitions and penalties, to ensure that businesses understood their obligations.

This issue is discussed in greater detail below on page 15.

Some stakeholders also raised the need for clarity around the concept of a 'rejection period' to avoid detriment to businesses if penalty provisions are introduced. A rejection period for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect a problem to appear.¹⁹ A consumer cannot reject the goods in certain circumstances including, if the rejection period has ended or if the goods have been lost, destroyed or disposed of by the consumer. It was noted that for penalties to be appropriate, businesses would need to have a high degree of certainty that particular conduct would contravene the relevant legislative provision.

In most jurisdictions, consumer guarantees issues are ordinarily heard by administrative tribunals which cannot provide binding jurisprudence on the law, and many of which do not publish outcomes or reasons. As a result, there has been limited judicial consideration of the consumer guarantees regime by superior courts and there is some uncertainty about how particular provisions apply.

¹⁹ Section 262(2) of the ACL.

The ACCC submits that if ACL regulators were able to take direct enforcement action, this will likely lead to greater judicial consideration and precedents relating to consumer guarantees. In turn, this will provide greater certainty about the application of the consumer guarantees, which can be reflected in the ACL regulators’ education and guidance material to assist businesses to comply.

Focus Questions

- Do aspects of the existing consumer guarantees regime need to be clarified prior to the introduction of prohibitions and penalties?
- Which aspects of the consumer guarantees regime are unclear? How could they be clarified?

Major failures

Part A, Option 3 in the previous Consultation RIS proposed civil prohibitions and penalties for suppliers that did not provide a consumer guarantees remedy in relation to a ‘major failure’ under the consumer guarantees.

The criteria for determining whether there has been a ‘major failure’ is at [Table 1](#) below.

Table 1: Major failure criteria

Goods	Services
<p>A major failure occurs if one or more of the following apply:</p> <ul style="list-style-type: none"> • a reasonable consumer fully acquainted with the nature and extent of the failure would not have bought the good • the good has multiple guarantee failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the good • the good is significantly different from the sample or description • the good is substantially unfit for its common purpose and cannot easily be fixed to make it fit for its purpose within a reasonable time • the good does not do what the consumer asked for and cannot easily be fixed to meet that purpose within a reasonable time • the good is unsafe 	<p>A major failure occurs if one or more of the following apply:</p> <ul style="list-style-type: none"> • a reasonable consumer fully acquainted with the nature and extent of the failure would not have bought the service • the service has multiple guarantee failures that are not major failures individually but, when taken as a whole, would have stopped a reasonable consumer fully acquainted with the nature and extent of the problems from buying the service • the service is substantially unfit for its common purpose and cannot easily be changed to make it fit for its purpose within a reasonable time • the service does not meet the specific purpose the consumer asked for and cannot easily be changed to meet that purpose within a reasonable time • the service creates an unsafe situation

Many stakeholders have commented on the difficulties involved in determining whether there has been a 'major failure' or not. The provisions contain a number of concepts which are open to interpretation, such as 'reasonable consumer', 'significantly different' and 'substantially unfit'.

Some stakeholders have suggested that it would be impractical and unfair to impose prohibitions and penalties when there has been a 'major failure', unless there is greater clarity about whether there has been a 'major failure' or not. Alternatively, some stakeholders have suggested removing the distinction between major failures and non-major failures.

Focus Questions

- Should there be greater clarity about whether there has been a 'major failure' or not?
- Which aspects of the criteria for determining whether there has been a major failure are unclear? How should they be clarified?
- Should all or only certain failures to provide a consumer guarantee remedy be a contravention of the ACL? For example, only in cases of major failures? Why or why not?

Economy-wide or for new motor vehicles only

The previous Consultation RIS noted the high incidence of unresolved problems with new motor vehicles, as reported in the 2016 Australian Consumer Survey, and also reflected in an ongoing high number of complaints received by the ACCC and state and territory ACL regulators.

The Consultation RIS compared the net benefit of introducing civil prohibitions and penalties economy-wide, or for new motor vehicles only. If implemented economy-wide, a civil prohibition on failing to provide a consumer guarantee remedy was estimated to create a net benefit of \$4.6 billion over the 10 years to 2031. If implemented for new motor vehicles only, the prohibition was estimated to create a net benefit of \$413 million over the same period.

Stakeholder responses to the previous Consultation RIS indicated that issues relating to both new and used motor vehicles were common, but that this was not the only area in which consumers experienced difficulties in obtaining a consumer guarantee remedy.

This experience is reflected in statistics provided by the ACCC, which indicate that there were 28,684 consumer guarantee related contacts in 2023. Of these, there were 6,760 consumer guarantee related contacts (24 per cent) related to the automotive industry, with a similar number of contacts (6,232 contacts; 22 per cent) received in relation to electronics and consumer whitegoods. These statistics suggest that the issues experienced by consumers are not confined to the automotive industry. It may be that consumers experience similar difficulties with vehicles and electronics and consumer whitegoods because they are both complex, high-value goods.

As noted in the *2017 Australian Consumer Law Review Final Report*, economy-wide prohibitions and penalties maintain consistency and avoid bespoke or industry-specific variations. The Report also noted that the flexible and economy-wide application of the consumer guarantee provisions has helped traders resolve disputes with consumers and lowered compliance costs.²⁰ Introducing prohibitions for new motor vehicles only would create separate protections for a certain category of goods and services and has the potential to create additional complexity in the ACL, and confusion for

²⁰ Consumer Affairs Australia and New Zealand (2017), [Australian Consumer Law Review Final Report](#), p 13, Australian Consumer Law website.

businesses and consumers to understand the different rights and responsibilities that apply depending on the type of purchase.

Focus Questions

- Should civil prohibitions and penalties for failures to provide a consumer guarantees remedy be applied economy-wide, or for new motor vehicles only?
- For how long should a vehicle be classed as a 'new motor vehicle'? Should the definition be based on the vehicle's build date, compliance date, delivery date, date of first registration or another date?
- What types of vehicles should be captured under the definition of 'motor vehicle'? Should the definition include passenger vehicles, motorcycles, utility, light commercial, heavy and commercial vehicles? Should caravans and trailers be included?

High-value vs low-value goods and services

The value of goods and services influences both the impact of a consumer guarantees failure, and a consumer's inclination to seek a remedy. Higher value goods and services naturally represent a higher immediate cost to consumers in the event of a failure, but also anecdotally mean that consumers are more motivated to pursue a remedy. However, an overwhelming majority of consumer transactions in Australia relate to goods or services that are of insufficient costs for a consumer to be motivated to enforce their statutory rights in the event of a consumer guarantee failure.

The ACCC noted that while most tribunals in states and territories have low fees for small claims, the time, energy and associated costs of taking action are typically still too high for many consumers to justify taking action in these tribunals. The costs of taking action in a court or tribunal can be considerable, especially relative to the cost of many of the goods and services in question, with most private legal actions being taken for high-value goods. The ACCC submitted that there is a widespread failure of low-cost goods which do not get remedied, and while the cost to individuals may be low, the aggregate cost to consumers can be significant with a windfall gain to non-compliant businesses.

High-value goods with non-major failures, however, can also be the subject of protracted campaigns by consumers to obtain a remedy. For example, caravans emerged in submissions to the previous Consultation RIS as a higher value good being impacted by non-major failures, and suppliers allegedly seeking to draw out and delay the provision of a remedy to frustrate the consumer.

Focus Questions

- Should the ACL prohibit suppliers from failing to provide a consumer guarantees remedy in relation to all goods and services, or only in relation to goods and services above a specified value? Why or why not? What should the value be?
- Is there a need to have penalties, or have stronger penalties, in relation to higher value goods and services?

Depreciation

Stakeholders representing the automotive industry have raised concerns about how the consumer guarantees framework applies to motor vehicles. At present, when there is a major failure with a

good, the consumer is entitled to either a replacement or a refund of the original purchase price, even when the consumer has had use of the product for potentially weeks, months or years.

Automotive dealers submit that the present consumer guarantees arrangements are unfair with regard to both new and used motor vehicles, and that a consumer's remedy should take into account the consumer's use of the vehicle, its condition and its depreciation in value because of use or the passage of time since the vehicle was purchased.

Several tribunal decisions on consumer guarantees claims have included deductions from refunds for the consumer's prior use of a good, despite this not being provided for in the ACL and Federal Court authority that the ACL does not allow for such deductions.²¹

In the ACCC's view, refunds which are linked to a vehicle's depreciated value could lead to unfair outcomes for consumers. The front-loaded nature of depreciation means that most of a vehicle's loss in value occurs almost immediately, when the consumer has only had a short period of 'trouble-free use' before experiencing a consumer guarantees failure. For new vehicles in particular, any depreciation in value is not likely to be outweighed by a short period of trouble-free use.

Focus Questions

- Is it appropriate to factor in depreciation (a reduction in value) when determining an appropriate refund amount? When would this be appropriate? How would the refund be calculated?

Consumer behaviour

Responses to the previous Consultation RIS highlighted a concern that the imposition of civil prohibitions and penalties could create distortions in the market resulting from an imbalance between the rights of businesses and consumers. For example, it was suggested that consumers and suppliers may seek to use the threat of a pecuniary penalty to force manufacturers to accept unmeritorious consumer guarantee and indemnification claims.

However, none of the submissions raising this concern provided specific evidence or case studies to substantiate the view that consumers or suppliers were making unmeritorious claims. By contrast, the joint submission provided by CHOICE, Consumer Action Law Centre, Consumer Credit Legal Service WA and WEstjustice noted: "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. 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."²²

²¹ See *Australian Competition and Consumer Commission (ACCC) v Jayco Corp Pty Ltd* [2020] FCA 1672, and *Australian Competition and Consumer Commission (ACCC) v Mazda Australia Pty Ltd* [2021] FCA 1493.

²² CHOICE (2022), [Joint consumer submission on improving the effectiveness of the consumer guarantee and supplier indemnification provisions](#), CHOICE website.

Focus Questions

- Do you have any information to support the view that the introduction of prohibitions and penalties would encourage consumers to seek a consumer guarantees remedy when they are not entitled to one? For example, in a change of mind situation? How can this be addressed?
- Will the introduction of civil prohibitions and penalties result in higher costs for consumers generally? Why or why not?

Enforcement powers and amount of penalty

ACL regulators have a range of compliance and enforcement remedies to address potential contraventions of the law, including providing guidance and education, dispute resolution, providing formal written warnings, public warnings, administrative resolutions, infringement notices, enforceable undertakings, and legal action. Each ACL regulator has a compliance and enforcement policy which explains the proportionality of the ACL regulators' use of the enforcement powers available to them. Under this proposal the ACL regulators would have the full range of compliance and enforcement remedies available for the proposed potential contraventions.

Infringement notices

Infringement notice powers for ACL contraventions vary between states and territories, depending on their specific ACL enabling legislation. In progressing this option, further consideration would need to be given to what changes individual states and territories may apply to their infringement notice regimes in light of a prohibition for traders who do not provide a consumer guarantees remedy when required under the ACL.

Under this proposal, the ACCC (and potentially state and territory regulators) would be able to issue an infringement notice where it has reasonable grounds to believe that a supplier has contravened the law by not providing a consumer guarantees remedy.

Where the alleged contravention is relatively minor, infringement notices can provide a timely and efficient method of dispute resolution without the need for litigation. The ACCC will generally raise its concerns with a recipient before issuing an infringement notice and will consider a number of factors including the business involved, the alleged contravention and its impact on consumers and businesses before issuing an infringement notice. If a person receives an infringement notice and denies they engaged in the alleged conduct, they may request that the ACCC withdraw the infringement notice.

If a party is issued an infringement notice and they pay the amount on the notice, the ACCC is not able to take future court action in relation to the alleged contravention. The payment of an infringement notice is not an admission of guilt, though details of infringement notices paid are made public on the ACCC website. There is no legal obligation on a party to pay an infringement notice penalty, but non-payment of infringement notice penalties will expose them to the prospect of proceedings arising from the regulator's concerns that the party may have contravened the ACL. Recipients of an infringement notice have 28 days to pay, which may be extended for up to another 28 days. The ACCC website includes a register of infringement notices which have been paid.

The penalties specified in infringement notices are lower than the maximum penalty that may be imposed by a court for a contravention of the same provision of the ACL. The amount varies depending on the alleged contravention, but in many cases, infringement notice penalties are \$18,780

(60 penalty units²³) for corporations, \$187,800 (600 penalty units) for listed corporations and \$3,756 (12 penalty units) for individuals.

In feedback to the previous Consultation RIS, stakeholders who supported the proposal noted that issuing infringement notices for alleged contraventions would be a quick and efficient way to deter businesses from failing to provide a remedy.

Stakeholders who opposed the use of infringement notices for an alleged failure to provide a consumer guarantee remedy raised concerns regarding the ACCC's lack of technical and practical market knowledge to form a view on suspected contraventions in order to issue an infringement notice, given the complexity of individual cases in relation to motor vehicles.

Guidance issued by the Attorney-General's Department indicates that infringement notices should be issued in relation to civil penalty provisions where 'contraventions can be determined by automatic operation of the law or where an assessment of a contravention can easily be made based on straightforward factual questions.'

Litigation

Litigation is costly compared to most other compliance and enforcement actions, and so is usually only undertaken where the alleged breach is blatant, within a regulator's priority areas, is repeated or would cause significant detriment.

Under this proposal, if the ACCC (and potentially state and territory regulators) pursued litigation and a court determined a contravention had occurred, the court would have the power to impose a civil pecuniary penalty up to the maximum set under the law, if the court thought that a penalty was appropriate in the circumstances. In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including the nature and extent of the act or omission, any loss or damage suffered as a result of the act or omission, circumstances of the contravention and any court findings as to prior similar conduct.²⁴

Courts would also have the power to issue an injunction to require the business to act, or refrain from acting, in a certain way in the future. This would support better outcomes for consumers because it would directly address specific supplier actions the court believes have impeded consumers from obtaining a remedy for a consumer guarantee failure.

The maximum pecuniary penalty payable for a contravention of current provisions of the ACL depends on the provision and can range from \$1,000 to \$50 million, depending on whether the person is a body corporate.

For contraventions relating to prescribed notice requirements for warranties and repairs, the maximum penalty which may be imposed by a court is \$10,000 for individuals and \$50,000 for corporations.

Enforceable undertakings

Contraventions of the ACL may also be resolved by a regulator accepting court enforceable undertakings. These undertakings are on the public record and involve traders or individuals agreeing to an ongoing obligation to do or cease doing something.

²³ Penalty amounts for infringement notices are calculated by reference to the value of a penalty unit prescribed by the *Crimes Act 1914*. The current value of a penalty unit is \$313 for offences committed on or after 1 July 2023.

²⁴ Section 224(2) of the ACL.

Public warning notices

ACL regulators have a discretionary power to issue a public warning notice containing a warning about the conduct of a person if they have reasonable grounds to suspect the relevant conduct may constitute a contravention of a provision in Chapter 2, 3 or 4 of the ACL; and are satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and are satisfied that it is in the public interest to issue the notice.

The factors an ACL regulator may consider in deciding whether to issue a public warning notice depends on the circumstances of each case and can include the need to take timely action to protect consumers at large, the types and extent of loss that has or may be incurred and the availability and appropriateness of other regulatory action.

Other compliance tools

As noted earlier, ACL regulators have other administrative tools they use when they have reason to believe a business has contravened the law, for example, formal written warnings, providing guidance and education, or resolving issues administratively. Under this proposal, these tools would also be available to the ACL regulators for potential contraventions of a prohibition on not providing a consumer guarantees remedy when required under the ACL.

Focus Questions

- Should the ACCC be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy?
- At what amount should infringement notice penalties be set for an alleged failure to provide a consumer guarantee remedy when required by the ACL? Why?
- At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a supplier or manufacturer failed to provide a consumer guarantee remedy when required by the ACL? Why?
- Is there a need to have maximum penalties for contraventions set at different amounts for goods and services above and below a particular monetary threshold? Why or why not?

Other

Focus Questions

- Are there any unintended consequences, risks or challenges that need to be considered when introducing civil prohibitions for suppliers or manufacturers failing to provide a consumer guarantees remedy when required by the ACL?

Part 2: Prohibition against manufacturers not indemnifying and retaliating against suppliers who request indemnification

The previous Consultation RIS sought stakeholder views on whether penalties and enforcement mechanisms should be introduced to prohibit manufacturers from not indemnifying suppliers where they are liable to under the ACL, and to make it unlawful for a manufacturer to retaliate against a supplier for seeking indemnification for a consumer guarantees failure (Part B, Options 3 and 4).

There was mixed support for the introduction of civil prohibitions and penalties for manufacturers. Some stakeholders noted that suppliers often bear the cost of recalcitrant manufacturers that refuse to comply with their indemnification obligations, while others submitted that suppliers are already appropriately indemnified under the current framework and cited a lack of evidence of retaliatory conduct from manufacturers. Those who supported a prohibition largely supported it to apply economy-wide.

Supplier indemnification (Part B, Option 3)

The previous Consultation RIS estimated that introducing a prohibition would increase the rate at which suppliers are indemnified by 0.5 per cent per year, from 80 per cent in 2020-21 to 85 per cent by 2030-31. This analysis was reached on the premise that manufacturers would be more likely to meet their indemnification obligations if there is a legal and monetary incentive for them to do so, resulting in more indemnification provided to suppliers for remedies they provide to consumers. However, it was estimated that the actual rate of suppliers who seek indemnification would not change due to concerns about retributions from manufacturers. The increased compliance by manufacturers was expected to result in a saving of time and resources by suppliers, with suppliers expected to save one hour in time negotiating with manufacturers in each case indemnification is required.

The regulatory burden incurred by businesses who are responsible for complying with the CGSI provisions was estimated to be \$44.8 million in the first year with no ongoing costs, for both Part B, Options 3 and 4.

Implementing an economy-wide civil prohibition on manufacturers failing to indemnify suppliers was estimated to create a net benefit of \$194 million over the 10 years to 2031. This compares to an estimated net benefit of \$184 million over the same period if the proposal is applied to new motor vehicles only.

Manufacturer retaliation (Part B, Option 4)

The previous Consultation RIS estimated that suppliers would only seek indemnification from manufacturers in 90 per cent of instances where they have provided a consumer with a remedy and that 10 per cent of suppliers would not seek indemnification for fear of retaliation. It was estimated that introducing a prohibition would decrease the propensity for a manufacturer to retaliate when a supplier requests a remedy by 0.4 per cent per year from 10 per cent in 2020-21 to 6 per cent in 2030-31. As with Part B, Option 3 above, a saving of time and resources by suppliers was expected as a result of increased compliance by manufacturers.

An economy-wide civil prohibition on retaliation by manufacturers was estimated to create a net benefit of \$368 million over the 10 years to 2031. If applied to new motor vehicles only, the net benefit was estimated to be \$324 million over the same period.

Issues for discussion

Barriers to obtaining supplier indemnification

Currently, manufacturers are not subject to a penalty if they fail to indemnify their supplier where the manufacturer is at fault for the consumer guarantees failure or retaliate against suppliers who seek indemnification for remedies provided to consumers following a consumer guarantees failure where the manufacturer is at fault. Very few submissions to the previous Consultation RIS supported maintaining the status quo.

A consumer's right to a consumer guarantees remedy from a supplier is separate from the supplier's right to receive indemnification from the manufacturer. However, the difficulty and uncertainty faced by suppliers in securing reimbursement from the manufacturer could contribute to consumers not receiving the remedies they are entitled to.

Difficulties obtaining supplier indemnification do not appear to be limited to small businesses, with larger businesses also reportedly spending significant time and resources seeking indemnification from manufacturers where there are disagreements around liability under the ACL. The imbalance of bargaining power between manufacturers and suppliers may also deter suppliers from seeking indemnification, however, experiences will not be the same across industries and each manufacturer/supplier relationship will be different in terms of their relative bargaining power.

Responses to the previous Consultation RIS indicated that some suppliers experience difficulty obtaining indemnification when they provide consumers with a remedy where the manufacturer is responsible for the failure.

Stakeholders reported that manufacturers disagreed with or denied the existence of suppliers' indemnification rights, resulting in suppliers wearing the costs of providing remedies to consumers. This could be due to a range of factors, including an insufficient understanding of manufacturer's obligations under the ACL, a lack of incentive to provide indemnification and disagreement on whether the manufacturer was responsible for the failure. Some stakeholders noted that there is a lack of awareness about the existing statutory right to indemnification, which may result in suppliers not seeking indemnification from manufacturers and suggested an education and guidance campaign to support implementation.

Where the consumer guarantees failure is a 'major failure', consumers are entitled to seek a refund or replacement and the manufacturer does not need to be provided with an opportunity to repair the good. Some stakeholders raised concerns that the introduction of prohibitions and penalties would incentivise suppliers to determine that a major failure had occurred without having tested the validity of the consumer's claims. Under this proposal, manufacturers would still be able to dispute supplier claims for indemnification on their merits if they consider that there has not been a manufacturer fault.

Stakeholders supporting the status quo submitted that suppliers are appropriately indemnified by manufacturers under the current regime and that introducing a civil prohibition would create an impediment in the relationship between manufacturers and suppliers.

Focus Questions

- When should a manufacturer's failure to provide supplier indemnification be a contravention of the law? Should it apply to all failures or only in cases of major failures? Why or why not?
- Would the introduction of a penalty change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification?
- What commercial arrangements between manufacturers and suppliers that relate to liability in cases of product or service failure would be impacted by the introduction of a contravention?
- Would introducing a civil prohibition with existing ACL enforcement remedies affect the relationship between manufacturers and suppliers in any way? If so, how?

Retaliation against suppliers

Feedback on the previous Consultation RIS highlighted suppliers' mixed experiences when seeking indemnification from a manufacturer. Some noted that a reason for manufacturers refusing to provide indemnification is often a result of their lack of awareness or refusal to acknowledge suppliers' rights, rather than through explicit threats of retaliation. Although suppliers' experience of retaliation may be limited, it was suggested that a civil prohibition may lead to retaliatory behaviour and take suppliers' focus away from ensuring they are providing remedies to consumers for consumer guarantees failures.

While some stakeholders viewed that a prohibition against retaliation would lead to greater compliance by manufacturers to provide indemnification, there were concerns that suppliers would still be reluctant to seek reimbursement due to the power imbalance between them, and the difficulty in proving that retaliation was linked to a supplier's request for indemnification. A suggestion was made that clear examples of retaliatory behaviour is likely capable of being addressed through the existing unconscionable conduct provisions in the ACL.

Noting the lack of clarity around what actions amount to 'retaliation', stakeholders submitted that there should be a clear definition of the term if a prohibition was to be introduced.

Focus Questions

- What are examples of retaliatory practices by manufacturers against suppliers seeking to enforce their indemnification rights? Which practices should be prohibited?
- Should presumptive tests apply if a civil prohibition was introduced to address manufacturer retaliation? If so, what presumptions should be considered?

Relationship with consumer guarantees

Supplier indemnification is a liability that arises when suppliers provide remedies to consumers for consumer guarantees failures for which the manufacturer is responsible. As such, matters relating to supplier indemnification are directly influenced by any changes to the consumer guarantees provisions. Because of this, many of the considerations within Part 1 similarly apply to Part 2 when considering coverage of a potential prohibition. This includes:

- coverage in circumstances of major and non-major failures
- coverage in transactions involving high-value and/or low-value goods

- coverage of prohibitions to be economy-wide or only for new motor vehicles
- whether refund entitlements should adjust to reflect consumer use and depreciation
- time periods associated with consumer guarantees remedies and delivering indemnification.

Automotive industry

There were mixed views within the automotive industry regarding the introduction of a civil prohibition for failure to indemnify a supplier. Representatives from the motor vehicle industry who supported the proposal believed a prohibition would deter manufacturers from failing to comply with their indemnification obligations. They submitted that dealers experience frustration when manufacturers take a selective approach in determining how much they will contribute to the indemnity, with dealers also being asked to contribute towards ACL consumer claims associated with refunds, replacements or repairs. Some dealers submitted that they should not be obliged to cover costs associated with the manufacturing process as they do not make or design cars.

Stakeholders who did not support a civil prohibition argued that suppliers are appropriately indemnified by manufacturers and that dealer agreements clearly provide for indemnification. It was noted that these dealer agreements or warranty regimes provide agreement between the parties to reimburse dealers for work done on consumers' vehicles, with the majority of dealer claims relating to the cost of repairs under warranty which do not require reliance on consumer guarantees. There was also a concern that a prohibition would allow a dealer to determine a remedy using a manufacturer's resources without regard to the validity of the consumer's claim, particularly if there are no risks to the dealer's revenue. There was also a view that, due to high legal costs, prohibitions are unlikely to affect a dealer's incentive to seek an indemnification.


For some dealers, the reported challenge in relation to consumer guarantees was not about obtaining indemnification but being the first point of contact with consumers to assess technical issues and engaging with the legal framework. These stakeholders considered that a civil prohibition was unlikely to provide assistance on this issue. Some dealers noted that manufacturers often neglect to provide dealers with clear policies and handling procedures for consumer guarantees claims, while other dealer agreements stipulate the reporting of all customer complaints to the manufacturer such that they may choose to intervene and direct how the dealer should respond.

A survey of around 150 new car dealer member franchisees conducted by the Australian Automotive Dealer Association (AADA) and noted in their submission to the previous Consultation RIS, had 80 per cent of respondents reporting less than 3 per cent of their customers request refunds or replacement of new motor vehicles in a given year. In the survey, the AADA members also reported that around 12 per cent of claims for refunds are requested within 3 months of the initial purchase, with around 51 per cent of claims being made within 12 months. The AADA members also reported that on average, 54 per cent of ACL claims are fully reimbursed, 24 per cent are partially reimbursed and 22 per cent are declined for reimbursement.

As noted above, economy-wide prohibitions and penalties ensures that laws are consistent and avoids complexity and confusion associated with industry-specific variations.

Enforcement powers and amount of penalty

As noted earlier, it is not a contravention of the current law for manufacturers to fail to reimburse suppliers for consumer guarantees failures for which the manufacturers are responsible. As such, the courts and ACL regulators do not have enforcement powers to address non-compliance with the supplier indemnification provisions.



As also noted earlier, the ACCC and other ACL regulators have a range of potential enforcement powers available to them for existing contraventions of the ACL, including powers such as issuing infringement notices and public warnings, accepting court-enforceable undertakings in which a business commits to changing behaviour, or commencing court proceedings for an alleged contravention of the ACL. In such court actions, the courts are able to make declarations, injunctive orders and, for civil pecuniary penalty provisions, impose monetary penalties against a business found to have contravened the law.

For many provisions of the *Competition and Consumer Act 2010* (CCA) and the ACL, the maximum pecuniary penalty a court may impose for a contravention by an individual is \$2.5 million. For a corporation, it is the greater of \$50 million, or if the court could determine the value of the benefits reasonably attributable to the contravention, 3 times that value. If the court could not determine the value of the benefits, it is 30 per cent of the company's adjusted turnover during the breach period for the relevant contravention.²⁵

Stakeholder feedback to the previous Consultation RIS noted that in setting the maximum available penalty, consideration needs to be given to ensure that the penalties are sufficiently high to act as a disincentive for non-compliance, and to keep them consistent with other comparable contraventions of the ACL.

Infringement notices

Infringement notice powers for ACL contraventions vary between states and territories, depending on their specific ACL enabling legislation. In progressing this option, further consideration would need to be given to what changes individual states and territories may apply to their infringement notice regimes in light of a prohibition for manufacturers who do not provide indemnification to suppliers when required under the ACL.

Under this proposal, the ACCC (and potentially state and territory regulators) would be able to issue an infringement notice where they have reasonable grounds to believe that a manufacturer has contravened the law by failing to indemnify a supplier when they are liable to under the ACL for consumer guarantees failure they are responsible for, or by retaliating against a supplier for seeking indemnification for a consumer guarantees failure.

²⁵ Section 224(3A) of the ACL.

Litigation

As is the case with consumer guarantees, suppliers of goods and services can enforce their right for indemnification through a court or tribunal. Currently, civil pecuniary penalties are not imposed on manufacturers for non-compliance with the indemnification provision, and suppliers face similar difficulties as consumers in terms of time and resources in taking action against a manufacturer.

Under this proposal, if the ACCC (and potentially state and territory regulators) pursued litigation and a court determined a contravention had occurred, the court would have the power to impose a civil pecuniary penalty up to the maximum set under the law, if the court thought that a penalty was appropriate in the circumstances.

Other compliance and enforcement powers such as enforceable undertakings and public warning notices would also be available to address contraventions of the supplier indemnification provisions (see page 18 for details).

Focus Questions

- Should the ACCC be given the authority to issue an infringement notice for an alleged contravention of supplier indemnification provisions and for retaliating against suppliers? Should it be a contravention only in cases of major failures? Why or why not?
- How long should suppliers and manufacturers be given to dispute a claim after an infringement notice has been issued? At what amount should infringement notice penalties be set for an alleged failure to indemnify a supplier when required by the ACL? Why?
- At what amount should infringement notice penalties be set for an alleged retaliatory practice by a manufacturer against suppliers seeking to enforce their indemnification rights? Why?
- At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a manufacturer contravened the supplier indemnification provisions? Why?
- At what amount should the maximum civil penalty be set for penalties that a court could impose after finding that a manufacturer had engaged in retaliatory practices against suppliers seeking indemnification? Why?

Appendix A: Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law, Schedule 2 of the <i>Competition and Consumer Act 2010</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CGSI	Consumer Guarantees and Supplier Indemnification
Consultation RIS	Consultation Regulation Impact Statement
Decision RIS	Decision Regulation Impact Statement