Law Council
OF AUSTRALIA

Business Law Section

20 November 2024

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

By email: consumerlaw@treasury.gov.au

Dear Treasury,

Consumer guarantees and supplier indemnification under the Australian Consumer Law (ACL)

1. The Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on Treasury's consultation paper 'Consumer guarantees and supplier indemnification under the Australian Consumer Law: Consultation on the design of proposed new civil prohibitions and penalties' (the **Paper**).

Clarity in the law

- *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?*

2. The Committee considers that prohibitions and penalties should not be introduced until and unless there is greater certainty and clarity around what constitutes a major (and minor) failure of a good or service, as well as the available remedies.

3. The Committee notes that, currently, to allege or prove that goods suffer from a major failure, an interpretation of several elements is required including what is or constitutes:
   (a) a 'reasonable consumer';
   (b) 'fully acquainted';
   (c) the 'nature and extent [of the failure]';
   (d) 'significant [respects]';
   (e) 'substantially unfit';
   (f) 'easily';
   (g) 'remedied';
   (h) 'reasonable time'; and

(i) ‘unsafe’.

4. These elements are difficult for both consumers and traders to understand and apply as the data from the previous Consultation RIS demonstrates.

5. This also makes the task difficult for regulators to investigate. The Committee notes that there have been only a handful of consumer guarantee cases run by the ACCC[1] and other State and Territory regulators.

6. Simpler and clearer legislative provisions in the Australian Consumer Law would assist all users of the regime. This includes available remedies. Sections 259–265 (for goods) and sections 267–270 (for services), are unnecessarily cumbersome. The definitions and criteria in these provisions are different as against manufacturers (sections 271–273) compared to suppliers.

Major failures

- *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?*

7. Please refer to the Committee’s response above.

8. Major failure is currently defined under section 260 in respect of goods, and under section 268 in respect of services.

9. The Committee encourages the inclusion of greater clarity regarding the circumstances in which a ‘major failure’ is likely to be found to occur. In particular, a number of the criteria are vague and require difficult value judgements. For example, a right to reject goods will be dependent on whether or not the good is ‘durable’ and/or whether or not the ‘rejection period’ has ended. These are inherently uncertain and subjective concepts.

10. Criteria or examples as to what constitutes a ‘major failure’ that is generally applicable across commerce or the economy– that is, not industry specific—should be developed to assist in the understanding and interpretation of these consumer guarantee provisions. Such an approach has been effectively done in the Australian Consumer Law in respect of unfair contract terms (section 25) and unconscionable conduct (section 22).

11. For the reasons discussed below, the Committee is of the view that individual failures to comply with the consumer guarantee provisions should not attract civil penalties or be subject to infringement notices. Such measures are not appropriate in respect of

[1] See for example *ACCC v Jayco Corporation Pty Ltd* (Jayco) [2021] FCA 453. The focus of regulators has been false or misleading conduct or representations as to consumers’ guarantee rights rather than guarantee rights per se as action taken by the ACCC against A&S Labels Pty Ltd (trading as Tiger Mist), Fitbit LLC, Mazda Australia Pty Ltd, The Good Guys Discount Warehouses (Aust) Pty Ltd and Jayco illustrates.

consumer guarantees where reasonable minds might differ as to a supplier / manufacturer's compliance with those obligations.

Economy-wide or for new motor vehicles only

- *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?*

12. As a general position, the Committee does not support the introduction of civil penalties or infringement notices for failures to provide a consumer guarantee remedy.

13. The Committee also considers that a strength of the ACL and its consumer guarantee provisions are that they are laws of general application and would caution against the introduction of bespoke or industry-specific civil prohibitions and penalties within the ACL that would apply to new motor vehicles only. As noted in the *2017 Australian Consumer Law Review Final Report*, the economy-wide approach taken to consumer guarantees within the ACL has helped provide clearer standards for traders, enabled consistent messaging about rights and responsibilities and lowered compliance costs.[2] Accordingly, the Committee considers that it is preferable to avoid bespoke or industry-specific variations in prohibitions and penalties in order to maintain consistency and flexibility in the law.

14. Introducing prohibitions and penalties for new motor vehicles only would create separate protections for a certain category of goods and services, which has the potential to create additional complexity in the ACL and confusion for businesses and consumers in understanding the different rights and responsibilities that apply depending on the type of purchase. To the extent that there are concerns in respect of the application of the law to new motor vehicles, the Committee considers that these can be addressed by direct interaction with relevant regulators and that industry. The various undertakings to the ACCC entered into by automotive manufacturers in recent years suggest that the ACCC has the tools to deal with any ongoing systemic issues. The ACCC has also successfully brought proceedings for misleading representations regarding the consumer guarantees regime, with the court ordering substantial penalties against automotive and other manufacturers and suppliers.

[2] Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Final Report* (2017), pp. 13, 16 <https://consumer.gov.au/sites/consumer/files/2017/04/ACL_Review_Final_Report.pdf>.

High-value vs low-value goods and services

- *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?*

15. The Committee's view is that prohibitions and penalties should not be introduced for a failure to provide a consumer guarantee remedy at all, irrespective of the value of goods or services. This is addressed further below under "*Enforcement powers and amount of penalty*".

16. Further, the Committee does not consider there is any clear basis for distinguishing between the regulatory treatment of "high value" and "low value" goods, or the monetary value that separates "high value" from "low value". This kind of distinction in the context of consumer protection and product guarantees appears likely to create uncertainty and may appear to introduce a degree of arbitrariness. It underscores that, where particular products raise concerns, these are better addressed through interactions with regulators in those industries rather than seeking to introduce distinctions based on the value of the product involved.

Depreciation

- *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?*

17. The Committee notes that the recent decisions of the High Court in *Biljana Capic v Ford Motor Company of Australia Pty Ltd*[3] and *Williams v Toyota Motor Corporation Australia Limited*[4] address the question of depreciation that is posed in the Paper. The Court held that a plaintiff's use and enjoyment of the relevant good notwithstanding the defect is not relevant to the assessment of reduction in value damages under section 272(1)(a) of the ACL. Despite this finding, it appears this factor may potentially still feature in an assessment of loss, to the extent that it has some bearing upon what a reasonable consumer would have expected at the time of supply about the performance of the good without any repair.

18. As previously submitted, the Committee considers it appropriate for the legislation to be clarified such that depreciation can be factored into the calculation of any appropriate refund amount. In particular, in contexts where a major failure manifests a number of years after a consumer's ownership of a good, it would be appropriate to take into account that consumer's uninterrupted use of the good. The purpose of the consumer guarantee regime is to protect consumers. Ignoring depreciation would, in some circumstances, go further by placing consumers in a better position than if no failure had manifested.

[3] [2024] HCA 39.
[4] [2024] HCA 38.

Barriers to obtaining supplier indemnification

- *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?*

19. The Committee does not consider that a manufacturer's failure to provide supplier indemnification should be subject to a penalty. Rather, consistent with the status quo, matters of indemnity are best administered commercially as between the supplier and relevant manufacturers. The Committee considers that suppliers are generally appropriately indemnified by manufacturers under the current regime, including in the automative industry, and notes that disputes between suppliers and manufacturers may be the result of a genuine disagreement as to the nature of any failure.

Retaliation against suppliers

- *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?*

20. The Committee is not best placed to respond to the Paper's questions in relation to manufacturer retaliation against suppliers as these are directed at the lived experience of suppliers and manufacturers. However, as a general comment, the Committee notes that any targeting or punishment of suppliers for seeking to enforce their indemnification rights is likely capable of being addressed through the prohibition on unconscionable conduct.

Consumer behaviour

- *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?*

21. The Committee is also not best placed to provide information to support the view that the introduction of prohibitions and penalties may encourage consumers to seek a consumer guarantee remedy when they are not entitled to one, as that also relates to the lived experience of suppliers and manufacturers in dealing with consumers.

22. The Committee is concerned that the introduction of civil prohibitions and penalties may result in higher costs for consumers generally. This is because the introduction of prohibitions and civil penalties generally will necessarily, and by design, bring about changes to supplier and manufacturer behaviour by increasing the risk of non-compliance. This is likely to raise compliance costs, and potentially make suppliers or manufacturers more risk averse in the sense that they may forecast greater costs in providing consumer guarantee remedies in order to avoid potentially being exposed to a penalty. Those costs will necessarily be factored into the prices of consumer goods and services.

Enforcement powers and amount of penalty

- *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?*

23. The Committee considers the introduction of a civil penalty regime in respect of consumer guarantees is unwarranted given the fact-specific or fact-determined nature of determining whether or not a consumer guarantee has been satisfied, or whether a consumer guarantee remedy is required by the ACL.

24. The uncertainty of the key concepts in the consumer guarantee regime is illustrated by the submission above (see "*Clarity in the law*" and "*Major failures*" above). The Committee considers that it is not reasonable for suppliers and manufacturers to be exposed to the risk of pecuniary penalties for failing to properly apply concepts over which reasonable minds may legitimately differ.

25. In addition, the consumer guarantee matters most likely to give rise to a dispute may be factually complex, often transaction-specific and disputed—for example, determining whether a failure has been caused by use or abnormal use. While these issues arise in other contexts of the ACL, other than situations where there has been obvious disregard for the application of the consumer guarantee regime at all, a significant majority of consumer guarantee disputes are transaction-specific. The Committee does not consider it appropriate for one party to such a dispute to also face the risk of civil penalties in the event that their reasonable assessment of the relevant facts is not correct.

26. While the Committee does not support the introduction of civil penalties for a failure to provide a consumer guarantee, if civil penalties were introduced, then they should be commensurate with the value of the goods and services subject to the regime. The Committee does not support applying a maximum penalty based on a formulation that uses the greater of $50,000,000, three times the value of any ascertainable benefit gained from the contravention, or (where the benefit is not ascertainable) 30 percent of turnover during the breach turnover period, as set out in section 224 of the ACL.

Other

- *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?*

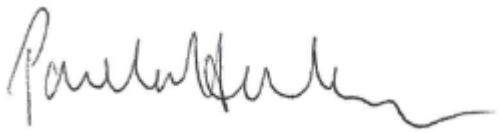
27. The Committee is concerned that the practical effect of introducing civil penalties for failing to provide a consumer guarantee or consumer guarantee remedy will be that the relevant regulatory authority (whether the ACCC or State agency) will be called on to adjudicate essentially private disputes between suppliers or manufacturers and consumers over these matters. The Committee considers there is a real question as to whether these regulatory authorities are best placed to resolve these matters, or whether there should instead be greater focus on whether the existing Tribunal and local court system is properly resourced to efficiently address consumer guarantee disputes.

Conclusion and further contact

28. The Committee would be pleased to discuss any aspect of this submission.

29. Please contact the chair of the Committee Peta Stevenson at peta.stevenson@au.kwm.com, if you would like to do so.

Yours faithfully



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