



Law Council
OF AUSTRALIA

Business Law Section

11 February 2022

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
Langton Cres
PARKES ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Sir/Madam,

Improving consumer guarantees and supplier indemnification provisions 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 'Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law' (**Paper**).
2. The majority of questions posed in the Paper are directed at the lived experience of consumers, suppliers and manufacturers. The Committee considers that those questions are appropriate but is not in a position to respond to these issues.
3. It is accepted that the individual experience of consumers when asserting consumer guarantees can vary. There may be circumstances where consumers have purchased goods or services from a supplier who is unwilling to acknowledge or comply with relevant obligations. However, in other instances, consumer displeasure with the outcome may simply reflect good faith differences regarding the application of relevant guarantees (i.e. a claim of a major failure in circumstances where there is no major failure and repairs or other remedies would be appropriate). Whilst the Committee is in favour of processes which improve consumer ability to appropriately assert their consumer guarantees, the Committee does not consider that generalised instances of consumer displeasure necessarily suggest that changes to the current regime are warranted.
4. If the status quo is perceived to be inappropriate, the Committee considers that options which focus on improved understanding of relevant guarantees and access to dispute resolution processes are preferable to legislated changes introducing civil penalties. In particular, and as detailed below, the Committee considers that:
 - the introduction of a civil penalty regime in respect of consumer guarantees is unwarranted;
 - the development of an industry specific regime to deal with the motor industry is also unwarranted. The Committee considers that a particular strength of the ACL is that it embodies principles of general application;
 - matters regarding indemnification as between manufacturers and suppliers are best dealt with under the current regime. To the extent that

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there are clear examples of retaliatory behaviour that type of conduct is likely capable of being addressed through the existing unconscionable conduct provision in the *Competition and Consumer Act 2010* (Cth) (**CCA**).

5. The Committee does consider that the CCA should be amended so as to allow for partial refunds in circumstances where consumers have had considerable use and enjoyment of the relevant goods. We consider that the requirement for a full refund is a deficiency in the current legislation. The Committee considers that allowing a full refund in such circumstances creates a basis for a dispute as between the consumer and the supplier. Allowing for a depreciation reduction may improve the overall efficacy of the consumer guarantee provisions.

Part A

Depreciation reduction (question 4)

6. The Committee considers that refunds for goods pursuant to consumer guarantees should reflect any use and enjoyment derived by the consumer prior to the manifestation of the relevant failure/s.
7. Currently, the consumer guarantee regime only permits full refunds. Refunds may either be issued by a supplier in respect of a minor failure, or can be claimed by a consumer who rejects a good due to a major failure.
8. In either circumstance, the ACL requires the refund consist of:
 - any money paid by the consumer for the goods; and
 - an amount that is equal to the value of any other consideration provided by the consumer for the goods.
9. That is, the ACL requires a full refund without any allowance for usage or benefit the consumer may have derived from the good prior to the refund.
10. The consumer guarantee provisions should seek to ensure a consumer can rely on certain fundamental matters when purchasing goods or services. Where those standards are not met, a consumer should be placed in the same position as if the guarantees were satisfied, whether via repair, placement, refund, etc. In this way, consumers are protected for exploitation, and consumer welfare is enhanced.
11. However, non-compliance with consumer guarantees should not place a consumer in a better position than if no minor/major failure has manifested. Such outcomes are contrary to, and undermine, the principles underpinning the consumer guarantee regime.

12. The Committee supports the provision of refunds in circumstances where the relevant failure has prevented a consumer from the use and enjoyment of the good. However, where a consumer has benefited from uninterrupted use of the good for a significant period of time, providing a full refund places the consumer in a better position than if no failure had arisen. The same is also true for a consumer who has benefited from the use of a good for a significant period of time and only experienced minor failures not amounting to a major failure. The Committee considers that a car owner who enjoys the uninterrupted use of their vehicle for four years before a major failure manifests should be able to seek a refund, but should not be entitled to a full refund of the vehicle's original purchase price. Such an outcome is both unnecessary to protect consumers, and may incentivise some suppliers to resist providing refunds when a consumer might in fact be entitled to one.
13. The requirement for a full refund is also anomalous when compared to the refund requirements for services, or services connected with rejected goods. In both those circumstances, refunds are only required to the extent that the consumer has not already consumed the services. The value of goods is consumed through use in much the same way as with services, a reality that should be reflected in the ACL.
14. As a practical matter, the Committee considers that partial refunds ought to be permissible:
 - i. for goods whose monetary and non-monetary purchase price exceeds a minimum value; and
 - ii. to reflect any period during which a consumer has enjoyed uninterrupted use of the good (or at least experienced only minor failures not amounting to a major failure), as a proportion of the good's reasonable life.
15. These reforms would also assist in addressing consumers' access to justice and considerations of practical outcomes and remedies. Tribunals and alternative dispute resolution mechanisms must often adjudicate difficult questions of the appropriateness/reasonableness of remedies. Allowing for a reasonable system of depreciation and partial refunds will provide additional guidance to those bodies in arriving at consistent, fair, and expedient decisions.
16. Insofar as goods may appreciate in value, the Committee considers such situations are relatively rare. The vast majority of goods covered by consumer guarantees would naturally depreciate over time. Nonetheless, insofar as material appreciation has occurred, the ACL already provides means by which consumers can recover damages against suppliers for loss or damage suffered due to non-compliance with a consumer guarantee.

Introduction of civil penalties (questions 8, 9, 10, 14)

17. The Committee accepts that there may be legal uncertainty in respect of any number of legislative provisions. However, the Committee considers that determining whether or not a consumer guarantee is applicable is a particularly difficult exercise where reasonable minds may differ. 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 concepts. As acknowledged by the Paper, the rights and remedies available to a consumer will vary depending on whether the failure is considered a "major" or "non-major failure". Again, in many circumstances there will be an inherent uncertainty in determining whether or not there has been a major failure.
18. A major failure in respect of goods and services includes where a reasonable consumer would not have acquired the goods or services had they been fully acquainted with the nature and extent of the failure. Understandably, a consumer may wish to assert that they would not have acquired the goods or services in support of a refund rather than repair remedy. Again, there is an inherent uncertainty in conducting any ex-post analysis of what a reasonable consumer may or may not have done.
19. The Committee considers that, in order for a civil pecuniary penalty to be appropriate, business would need to have a high degree of certainty that conduct will, in fact, contravene the relevant legislative provision. Given the inherent uncertainties associated with consumer guarantees, this requirement is not met. As such, the Committee does not support the introduction of civil penalties in respect of consumer guarantees. The Committee considers that the introduction of financial penalties, and especially the risk of material financial penalties, would be an instance of regulatory overreach and that examples of the Australian Competition and Consumer Commission (**ACCC**) reaching undertakings, including in respect of motor vehicle manufacturers, suggest that the current regime is capable of delivering appropriate results for consumers.
20. The Committee notes that the Paper has requested submissions regarding the appropriate penalty in respect of a consumer guarantee law failure. As noted, the Committee does not support the introduction of pecuniary penalties. If a pecuniary penalty regime were to be introduced, the Committee would caution against any assumption that the default position should be the greater of \$10million, 3x the benefit or 10% of group turnover formulation set out in section 224(3A) of the ACL. The Committee considers that such penalties would be manifestly unreasonable. That outcome would expose companies to material financial penalties in circumstances where there remains significant uncertainty regarding the application of the law. We note that there are other penalty provisions in the ACL which do not adopt this formulation.¹

¹ See for example s47(1), Division 2 of part 3-2, other than s85, s102(2), s103(2), Division 3 of part 3-2, other than s96(2).

21. As noted in the Paper, the ACL contains provisions which prohibit false or misleading representations, including in respect of the application of consumer guarantees as well as prohibitions against unconscionable conduct. The ACCC has been successful in a number of matters concerning the misleading of consumers about their rights under consumer guarantees. The Paper also notes a number of section 87B undertakings which the ACCC has accepted from a variety of motor vehicle manufacturers to strengthen their compliance with the ACL and consumer guarantees. The Committee considers that ACCC enforcement action does not suggest an inherent deficiency regarding consumer guarantees and, therefore, a need to introduce civil pecuniary penalties. Rather, they suggest that the ACCC and other regulators have the necessary tools to address any systemic concerns in respect of the application of consumer guarantees.
22. Whilst the Committee considers that civil penalties should not be introduced, to the extent that some form of civil penalty regime is deemed to be necessary it should be limited to use of infringement notices. Suppliers trade on their general reputation. The introduction of infringement notices would, in addition to existing measures available to consumers and regulators, provide an additional tool to promote compliance whilst not exposing companies to substantive penalties in circumstances of significant legal uncertainty.
23. There are a variety of ways in which consumers currently may obtain assistance with consumer complaints, including through the ACCC and state regulators, as well as through consumer tribunals and the courts. The Committee recognises, consistent with prior Law Council views, that consumer access to knowledge and assistance is an important feature in considering the consumer guarantee regime. The Committee considers that alternative dispute resolution mechanisms including compulsory conciliation and direction powers might be considered as an alternative to the introduction of pecuniary penalties. The Law Council has previously noted the South Australia Compulsory Conciliation Regime and the power of the New South Wales Commissioner for Fair Trading to issue consumer guarantee directions as useful models for consideration.²
24. As noted above, key matters of uncertainty under the current consumer guarantee regime are in respect of the relevant "rejection period" as well as the definition of a "major failure". Relevant legal uncertainty is highest, and therefore the introduction of material pecuniary penalties is most unwarranted, where there is a legal question as to whether or not relevant goods are subject to a right of return. While the Committee considers that it is unlikely that many consumers seek to "game" the system to obtain a refund, the threat of legal jeopardy should not be such as to provide a consumer windfall. In such circumstances, the Committee does not, as a matter of principle, support a major failure only penalty regime.

² Law Council of Australia "Strengthening Australia's Cyber Security Regulations and Incentives" 8 September 2021 at page 13.

Motor Vehicle Specific Requirements

25. The Committee considers that a strength of the ACL and consumer guarantee provisions are that they are laws of general application. The Committee does not support changes to the law that would introduce a regime targeted to a particular industry. To the extent that there are concerns in respect of the application of the law to a particular industry, the Committee considers that this can be addressed by direct interaction with relevant regulators and that industry. As noted above, the various undertakings entered into by automotive manufacturers suggest that the ACCC has the tools to deal with any ongoing systemic issues. If the issue is the monetary cap for a person to be a consumer, that can be addressed as a separate issue.

View on Policy Options

26. The Paper proposes three main options in respect of consumer guarantees, being:
 - i. maintaining the status quo;
 - ii. an education and guidance campaign; and
 - iii. the introduction of a penalty provision (including other remedies such as injunctions).
27. The Committee supports option 2. The Committee notes the existence of materials and guidelines published by the ACCC as well as the various state regulators. It acknowledged that further education is unlikely to change the behaviour of any business who foresees a financial benefit in not complying with current requirements. The Committee suggests, however, that there are few organisations that would fit within that category. While acknowledging that there are costs associated with the development of additional guidance and interaction with consumers and businesses, we consider that further guidance and education is likely to pay dividends.
28. If, at some stage, option 3 were pursued, the Committee considers that the ACCC (in conjunction with relevant state regulators) should publish significantly more detailed guidelines addressing the circumstances where they may commence proceedings and their interpretation of relevant uncertainties with current drafting.

Part B

Civil prohibition on manufacturer retribution (Questions 32 and 33)

29. The Committee does not consider that the Paper demonstrates a material issue, from the perspective of the overall economy, regarding retaliation or refusal on the part of manufacturers to indemnify suppliers. It is not apparent that the introduction of an indemnification provision would significantly change the way in which suppliers consider their consumer guarantee obligations to the benefit of consumers. Disputes as between suppliers and manufacturers may be the result of a genuine disagreement as to the nature of any default. The Committee notes that in certain circumstances, and depending on supplier approach, there may be issues regarding the ability of the manufacturer to inspect the goods in question and to meaningfully engage with the supplier prior to the supplier resolving any complaint with the customer.

30. The Committee considers that, consistent with the status quo, matters of indemnity are best administered commercially as between the supplier and relevant manufacturers. To the extent that, in limited circumstances, there is an absolute failure from a manufacturer to engage in discussions regarding indemnity obligations and any targeting/punishment of relevant suppliers for raising such concerns, the law of unconscionable conduct is sufficiently broad so as to capture these circumstances.
31. Consideration could be given to re-introducing a provision analogous to section 74H of the *Trade Practices Act 1974-2009* (Cth) which may have been inadvertently 'lost' as part of the transition to the CCA/ACL. That provision conferred on retailers an express statutory right of indemnity against manufacturers where the retailer was required to compensate a consumer.

Conclusion and further contact

32. The Committee would be pleased to discuss any aspect of this submission.
33. Please contact the chair of the Committee Jacqueline Downes at Jacqueline.downes@allens.com.au, if you would like to do so.

Yours faithfully



Philip Argy
Chairman
Business Law Section