

Submission to the Treasury Consultation Regulation Impact Statement: Improving the effectiveness of the consumer guarantee and supplier indemnification provision under the Australian Consumer Law

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By email: consumerlaw@treasury.gov.au

Dear Consumer Policy Unit

Thank you for the opportunity to provide a submission to the Treasury Consultation Regulation Impact Statement (CRIS): *Improving the Effectiveness of the Consumer Guarantee and Supplier Indemnification Provision Under the Australian Consumer Law*. CPRC is an independent, non-profit consumer research organisation. Our mission is to improve the lives and welfare of consumers by producing evidence-based research that drives policy and practice change.

Australian consumers benefit from a robust consumer protection regime. However, there remains a high number of consumers who are not able to access the right support or redress when things go wrong.¹ CPRC is pleased to see Treasury progress this important reform.

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

CPRC supports the proposal to strengthen consumer protections through the creation of civil penalties for businesses who fail to provide consumer guarantee remedies. We consider it essential to apply these changes across the economy rather than limit changes to one sector.

Strengthening consumer guarantees only for new cars would leave gaps in the consumer protection framework and make it more complex for consumers to navigate, determine what rights they have and how to enforce them.² It would also undermine the purpose and intent of the Australian Consumer Law (ACL), which was to establish one law with multiple regulators, designed to ensure consistent protections across Australia. The cost benefit analysis in the CRIS found the economy wide approach demonstrates the highest cost benefit ratio (CBR) out of all the options assessed.³

While cars are one of the single largest purchases a consumer may make, consumers struggle to access redress for a range of products.⁴ We know from the Australian Consumer Survey (ACS) (2016) that 65% of consumers (who wouldn't always make a complaint) would make a complaint if the value of the product or service was a significant amount, and the

¹ The Australian Government the Treasury, 2021, *Improving the Effectiveness of the Consumer Guarantee and Supplier Indemnification Provisions Under the Australian Consumer Law*, Department of the Treasury on behalf of Consumer Senior Officials

² *Ibid.*,33

³ The Australian Government the Treasury, 2021, *Improving the Effectiveness of the Consumer Guarantee and Supplier Indemnification Provisions Under the Australian Consumer Law*, Department of the Treasury on behalf of Consumer Senior Officials

⁴ The Australian Government the Treasury and EY Sweeney, 2016, *Australian Consumer Survey 2016*, The Treasury, on behalf of Consumer Affairs Australia and New Zealand

average amount considered significant was \$275 AUD⁵. This suggests that consumers consider a wider range of products or services beyond just vehicles to be significant enough to influence their decision to seek redress.

Consumers require support across the economy to resolve issues, not a piecemeal approach to consumer guarantees. Through July and August 2021 CPRC undertook qualitative research with Australian consumers to understand their experiences with businesses and markets today. Consumers who participated, consistently reported telecommunications and internet to be essential services. We also found this sector performed the worst out of five sectors assessed in our Sector Scorecard.⁶ According to the ACS it is estimated to cost \$46.04 per consumer per year to resolve issues with motor vehicles. In contrast, to resolve issues with telecommunications it costs \$97.04 per consumer and with internet providers \$101.37 per person per year.⁷ The Australian Communications Consumer Action Network have compiled an extensive submission outlining the issues consumers face seeking redress in the telecommunications sector for this consultation process.⁸ This demonstrates the need for a holistic, economy-wide approach.

Finally, limiting access to redress can result in harms beyond potential economic impacts, including time and stress where there are barriers to seeking redress. These impacts can be heightened for consumers who are experiencing or at risk of experiencing vulnerability. Increasing the complexity to navigate a system (by only applying civil penalties to just one part of the system) introduces administrative burden onto these groups⁹. While the dollar cost may be lower for non-vehicle purchases, if consumers experience faults and issues with several products – these can cumulatively add up through loss of welfare from products consumers cannot use, as well as non-financial harms such as lost opportunity costs, psychological detriment, compromised personal information and restricted choice.¹⁰

Part A, Option 2 – an education and guidance campaign

While CPRC's preference is for Option 3 (*a prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms*), we see merit in additional education and guidance for consumers. Should the civil penalties be implemented, a targeted, long-term integrated education and communication program should be developed that aims to raise consumer awareness and understanding of these changes. We encourage Treasury to consider supporting community and consumer organisations to be delivery partners of any education or communication program to ensure maximum consumer reach and impact of the message via grassroots initiatives. As seeking redress could occur any time for a consumer, a one-off campaign run for a specific period of time is unlikely to dramatically increase awareness and understanding. A sustained

⁵ *Ibid.*

⁶ Consumer Policy Research Centre, 2021, *Covid-19 and Consumers: Sector Scorecard*

⁷ *Ibid.*, 64 & 65

⁸ Australian Communications Consumer Action Network, 2022, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*, Submission by the Australian Communications Consumer Action Network to the Treasury on the Consultation Regulation Impact Statement

⁹ Carey, G., Malbon, E. and Blackwell, J., 2021. Administering inequality? The National Disability Insurance Scheme and administrative burdens on individuals. *Australian Journal of Public Administration*, 80,4, 854-872

¹⁰ OECD, 2020, *Measuring Consumer Detriment and the Impact of Consumer Policy: Feasibility study*, Directorate for Science, Technology and Innovation - Committee on Consumer Policy

approach could result in an increase in consumers successfully seeking redress and in turn an increase in consumer confidence in markets.

According to the ACS the number of consumers who had heard of dispute resolution services was just 44%. This number is lower for women (38%), younger consumers (35%) and those who speak a language other than English at home (39%).¹¹ Any education and guidance program must be designed to target these groups and user comprehension testing must be undertaken to effectively design the campaign. In addition, this program should ensure it uses images and text that reflect a diverse range of people. Imagery should portray people of all genders with equal value and respect and avoid gender stereotypes that are harmful or perpetuate false assumptions about people.¹²

Guidance materials need to be updated to provide tailored information for navigating consumer guarantees through online marketplaces. As demonstrated in our recent report *The Digital Checkout*¹³, the nature of how consumers interact with businesses to buy goods and services has changed and consumer rights need to keep pace with these changes.

"...I very rarely buy an electrical item online, that gets delivered to me. Because I'm always worried about being able to take it back... Because the one time I bought a phone online years ago, it bit me on the backside and I had that much trouble trying to get it replaced and fixed, and I went, I'm never ever doing that again." Male, Regional Victoria, Under 50¹⁴

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

CPRC conducted qualitative analysis between July and August 2021, the following quotes come from our Consumer Wellbeing reports, along with additional unpublished quotes¹⁵. We heard from consumers about the challenges they found seeking help even when they had purchased insurance.

"My girlfriend's got a cracked phone screen, and we had insurance on it, but it's just such a process to use the insurance. They don't give replacement phones anymore, and it's been cracked for ages. I just don't think we'll ever bother taking it back, because she'd have to switch to an older, worse phone, and she doesn't want to do it. So, I figure I would just never buy insurance again, because the insurance is just too difficult a product to use." Male, Regional VIC, aged under 50¹⁶

Others described how frustrating and difficult it was to seek redress; many consumers often do not pursue any form of redress because of the perception that it will be too difficult.

We have something that's faulty at the moment, and my dad is just not even going to bother to attempt to return it because he bought it from Kogan. He's like, "Yeah, it's not even worth even attempting to try and return it because their reputation." There's been other things, like

¹¹ The Australian Government the Treasury and EY Sweeney, 2016, *Australian Consumer Survey 2016*, The Treasury, on behalf of Consumer Affairs Australia and New Zealand

¹² City of Melbourne, Women's Health Victoria and Spry PR & Communications, 2022, *Gender Equality in Advertising & Communications Guidelines for Local Government* <https://shequal.com.au/2022/01/20/shequal-launches-gender-equality-guide-for-local-government-advertising/>

¹³ Consumer Policy Research Centre, 2021, *The Digital Checkout*

¹⁴ Consumer Policy Research Centre, 2021, *The Digital Checkout*

¹⁵ Consumer Policy Research Centre, 2021, *Towards a wellbeing approach to consumer policy in Australia*. Part One: Why now?

¹⁶ *Ibid*

my phone broke. It was within the contract, and I had to be quite aggressive with them to get them to do anything about it because they were like, "Well, it's already like a year old." And I had to really fight to get them to send it back for repairs for free. And even then, I was like, "Look, I'm going to be without a phone. That's basically how I get all of my business. I can't be without a phone, that's costing me money." Female, SA, renter¹⁷

Many consumers expressed frustration with the challenges they face when contacting a company as many businesses' initial and sometimes only contact options are now chat boxes and online forms.

The eBay chat is extremely annoying...It's almost designed to stop customers from continuing with their issue. They told me to go to PayPal, which I did. Again, there was no human interaction. Everything is online. In the end, I spent \$1100 on the masks and got like \$100 back. That's it, I just lost my money. I went to fair trade or the equivalent ombudsman. Industrial relations, you name it. I rang everywhere. I was just going in a circle. Nothing was resolved. I gave up. I just kept my \$100 and the masks. So yeah, my recent experience online has been really, really horrible...The experience was deteriorating and made me not want to trust online shopping." VIC, CALD admin intermediary¹⁸

Ensuring consumers can easily communicate with a business or a provider is essential in enabling them to uphold their rights. Raising their awareness through education, only to be met with delays and barriers to communicating with a company will continue to erode consumer trust in markets and protection frameworks.

Consumers may continue to look for alternative ways to address their concerns such as using social media or reviews to contact businesses or warn others of their poor experience. In 2016 this number was less than one in ten who would complain via social media or online forum¹⁹ but this likely to have significantly increased due to impact of COVID-19 restrictions on consumers spending more time online.

"They say you can email them, but this never leads to a resolution. One thing that I've noticed nowadays is that Twitter is holding companies to account. If you have a concern you can reach out to their Twitter handle. If you raise a concern on Twitter, then somebody messages back within like half an hour." NSW, struggled to pay bill²⁰

Even when a consumer knows their rights, seeking redress can still be challenging if the person they are speaking with doesn't understand the relevant laws.

"At the end of the day, it just comes down to, basically, are you speaking to the right person who understands how the law works as well and then just getting somebody as well that's actually helpful rather than trying to fob you off, because that happens a lot in retail". Male, SA, renter²¹

¹⁷ Consumer Policy Research Centre, Unpublished Qualitative Research

¹⁸ Consumer Policy Research Centre, Unpublished Qualitative Research

¹⁹ The Australian Government the Treasury and EY Sweeney, 2016, *Australian Consumer Survey 2016*, The Treasury, on behalf of Consumer Affairs Australia and New Zealand

²⁰ Consumer Policy Research Centre, Unpublished Qualitative Research

²¹ Consumer Policy Research Centre, Unpublished Qualitative Research

If suppliers are held to account for not providing remedies, there is an incentive for them to ensure their staff are educated on their obligations and adequately resourced to support consumers.

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

CPRC does not consider it appropriate to apply depreciation to determine the dollar amount of a refund for products or services. There may be situations where there is a delay between a fault or issue being identified and its rectification. As the case studies provided within the CRISS²² outline, these delays are often caused by suppliers or manufactures providing the remedy. As outlined by our research, consumers face delays in seeking redress due to the complexity and challenges of contacting suppliers/manufactures.²³ Consumers should not be penalised due to delays that are outside of their control.

Are there any other benefits associated with maintaining the status quo? If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?

As the CRIS clearly outlines there are no benefits to consumers by maintaining the status quo. If this issue is not addressed, consumers will continue to bear the burden of upholding the rights with minimal support and be left with the costs falling on them. This is particularly concerning where Australia does not have a General Safety Provision so effective consumer guarantees are the only means to provide an indirect safety net in many circumstances.

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

The penalties regime needs to be accessible and should be issued by a court or tribunal on application by any party and not just a regulator this would be analogous to powers under the Fair Work Act and the National Credit Code.²⁴ CHOICE, Consumer Action Law Centre, Consumer Credit Legal Service (WA) provide comprehensive evidence in their submission on how to implement the civil prohibition for a failure to provide a consumer guarantee remedy.

Consideration should be given to publishing a list of companies that breach the consumer guarantees, especially if they repeatedly breach them or if a breach impacts a significant number of consumers. NSW Fair Trading publish public warnings that are issued by the Minister for Better Regulation or the Commissioner for Fair Trading when it is in the public interest.²⁵

²² The Australian Government the Treasury, 2021, *Improving the Effectiveness of the Consumer Guarantee and Supplier Indemnification Provisions Under the Australian Consumer Law*, Department of the Treasury on behalf of Consumer Senior Officials

²³ Consumer Policy Research Centre, Unpublished Qualitative Research

²⁴ CHOICE, Consumer Action Law Centre, Consumer Credit Legal Service (WA) and WEstjustice, 2022, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions* Submission to the Treasury on the Consultation Regulation Impact Statement

²⁵ NSW Fair Trading <https://www.fairtrading.nsw.gov.au/news-and-updates/updates/public-warnings>

Relevant reforms underway

CPRC wishes to draw Treasury's attention to two reviews that could inform their work:

- Productivity Commission (PC): Right to Repair review²⁶ which identified clear gaps in the consumer protection framework to ensure consumers' right to repair.
 - The PC recommended the government consider extending consumer guarantees to require that manufactures provide reasonable software updates. This is important to ensure connected devices remain functional, secure and safe.
 - The PC also recognised the need to reform the enforcement of consumer guarantees to provide consumers with increased access to remedies. It recommended the Government consider a range of mechanisms such as a supplier complaints mechanism or consideration of an ombudsman for specific markets such as motor vehicles.
 - The PC also recommended the Australian Government should 'amend the Australian Consumer Law to make it a contravention for suppliers and manufacturers to fail to provide a remedy to consumers when legally obliged to do so under the consumer guarantees'.²⁷
- Home Affairs is currently undertaking a review '*Strengthening Australia's cyber security regulations and incentives*'. The department recognises there are potential gaps in how consumer guarantees might apply to cyber security and the challenges in seeking redress for digital goods and services given the complex nature and number of businesses that may be involved – 'leaving it unclear who is responsible for ensuring the consumer guarantee is upheld'.²⁸

We support these views and consider them relevant to the issues being considered in this CRIS and have provided submissions to these reviews.^{29 30}

Additional issues

While this is not discussed in the CRIS, CPRC considers it is important to ensure consumers have the right support to effectively seek redress. It is important to provide access to alternative dispute resolution processes that are fit for purpose, quick and affordable for consumers. CPRC along with other consumer groups have identified the need for additional dedicated ombudsman support, including the need for a digital ombudsman³¹ and for motor vehicles.³²

In addition, we believe that there are further reforms that need to be progressed to support consumers and ensure an even playing field, such as:

²⁶ Productivity Commission, 2021, Right to Repair, Productivity Commission Inquiry Final Report No 97

²⁷ *Ibid.*, 31

²⁸ Australian Government, 2021, *Strengthening Australia's cyber security regulations and incentives. A call for views. An initiative of Australia's Cyber Security Strategy 2020*, <https://www.homeaffairs.gov.au/reports-and-pubs/files/strengthening-australia-cyber-security-regulations-discussion-paper.pdf>.

²⁹ Consumer Policy Research Centre, 2021, *Submission to the Productivity Commission Review into Right to repair*, <https://cprc.org.au/publications/right-to-repair-submission/>.

³⁰ Consumer Policy Research Centre, 2021, *Submission to Home Affairs – Strengthening Australia's cyber security regulations and incentives*, <https://cprc.org.au/publications/submission-to-home-affairs-strengthening-australias-cyber-security-regulations-and-incentives/>.

³¹ Consumer Policy Research Centre, 2021, *The Digital Checkout*, <https://cprc.org.au/publications/the-digital-checkout/>.

³² Consumer Action Law Centre (Consumer Action), Victorian Aboriginal Legal Service (VALS), WEstjustice and Hume Riverina Community Legal Service, 2021, Victorian pre-Budget submission 2022-23

- introducing an unfair trading prohibition
- introducing a general safety provision.

Finally, it has been almost six years since the last survey of the ACL, which is an important source of data to understand how the ACL is continuing to support consumers. The global pandemic has changed how consumers shop and seek support – it may have also changed the type of products and services they experience issues with – such as the difficulty faced by many consumers in getting refunds for travel that needed to be cancelled at short notice.^{33 34} It is important that Treasury undertake a new survey of the ACL in 2022.

We would welcome the opportunity to work with Treasury and share further insights from our consumer research projects. For further discussion regarding our research and the contents of this submission, please contact Kristal Burry, Policy and Program Director kristal.burry@cprc.org.au

Yours sincerely



Chandni Gupta
A/g Chief Executive Officer
Consumer Policy Research Centre

³³ COVID-19- Consumer Law Research Group, 2020, Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic. *J Consum Policy* 43, 437–450. <https://doi.org/10.1007/s10603-020-09463-z>

³⁴ CHOICE, 2022, CHOICE Calls for Clearer Terms and Conditions for Travellers. 01 February 2022 <https://www.choice.com.au/travel/on-holidays/advice/articles/nsw-travel-information-standard>