



Australian Government

CONSULTATION REGULATION IMPACT STATEMENT

**Australian Consumer Law Review:
Clarification, simplification and
modernisation of the consumer guarantee
framework**

Consumer Affairs Australia and New Zealand
2018

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ABOUT THIS REGULATION IMPACT STATEMENT

BACKGROUND TO THIS CONSULTATION RIS

In June 2015, the Australian Consumer Affairs Ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF), asked Consumer Affairs Australia and New Zealand (CAANZ) to initiate a broad-reaching review of the Australian Consumer Law (ACL).

In March 2017, CAANZ presented the Final Report of the ACL Review (the Review).

The Review found that the introduction of the ACL had been beneficial for both consumers and traders and the ACL is generally 'fit for purpose'. In particular, the Review found that the flexible and economy-wide approach taken to consumer guarantees within the ACL has assisted in clarifying the rights and responsibilities of both traders and consumers. However, the Review also identified ongoing difficulties with the operation of the consumer guarantee provisions, and made a number of proposed amendments to the ACL, to assist with further clarification, simplification and modernisation of the law.

In August 2017, CAF supported regulatory impact assessment of seven proposals from the Review. Five of those proposals and their implementation options relate to the consumer guarantees regime in the ACL, and are considered in this consultation regulatory impact statement (Consultation RIS).

AN OVERVIEW OF THE ACL

The ACL is a single generic consumer protection law operating as a law of the Commonwealth and in each State and Territory. The ACL provides a system of consumer protections and remedies for consumers in relation to defective goods and services (consumer guarantees), prohibitions against misleading and deceptive conduct and unconscionable conduct, unfair contract term protections, a harmonised national product safety and enforcement system, national laws covering a number of sales practices and enforcement powers.

The consumer guarantees set out standards for goods and services supplied to consumers, and are independent of contractual arrangements between parties. They are outlined in Part 3-2, Division 1 of the ACL. Among these guarantees is section 54, which provides the consumer with the principal guarantee that goods are of acceptable quality. Other key guarantees include the guarantee of title (section 51), that the product is fit for purpose (section 55) and that the goods correspond with the description or sample model provided to the consumer (sections 56 and 57).

PURPOSE OF THIS CONSULTATION RIS

A Consultation RIS presumes that there *may* be scope for the Government to take action to address an identified problem. The purpose of the Consultation RIS, therefore, is ‘to canvass the regulatory options under consideration, in order to determine the relative costs and benefits of those options.’¹

The Council of Australian Governments (COAG) Best Practice Regulation guidelines for regulatory proposals made by Ministerial Councils and National Standards (the Guidelines) require that a Consultation RIS canvass both regulatory and non-regulatory approaches, and include a status quo or ‘no change’ option (recognising that not all problems have a cost effective solution through government action).

The Consultation RIS is provided to stakeholders for comment. Your views are sought on those areas where further data is needed and/or where assumptions made in the analysis require verification. Views are also sought on the costs and benefits of each of the five proposals and their associated options for implementation. The costs and benefits of each of the five proposals will be assessed individually to assist Ministers to form a view on whether any regulatory change should be supported. The Consultation RIS therefore provides a valuable means through which governments and stakeholders can consider policy and regulatory options in meaningful and constructive way.

THE STRUCTURE AND FOCUS OF THIS CONSULTATION RIS

This Consultation RIS is comprised of four chapters, addressing five proposals from the Review which relate to the consumer guarantee regime in some way and their implementation options. The Consultation RIS is structured as follows:

1. **Chapter 1:** Increasing the threshold in the definition of ‘consumer’ from \$40,000 to \$100,000;
2. **Chapter 2:** Clarifying the consumer guarantees remedies (comprised of two proposals – failure within a short period of time and multiple failures);
3. **Chapter 3:** Enhanced disclosure for extended warranties; and
4. **Chapter 4:** Access to consumer guarantees for goods sold at auctions.

In considering this Consultation RIS it is important to note some key features of the consumer guarantee provisions which operate as preconditions to accessing the consumer guarantees regime. These features are who is a ‘consumer’, and which party is entitled to choose the remedy where there is a failure to meet the consumer guarantees, and are the focus of chapters 1 and 2 respectively. Accordingly, these chapters set the scene for the next two chapters, which focus on disclosure obligations and auction exemptions.

1 COAG (2007), *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, Canberra.

AN OVERVIEW OF THE PROPOSALS AND THEIR IMPLEMENTATION OPTIONS

This section provides an outline of the main findings for each of five proposals, and a summary of their implementation options.

Chapter 1: Increasing the threshold in the definition of 'consumer' from \$40,000 to \$100,000

Many of the ACL's protections (including consumer guarantees) apply only when goods or services are supplied to a 'consumer' as defined in the ACL. According to one of the definitions, a buyer of goods will be a consumer if the purchase price does not exceed the current threshold of \$40,000 and the goods are not bought for the purpose of resupply or to make a new product for a commercial purpose.

The current threshold amount of \$40,000 has not changed since its introduction in 1986. A finding from the Review is that the level of protection afforded to consumers (including small businesses) has been eroded over time as the decline in the real value of the threshold means that certain business purchases once covered under the ACL are no longer so covered. The Review proposed that the threshold amount be increased to \$100,000.

In relation to this proposal, Chapter 1 explores these options:

1. Maintain the status quo;
2. Increase the threshold in the definition of consumer from \$40,000 to \$100,000; and
3. Increase the threshold in the definition of consumer from \$40,000 to \$100,000 and apply indexation.

Chapter 2: Clarifying the consumer guarantees

Chapter 2 comprises of two proposals from the Review.

Failure within a short period of time

Under the current regime, where a good purchased by a consumer fails to meet one of the consumer guarantees, the consumer's right to reject the good is dependent on whether the failure is 'major'. If it is a major failure, consumers have the right to reject the goods within a reasonable time and choose a remedy, including a refund. If the failure is non-major, the supplier chooses the remedy, which can be a repair, replacement or refund.

The Review found that consumers and traders may be uncertain about how the right to reject goods for a refund or replacement under the consumer guarantees regime applies when there is a failure within a short period of time after purchase. The Review also noted that a failure that occurs within a short period of time would be considered a major failure, as a reasonable consumer would not have purchased a good had they known it would fail within a short period. Accordingly, the Review proposed that the ACL be amended to specify that where there is a failure to meet the consumer guarantees within a short specified period of time, consumers can choose a refund or replacement regardless of whether the failure is major.

In relation to this proposal, Chapter 2 explores these options:

1. Maintain the status quo;
2. Specify a short period of time during which a consumer is entitled to a refund or replacement without needing to prove a major failure. The proposed period is 30 days;
3. Option 2, but specify a different time period for high value goods, such as motor vehicles and white goods, based on a monetary threshold, during which a consumer is entitled to a refund or replacement without needing to prove a major failure.
 - 3.1. Within **Option 3**, there is consideration of two approaches: A longer period of time for high value goods and an exemption (status quo) for high value goods.

Multiple failures

The consumer guarantees provisions are currently unclear about whether multiple non-major failures can collectively be considered a major failure. This has resulted in uncertainty for both consumers and businesses. The Review proposed that the law be amended to clarify that multiple non-major failures can collectively amount to a major failure under the consumer guarantees regime.

In relation to this proposal, Chapter 2 explores these options:

1. Maintain the status quo;
2. Clarify that multiple non-major failures can amount to a major failure; and
3. Specify the number of non-major failures that can amount to a major failure.

Chapter 3: Enhance disclosure for extended warranties

The Review noted that it was sometimes difficult for consumers to determine if an extended warranty offers value for money and provides the additional protection they seek. The Review recommended enhancing disclosure in relation to extended warranties by requiring:

- agreements for extended warranties to be clear and in writing;
- additional information about what the ACL offers in comparison; and
- a cooling-off period of 10 working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed orally and in writing.

In relation to this proposal, Chapter 3 explores these options:

1. Maintain the status quo;
2. A legislative amendment comprising a cooling-off right, oral disclosure and written disclosure; and
3. Oral and written disclosure with an opt-in process.

Chapter 4: Access to consumer guarantees for goods sold at auctions

Currently, goods sold through some forms of auctions are exempt from certain consumer guarantees in the ACL on the basis that, typically, consumers purchasing from traditional auctions have had the ability to inspect goods and identify defects prior to purchase. However, such an ability does not extend to auctions that occur in an 'online only' manner. The traditional rationale for the exemptions is difficult to apply to the online context.

The Review proposed modernizing the 'sale by auction' exemption from the consumer guarantees by ensuring the consumer guarantees apply to all online auctions.

In relation to this proposal, Chapter 4 explores these options:

1. Maintain the status quo;
2. Goods purchased through online auctions that are conducted entirely online, with no reasonable opportunity to inspect goods, receive access to the remainder of the consumer guarantees (that are available in the ACL for generic retail sales). The status quo remains if the auctioneer makes the goods reasonably available for inspection;
3. Goods purchased through online auctions, regardless of the ability for a prior inspection (including traditional auctions that allow online bidding) receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales). The status quo will remain for consumers who purchase from auctions in person ; and
4. All goods purchased through auctions will receive access to the remainder of consumer guarantees (that are available in the ACL for generic retail sales).

CONSULTATION

SUMMARY

1. CAANZ aims to use the public consultation process to seek feedback on the policy options for each of the proposals as presented in this Consultation RIS.
2. CAANZ will accept formal written submissions, conduct face-to-face meetings with key stakeholders and provide the opportunity for consumers to share their experiences with the ACL generally, and consumer guarantees in particular, through a comment facility on our website.

CAANZ will undertake an extensive public consultation process in relation to the proposals and options explored in this Consultation RIS. The objective of the consultation process is to gather additional evidence and data on the extent of the problem and to seek views on the benefits and costs of the proposed policy options in each of the chapters.

The consultation process will consist of:

- a formal written submission process;
- targeted face-to-face and telephone meetings with key stakeholders; and
- a comment facility for consumers to share their experiences.

CAANZ intends to reach a broad cross-section of stakeholders. It will be important to assess the views of consumers, traders and businesses.

Once the initial consultation process has concluded, a final or decision-making RIS will be produced to discuss the results of the consultation process, the evidence that has been gathered and the preferred policy option for each of the proposals. All submissions to the consultation process will be published on the CAANZ website, unless authors have indicated that they would like all or part of their submission to remain in confidence.

Specific questions are likely to arise from this consultation paper which may have not been considered at the time of drafting and CAANZ may undertake further targeted consultation with key stakeholders if necessary.

CAANZ has designed the consultation procedures consistently with COAG consultation principles and has ensured that there is flexibility to maximise stakeholder participation in the consultation process.

Both this Consultation RIS and the decision-making RIS will be published on the Office of Best Practice Regulation website.