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CLARIFYING, SIMPLIFYING AND MODERNISING THE CONSUMER GUARANTEES

Submission to the Treasury on the consultation
regulation impact statement

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Treasury regarding the Consultation Regulatory Impact Statement (Consultation RIS) on options for clarifying, simplifying and modernising the consumer guarantees framework found in the Australian Consumer Law (ACL).

The guarantees are designed to be flexible in their application. This is one of their great strengths, particularly when considering complex or otherwise unusual disputes between traders and consumers. However, the consumer guarantees were also designed to be an accessible law for consumers, retailers and manufacturers, intended to be applied with ease and without lengthy or formal dispute resolution processes needed. The guarantees should be a fast, low-cost avenue for providing consumers with remedies when something goes wrong with a product or service. For many consumers, this is not currently the case.

CHOICE hears directly from people who are having difficulty enforcing their rights. People contact us through our dispute resolution and information service for members called CHOICE Help, and we also receive inquiries from the general public via email, phone, letter and social media. Most often these stories relate to the consumer guarantees and attempts to enforce them in situations where traders initially refuse to provide them with an appropriate remedy for a faulty product. We have received hundreds of contacts over the last month from individuals who are frustrated with how much time and effort they have needed to expend in order to convince businesses to provide them with remedies that they are legally entitled to. This submission details some of these stories, as well as relevant case studies taken from CHOICE Help. Altogether, these case studies provide evidence that there is an urgent need to amend the law to make it expressly clear that consumers are entitled to their choice of remedy if a product experiences any failure in a short period of time, or multiple minor failures over a specified period of time.

If you purchase something that does not work and cannot be repaired, you should be able to receive your choice of a refund or replacement. The existing law supports this, but the experience of consumers varies enormously. Your chance of receiving a refund can depend on the individual staff member you speak to, training and compliance programs in place at a particular retailer, and how determined and dogged you are in pursuing your rights. In a surprising number of everyday disputes, we see frustrated consumers seeking support from experts including consumer advocates, lawyers, public servants and various specialists such as

electricians, mechanics and computer technicians. It is time to introduce some clarity to the law, to ensure that ordinary consumers are able to effectively assert their rights.

Recommendation summary

- Consumers should be entitled to a refund or replacement if a product experiences any failure in a short period of time (30 days), without having to prove a major failure.
 - This period should be extended to six months for high-value goods.
 - Alternatively, this reform should follow the approach taken in Holden's recent undertaking to the ACCC, and the period should be extended to 60 days for high-value goods.
- Clarify the law to indicate that multiple minor failures can amount to a major failure.
 - Preferably, identify the specific number of minor failures that constitute a major failure. Case studies from consumers indicate that setting the number of minor failures at two or more would best match consumer expectations.
- Introduce a disclosure regime coupled with an opt-in process for the sale of extended warranties.
- Remove the existing exemption from the consumer guarantees for auctions.
- Raise the threshold for the definition of 'consumer' from \$40,000 to \$100,000.
 - Apply indexation, provided a cost-benefit analysis supports this option.
- Raise the tribunal ceilings for consistency and to reflect the new, higher threshold for the definition of 'consumer'.
- Define tribunals as courts, to enable easier and more affordable resolution of cross-border consumer guarantee disputes.

Clarifying the consumer guarantees remedies

The consumer guarantees provide consumers with strong rights, and are flexible enough to deal with a range of circumstances. However, that flexibility causes problems for consumers who are unsure how the guarantees apply to their individual cases and who find themselves dealing with retailers and manufacturers who can have varied and conflicting interpretations of the law. Clarifying rights to a refund where a product fails within a short period of time, or where a product experiences multiple minor failures, must be a priority for reform. The status quo is causing costly disputes that take far too much time and effort for consumers to resolve.

Failure within a short period of time

We have heard from numerous consumers who have experienced a clear failure within a very short period of time, but have had difficulty accessing an appropriate (or indeed any) remedy from the business.

Robert bought a Navman GPS for \$246. On its first use, it experienced multiple faults. After a three month dispute with the retailer, Robert “only got my refund after Department of Fair Trading stepped in... [retailer] denied liability and kept referring me to Navman complaints/service centre and refused a refund, said they would only do a credit or exchange!”.

Costs incurred: the price of the Navman GPS, Robert’s time spent resolving the issue, the three months spent without a functioning GPS, time spent by staff at the Department of Fair Trading, the retailer and Navman service centre.

Rod told us, “I bought a pair of very expensive running glasses that came with prescription inserts. Total cost was over \$600 and the inserts rubbed the film off the sunglasses within a month. Despite the optometrist writing a letter stating the product was faulty... the company just ignored me”.

Costs incurred: the price of the glasses, Rod’s time attempting to solve the problem, time spent by the optometrist, presumably purchase of a new specialised pair of running glasses, Rod’s loss of confidence in the law/market.

Jane bought a \$1000 laptop, telling us “the keyboard stopped working within a week... which I argued was a major fault, however the seller disagreed. It took over a week for it to be repaired... I lost quite a lot of work time driving to get it fixed”.

Costs incurred: Jane's work time spent seeking a resolution, petrol costs in driving to get it fixed, one week spent without a functioning laptop, staff costs for the retailer in resolving the dispute and repairing the product.

Another common problem experienced by consumers is the time taken to remedy simple problems.

Kim bought a TV for \$499, which demonstrated a fault at four weeks. It took Kim six months to get a refund for the faulty TV.

Costs incurred: Time spent without a TV (theoretical temporary replacement cost of \$561.12), Kim's time spent resolving the problem (six months), staff costs for the retailer in resolving the dispute over this time.¹

Kevan's mother bought him a Logitech slim folio for an iPad Pro as a gift. Kevan immediately realised it did not connect to his iPad properly, leading to intermittent Bluetooth connectivity problems. Kevan's mother took it back to the retailer, who told her they could not do anything as it had been opened. Kevan's husband then tried taking it back to the retailer two days later, who suggested they use Blu Tac to hold the folio in place. Kevan wrote to Logitech, who escalated the matter back to the retailer. Kevan and his husband went back to the retailer a third time, where after a 45 minute discussion they were given a refund. "The item was \$109, it took three weeks of constant backwards and forwards and a massive amount of our time".

Costs incurred: Time spent without a working folio for Kevan's iPad, staff costs for the retailer and Logitech in resolving the problem, Kevan (and family's) time spent resolving the problem (three weeks).

Bambi bought a \$3500 Apple MacBook Pro computer that had "problems from the first day". Bambi is an experienced computer professional, and spent several days trying to resolve the problem before contacting Apple Help. Bambi was encouraged to continue troubleshooting, but "the computer was finally replaced after persistent follow-up and multiple visits to an Authorised Apple Repair Centre... the onus was on me to prove that it was a hardware problem. The problem was reported within 10 working days... yet it took in excess of seven weeks before it was replaced."

¹ See Radio Rentals price for Philips 55" 4K UHD Slim Led TV via <https://www.radio-rentals.com.au/tv/philips-55inch-4k-uhd-slim-tv> Price per week is \$23.38, but we note that it appears the product can only be rented for a minimum of 36 months, at a cost of \$3366.72.

Bambi used the computer for work, and lost income while the product was unusable, “as well as a new client for whom I could not deliver their project... I was pretty much unable to work for most of this seven weeks”.

Costs incurred: Bambi’s time spent resolving the problem, Bambi’s lost income (seven weeks of work and one new client, and potentially loss of professional reputation), staff costs for Apple Help and Authorised Apple Repair Centre.

Some of the situations consumers tell CHOICE about appear to indicate a lack of understanding on the part of businesses of existing requirements under the ACL, particularly when goods purchased are low in value. In these cases, a bright-line law that makes it clear that any failure within a specified time period enables the consumer to choose a remedy would likely eliminate confusion and result in disputes being settled much faster.

Laurel bought a cheap Acatel phone. After one week, “I discovered that I was unable to hear anyone’s voice but they could hear me. I took it back to Vodafone but they said they could only send it for repair and would not give me a replacement phone. I had to buy another phone and return two weeks later to find that the defective phone was to be replaced with a new phone. They refused to give me a refund”.

Costs incurred: Laurel’s time spent resolving the problem (two weeks), cost of a replacement phone, staff costs for Vodafone in resolving the problem, Laurel’s loss of confidence in the law/market.

Sue bought a wheeled suitcase from Strandbags for \$89. The rubber on one wheel began to disintegrate shortly after purchase. “As I’d had the bag less than two weeks and used it lightly for the purpose intended I took it into the Strandbags store where I purchased it to show them. I was informed wheels are not covered under warranty so there was nothing they could do but send it away for repair which would cost me in time and money and likely more than the cost of the bag... I raised my complaint with Strandbags Australia head office and was sent a copy of the returns policy and warranty information highlighting wheels are not covered, ever, regardless of time and use”.

Costs incurred: Sue’s time spent attempting to resolve the problem, time spent without a functional suitcase, presumably the cost of a new suitcase, Strandbags staff costs in responding to Sue’s complaint in person and via email, Sue’s loss of confidence in the law/market.

Michelle bought a \$70 toy from Australian Geographic. It broke within one day, during normal use. “They said, no refunds or exchange as it’s on sale. I knew the

thing wasn't made well, but still no refund. They said we could try going to the manufacturer [a US company]... we didn't bother".

Costs incurred: Michelle's time spent trying to resolve the problem, time without a functional product, staff costs for Australian Geographic in responding to Michelle's complaint, Michelle's loss of confidence in the law/market.

Another theme that has become apparent in the stories shared by consumers is that many people already believe the law operates or should operate in the way set out in Option 2 of Chapter 2 of the Consultation RIS. Further, there is strong support for this option among consumers.

Jo bought a KitchenAid processor through a company called Chefs Toolbox. "The first time it was used it went haywire... there was a major fault with the machine. I rang KitchenAid and was told the appliance had to come back to them for people to look at it and make their decision. They repaired the machine with possibly reconditioned spare parts and insisted on giving us back the fixed machine as opposed to what I wanted which was a new machine with no faults. Given the machine was brand new I think a replacement new machine should have been an option for me... I said to Kitchenaid I don't want a reconditioned machine, I want what I paid for which was a new machine".

Costs incurred: Jo's time spent resolving the problem, Kitchenaid staff costs in repairing the product and responding to Jo, Jo's loss of confidence in the law/market.

Verena bought a vacuum cleaner that stopped working immediately. "I called the store because I live in a remote community and they said I had to bring it in. When I brought it in they argued it was only a minor fault and they would send it to a repairer. I argued that it was a major fault that no one would purchase it if they knew it would work for five minutes and stop working. It took over five employees and finally speaking to the manager before they finally agreed it was a major fault and replaced it."

Costs incurred: Verena's time spent resolving the problem, travel and petrol costs for Verena in going to the store, staff costs in time spent arguing about the problem, the time Verena spent without a functioning vacuum cleaner.

CHOICE has been alarmed at the enormous lengths some consumers are forced to go to in their attempts to access refunds for clearly faulty goods that failed quickly. Many of these consumers even seek expert assessments at their own cost in order to support their attempts to assert their rights under the ACL:

Jess purchased Doc Marten boots and “after a week one boot’s inner sole collapsed. I had to acquire testimony from a shoe smith”. Jess eventually received a store credit after taking the case to “consumer court”.

Costs incurred: Jess’s time spent resolving the problem, staff costs for the retailer in resolving the problem, time spent by the shoe smith and decision maker, Jess’s time spent without wearable shoes.

Linda bought a mid-range coffee grinder from Harvey Norman which began to smell of burning after using it “about six times (two weeks)”. Linda told us “the shop did not want to know about it at all despite presenting the receipt and faulty equipment”. Linda went to an electrician to find out if the product did have an electrical fault. The electrician confirmed this was the case. “Perseverance and several months were required in order to resolve the issue for a product that was faulty virtually from the start”.

Costs incurred: Linda’s time spent resolving the problem (several months), staff costs for Harvey Norman in resolving the problem, time spent by the electrician assessing the grinder, Linda’s time spent without a functioning coffee grinder.

Denis, a CHOICE member, contacted our CHOICE Help service due to issues with a TV purchase. Denis bought a Panasonic 3D TV in September 2017 from the Good Guys. He specifically purchased Panasonic because he wanted the 3D capabilities and Panasonic is the only company that still makes them. When set up, the TV worked, but the 3D function didn’t. Denis contacted Panasonic, who sent him to a company called Techworkz, who then sent him on to a third company called SEQ Electronics. This third company picked up the TV in early December 2017. For almost two months, Denis could not get any information about what was wrong with his TV, whether it could be repaired, when he was getting it back, or whether he could get a replacement. He made 15 phone calls in total during this period, and then contacted CHOICE’s consumer rights expert advisers in late January. CHOICE contacted Panasonic and explained that Denis was not satisfied that his brand new TV never worked properly and was taken away more than a month ago with no remedy in sight. Panasonic told us they were still waiting for a detailed job report from Techworkz and SEQ Electronics, but agreed to send Denis a new TV. It arrived seven days later.

Costs incurred: Denis’ time spent attempting to resolve the problem, staff costs for Panasonic, Techworkz and SEQ electronics in assessing the problem, transportation costs for moving the TV, time spent by a CHOICE Help consumer lawyer, several months spent without a working TV.

Multiple failures

Products that experience multiple repairable issues are also a common problem for consumers who would prefer not to get stuck in a cycle of repairs on a product that they believe is unreliable. This problem is particularly prevalent in relation to the sale of cars and caravans.

Wayne contacted us in April about a new Fiat 500C purchased for his 17 year old daughter on 14 February 2018 from Sutton's Zetland. On 20 February it had a major breakdown and was towed to a dealership. "After three weeks in the service shop, the car came back... it broke down again the next day. In total since 14 February, we have had a brand new car in our possession for a total six days". Wayne rang the dealer up and asked for a refund, but was denied this. He then rang the manufacturer and told them the car had major mechanical problems that made it unsafe and that he wanted a refund. When Wayne contacted CHOICE, he had made five calls to the manufacturer seeking help. He has not received a refund.

Costs incurred: Costs of being without a car/potential hire car costs for roughly five weeks (\$1840.27)², staff costs for the dealer and repairers in attempting to resolve the problem and fix the car, time spent by Wayne attempting to resolve the problem.

Peter bought a brand new car that "spent at least over three months in the first year of ownership being fixed for 'minor problems'. The computer kept failing, it rattled everywhere, the door liners and seals fell off... I documented everything for the year, had a meeting with sales representative and countless calls with head office". Peter asked for a refund or replacement, but did not receive this. He chose to sell the car at a \$20,000 loss.

Costs incurred: Peter's time spent attempting to resolve the problem (one year), staff costs for the dealer in responding to Peter, repair costs for multiple problems, time spent without a functioning car, \$20,000 loss in selling the car, new car owner's likely costs associated with owning a faulty car.

Addy bought a new VW Golf for \$35,500. "From the minute I drove out of the dealership the gearbox shuddered... the dealer told me the problem wasn't a problem, just the car had to 'get used' to the way I drove". Addy said the problem continued over the next two years, and despite attempts to have it fixed she was continuously denied remedies other than repairs. "I sold it at a \$12,000 loss because I didn't want the headache anymore... apparently there is a known fault

² Note that for Wayne, this would not be a possibility due to his daughter's age. Price estimate is based on renting the cheapest car available on Redspot.com.au for a person aged 21 – 25 (minimum age available). Price checked on 18 April 2018.

with the gearbox they use and it would have cost \$24,000 to replace... you don't expect a major mechanical fault in a brand new car, and they won't admit to it."

Costs incurred: Addy's time spent resolving the problem (on and off over two years), staff costs for the dealer in responding to Addy's complaints, time spent by repairers fixing multiple problems, time spent without a working car, \$12,000 loss in selling the car, new car owner's likely costs associated with owning a faulty car, Addy's loss of confidence in the law/market.

Garry purchased a new Jayco caravan for \$70,000 which suffered multiple failures, causing it to be sent for repairs "ten times in 12 months". Garry paid an engineer \$2065 to assess his caravan and write a report on it, and has appeared at four Tribunal hearings and had the regulator inspect the caravan. "Nearly 12 months later I still don't have a decision... I have had eight gas related issues, eight extra struts placed under the floor, still not fixed, washing machine replaced twice, oven replaced twice, slide out awning replaced three times, handles fall off, drawers fall out whilst travelling, hot water blow up, oven blow up, bulges in external walls, drainage issues, ridges in floor, lights fail, washing machine flooding van, shower door jambs, sliding door fell off, four windows cracked at hinge points, two windows replaced... apart from the \$70,000 purchase price and the \$2065 for the engineer's report, we have travelled 4000km just to have repairs carried out".

Costs incurred: Garry's time spent resolving the problem (a year or more), staff costs for Jayco/the dealership in responding to Garry, time spent by repairers fixing multiple problems, time spent by the Tribunal members and staff in resolving Garry's dispute, travel costs in seeking repairs (4000km), the engineer's time and fee for assessing the problems (\$2065), Garry's time spent without a fully functioning caravan (a year or more).

While problems with cars and caravans were raised by a significant number of consumers contacting CHOICE, the issue of multiple repairs is in no way restricted to just this category of product:

Natalie bought a TV from Kogan, which did not work from the start. "I contacted Kogan for a refund and was refused". Kogan repeatedly instructed Natalie to upgrade the firmware on the TV, which she did several times. Natalie asked again for a refund, stating she felt this was a major defect. Kogan told her the fix was simple, therefore it was not a major defect and Kogan had the right to repair the product. Eventually the TV was taken away for repair, but when it returned it still had the same problem (the TV would power off unexpectedly). Natalie contacted Kogan

a final time to request a refund, and was instructed to again perform a firmware upgrade. Natalie did, but the problem persisted so she threw the TV out.

Costs incurred: Natalie's time spent resolving the problem, staff costs for Kogan in responding to Natalie's complaints, time spent by repairers attempting to fix the problem, Natalie's time without a functioning TV, costs associated with disposing of the faulty TV, presumably the cost of a new TV.

Brad bought a Dell, "which would increasingly have the blue screen of death, until it died altogether. They thought it was a motherboard problem and replaced the motherboard – three times! – without actually fixing the problem... after 16 months of not fixing the problem I raised hell and they finally replaced my lemon. It was a nightmare!".

Costs incurred: Brad's time spent resolving the problem (16 months), staff costs for the retailer in responding to Brad's complaints, time spent by repairers fixing multiple problems/the same problem multiple times, time spent without a fully functional computer.

Shirley spent more than \$2000 on an Oz Tent that was guaranteed not to leak. After the first use, it leaked and Shirley successfully sought a replacement. But then, "the tent went in another three times and on the fourth time I asked for a refund as the tent that was the third replacement leaked. They refused to refund".

Costs incurred: Shirley's time spent attempting to resolve the problem, staff costs for the retailer in responding to Shirley's complaints, time spent without a tent that does not leak, loss of enjoyment during Shirley's camping trips, \$2000 spent on a faulty tent, presumably the cost of a replacement tent.

Mel bought an ASUS laptop from the Good Guys. It would not connect to the internet, so "it was sent back and they put in a new hard-drive and re-imaged it. This is a brand new laptop and it needed a new hard-drive? Still didn't work properly, so sent back again to be re-imaged again... didn't take long before it had the same problem. I had to get Fair Trading involved and without them I would never have gotten a refund. This product was faulty from the very beginning and it took me eight months before I finally got the refund".

Costs incurred: Mel's time spent resolving the problem (eight months), staff costs for the Good Guys in responding to Mel's complaints, costs associated with multiple failed repairs, Fair Trading's staff time, time spent without a functioning laptop.

Tony, a CHOICE member, contacted CHOICE Help about an ASUS laptop he purchased from JB Hi-Fi for \$1589.32. The monitor had a fault beginning approximately two years after purchase – it would go blank, or flash in a way that prevented the screen from being read. JB Hi-Fi sent the laptop away for repairs on three separate occasions over a five month period in 2017. The original fault remains. A temporary replacement laptop was not provided during periods where Tony's laptop was being repaired. Tony has not received an adequate remedy yet.

Costs incurred: Tony's time spent attempting to resolve the problem (nine months and counting), staff costs for JB Hi-Fi in responding to Tony's complaints, costs associated with multiple failed repairs including transportation costs, time spent without a working laptop, time spent by CHOICE Help consumer lawyer in attempting to resolve the problem, presumably cost of a new laptop (if Tony does not receive an appropriate remedy soon).

Cost of resolving problems

As the above case studies demonstrate, pursuing remedies under consumer guarantee law can be an unnecessarily lengthy, costly process. In March 2016, CHOICE published the results of a nationally representative survey examining consumer experiences in the new car market.³ While this research was limited to just the market for new cars, it provides insights into the costs consumers incur when sellers refuse to provide adequate redress to problems. The results of the survey were shocking. Two thirds of all new car buyers experienced problems of some sort with their car in the first five years of ownership. A significant 14% of all survey respondents experienced major problems, defined as 'problems that seriously impaired the car's operation or outright stopped it working'. Of particular relevance to this consultation, 21% of respondents experienced a series of different problems. The time spent and costs incurred in seeking resolutions for these problems was worrying. The total average cost of fixing a problem with a new car was \$1295.25, being comprised of \$858 in direct costs and \$437 in lost wages. On average, people spent 31 hours attempting to seek a resolution to the problem. Costs of hire cars during periods where consumers were without a car were not added to this figure, and neither were the costs associated with seeking help from bodies like Fair Trading or CHOICE.

With problems occurring so frequently, and remedies being provided so grudgingly, reform is needed. When products are particularly expensive, like new cars are, businesses should be held to a high standard in providing remedies when things go wrong. For this reason, CHOICE

³ 15 March 2016, CHOICE, 'Turning lemons into lemonade: consumer experiences in the new car market', available at <https://www.choice.com.au/consumer-advocacy/policy-submissions#reports>

supports Approach 3A in Chapter 2 of the Consultation RIS; consumers should be given a substantial period of time for high value goods, during which period any failure would entitle them to their choice of a remedy. Businesses clearly need more clarity regarding the application of the consumer law, and consumers should be able to rely on their consumer guarantee protections when purchasing expensive items like cars, or high-end electronics and whitegoods. As the Consultation RIS outlines, the majority of problems with cars and electronic goods are identified by consumers in the first six months, making this an appropriate time period for consumers to be entitled to clearer remedies when something goes wrong. Alternatively, we note the approach taken in Holden's recent undertaking to the ACCC. This undertaking states that if a consumer purchases a car that experiences a defect that causes the vehicle to become immobile and no longer driveable within the first 60 days of purchase, the consumer will be entitled to their choice of remedy without needing to prove a major failure of the consumer guarantees has occurred.⁴ Our preference, however, is for any failure to be covered in this period, in order to ensure the law applies to all high-value goods (not just cars) and to limit the opportunity for lengthy disputes to arise over whether a fault has rendered a car 'undriveable'. In our experience, and as the case studies illustrate, if space is left for argument we expect to see similar outcomes to those we see under the current legal framework - lengthy, unnecessary disputes involving expert reports and other costs.

This approach should not cause a significant increase in compliance costs for businesses. High-value goods are expected to last longer than six months in any case. This approach will just add needed clarity to the existing applicable legal framework, reducing time-consuming disputes between businesses and consumers and consequently reducing those associated costs. Behavioural economics also indicates that is unlikely that most consumers will seek refunds for minor, repairable failures. The endowment effect describes the concept that individuals attach higher value to things that they own than things that they don't.⁵ The trend towards online retailers offering very generous returns policies reflects an understanding by business of this – once someone owns something, they tend to want to keep it unless it is substantially faulty. It is a safe business decision to offer blanket change-of-mind refunds, because most people don't change their minds. For those stuck with faulty products, though, there should be a clear pathway to receiving an appropriate, quick remedy – in some cases this will be a refund, and in others it will be a replacement or repair. In all cases, the consumer should be empowered to

⁴ See GM Holden Ltd undertaking to the ACCC dated 2 August 2017, Annexure H, available at <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/gm-holden-ltd-s87b-undertaking>

⁵ June 1979, Thaler, R., 'Towards a Positive Theory of Consumer Choice', available via <http://www.eief.it/butler/files/2009/11/thaler80.pdf>

Also see 23 April 2016, Lebowitz S., 'Here's the psychological reason most people overvalue things they already own', available via <https://www.businessinsider.com.au/endowment-effect-why-people-overvalue-things-2016-4?r=US&IR=T>

choose, if a fault occurs shortly after purchase or if multiple repair attempts have failed to provide the consumer with a properly functioning product.

Recommendations 1 and 2

CHOICE recommends:

- Consumers should be entitled to a refund or replacement if a product experiences any failure in a short period of time (30 days), without having to prove a major failure.
 - This period should be extended to six months for high-value goods.
 - Alternatively, this reform should follow the approach taken in Holden's recent undertaking to the ACCC, and the period should be extended to 60 days for high-value goods.
- Clarify the law to indicate that multiple minor failures can amount to a major failure.
 - Preferably, identify the specific number of minor failures that constitute a major failure. Case studies from consumers indicate that setting the number of minor failures at two or more would best match consumer expectations.

Enhanced disclosure for extended warranties

We receive many complaints through our CHOICE Help consumer advice service from consumers who have purchased an extended warranty and experienced a product failure that is likely to be covered by the consumer guarantees. Subsequently, they have approached the retailer to request a remedy only to be told that the extended warranty does not apply in this particular case due to exclusions in the terms and conditions.

William bought a Fisher & Paykel washing machine from Harvey Norman. He also bought a 60 month extended warranty, called a Product Care Replacement. When the machine was a little over 18 months old, and still covered by the extended warranty, the hot water hose at the back of the machine burst and caused several thousand dollars' worth of damage to William's house. When William tried to make a claim under his extended warranty, he was told the warranty only covered the machine, and not the hoses attached to it. The extended warranty was useless to William; in the end, he relied on his home and contents insurance to cover the damage.

We are aware of some cases where a consumer has attempted to rely on an extended warranty but has been turned back by the retailer. When they have complained about the inadequacy of the warranty, they have been offered a refund for the price of the extended warranty itself,

rather than the faulty product. These and other cases have led CHOICE to the conclusion that the quality of extended warranties offered in Australia is often very low. In many instances, consumers would be better off not buying extended warranties but instead relying solely on their consumer guarantee rights. As things stand, CHOICE advises consumers to find out what an extended warranty will provide, over and above their rights under the ACL. This may require legal research and a close reading of lengthy terms and conditions.

CHOICE believes New Zealand has a more effective solution to this problem. The New Zealand law includes some useful disclosure rules. At the point of purchase, consumers must be provided with a written copy of the extended warranty agreement. The agreement must be in plain language, and importantly, provide a comparison between the consumer guarantee rights and remedies and any additional protections provided under the extended warranty.

We note that the ACCC has already begun experimenting with requiring businesses to include this kind of information through its compliance activities. In late 2016, the ACCC accepted a court enforceable undertaking from Virginia Surety Company, Inc (VSC), which dealt with extended warranties directly. VSC undertook to “engage with retailers to revise extended warranty brochures to include additional information to assist consumers in comparing the features of the extended warranty being sold with the existing remedies available under the ACL”.⁶ CHOICE welcomes this strategic approach to encouraging compliance and market change, but we feel it would be more beneficial if it applied across the entire marketplace, rather than being applied on a case-by-case basis.

Extended warranties are a ubiquitous part of the retail landscape in Australia; CHOICE shadow shops have found nearly all salespeople offer extended warranties to consumers, unprompted. This is likely due to sales incentives or key performance indicators being linked to sales quotas, suggesting just how high-margin extended warranties must be. Adopting the New Zealand model in relation to disclosure will make it much more difficult for businesses to sell low-value, potentially harmful, products to consumers.

We note that cooling-off periods are generally not a useful tool for consumers, particularly in relation to extended warranties.⁷ Consumers tend to find problems with extended warranties

⁶ 8 November 2016, ‘VSC undertakes to help improve extended warranty selling practices’, available at <https://www.accc.gov.au/media-release/vsc-undertakes-to-help-improve-extended-warranty-selling-practices>

⁷ 29 November 2016, Consumer Action Law Centre, Cooling-off periods for consumers don’t work, headline results available at <http://consumeraction.org.au/cooling-off-periods-consumers-dont-work-study/>

after they try to use them in order to receive a remedy for a problem with a physical good. This invariably occurs much later than within 10 days of purchase.

Recommendation 3

CHOICE recommends:

- Implement Option 3 in the Consultation RIS: introduce a disclosure regime coupled with an opt-in process for the sale of extended warranties.

Access to consumer guarantees for goods sold at auction

Under the ACL, “auction” is defined as “a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means)”. This means that many online “auctions” may not actually fall under this definition, and will in fact be covered by the guarantees already. However, this is not clear to many consumers, who are likely to perceive sales made through bidding processes on websites such as eBay as an auction. Even experts find the application of the “auction” exemption to online sales unclear, noting that “whether an online auction, such as those that occur through eBay is actually an auction in accordance with the definition is also unclear”.⁸ As the Consultation RIS discusses, an option for dealing with this confusion is to remove the “sale by auction” exemption for consumer guarantees (see Option 4 in Chapter Four). Removing the exemption would provide clarity to both business and consumers. The rationale for originally including the exemption is that auctions occurred in circumstances where consumers were able to inspect the goods in person before purchasing them. For online sales, this rationale does not apply. More broadly, CHOICE is not convinced that this exemption is necessary even in the context of traditional, in-person auctions. In a situation where a seller stands to profit from selling goods, there should be an obligation on that seller to ensure the goods they are selling are of acceptable quality regardless of whether the goods are sold by auction, online, or in a bricks-and-mortar retail store. Consumers have ample opportunity to inspect goods in bricks-and-mortar stores, but they can still rely on their consumer guarantee rights if they purchase those goods – as well they should.

⁸ See Submission from QUT Commercial and Property Law Research Centre to the Australian Consumer Law Review Draft Report, page 21.

CHOICE has not received a significant volume of inquiries from consumers regarding the application of consumer guarantees to auction sales. A notable exception is in relation to motor vehicles, where we have had consumers contact us in situations where they purchased a vehicle at auction and were unable to access their consumer guarantee rights later when the cars were found to be faulty. These consumers should have access to the same protections as consumers purchasing cars through dealerships.

Recommendation 4

CHOICE recommends:

- Remove the existing exemption for auctions from the consumer guarantees.

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

The Consultation RIS identifies the potential impact that the current threshold of \$40,000 in the definition of 'consumer' may have on small businesses. As a consumer advocacy body that recognises the power imbalance inherent between individual consumers and businesses, CHOICE does not have a remit for assisting or advocating on behalf of small business consumers. As such, we do not have access to case studies highlighting the experience of small businesses. In our experience, the \$40,000 threshold does not pose an issue for individual consumers. When CHOICE members contact us regarding problems with more expensive products, these tend to be caravans, boats and luxury motor vehicles – all of which are covered under the existing definition of 'consumer'.

Having said that, in principle we support raising the threshold. The \$40,000 threshold has not changed since 1986. At an average annual inflation rate of 3.1% since 1986, the change in value of goods is a very substantial 159.9%.⁹ A consumer who purchased a product for \$39,000 in 1986 would have been protected by the law at the time; today the same product would cost roughly \$100,000, leaving them well outside of the threshold and without the benefit of the protections in the ACL (unless the goods were of a kind ordinarily acquired for personal, domestic or household use).

⁹ See the Reserve Bank of Australia's Inflation Calculator, accessed on 16 April 2018, available at <http://www.rba.gov.au/calculator/annualDecimal.html>

Changing the threshold appears likely to primarily benefit small businesses, although we note that given the nature of CHOICE’s work we do not have access to illustrative case study examples. However, it is fair to note that small businesses generally do not have access to the same resources as big businesses. It is reasonable for small businesses to be treated differently to big business, allowing them to rely on the consumer guarantee rights included in the ACL. Changing the threshold does have the potential to positively impact individual consumers, as well. The Law Council of Australia’s Competition and Consumer Committee provided one such example in the review of the Australian Consumer Law. In this case, an injured consumer had purchased a \$50,000 elevator for use in their home. Had this consumer purchased an equivalent product in 1986, adjusting for inflation it would have cost a bit less than \$20,000, meaning they would have been able to rely on the consumer guarantee protections. CHOICE expects that examples like this will increase in frequency as markets evolve. Taking into account changes in inflation and the cost of goods since 1986, it is entirely reasonable to increase the threshold and also link it to the Consumer Price Index. As a starting point, increasing the threshold to \$100,000 would adequately bridge the inflation gap from 1986, and bring the law up to date.

While it may be outside of the scope of this consultation, we would also note that some individual consumers do experience difficulties enforcing their consumer guarantee rights in relation to more expensive goods. This is not because they are not covered by the ACL, but because tribunal ceilings are often set too low to enable consumers to affordably bring actions relating to more expensive goods.

Table 1: Consumer claim limits in state and territory courts and tribunals

State/Territory	Court/Tribunal	Consumer claim limit
VIC	VCAT	Any value
NSW	NCAT	Up to the value of \$40,000
NT	NTCAT	Up to \$25,000
QLD	QCAT	Up to \$25,000
ACT	ACAT	Up to \$25,000
WA	Magistrate’s Court	Any value

SA	Magistrate’s Court	Minor claims – up to \$12,000
TAS	Magistrate’s Court	Minor claims – up to \$5000

A further problem in enforcing consumer guarantee rights at the tribunal level can be seen when products are purchased in one state or territory by a consumer living in a different state or territory. This is a particular problem for consumers living in towns near borders. Defining tribunals as courts would assist in resolving this problem. As things currently stand, of all the tribunals only QCAT falls under this definition.

Recommendations 5 - 7

CHOICE recommends the following to assist consumers who purchase goods worth more than \$40,000:

- Raise the threshold for the definition of ‘consumer’ from \$40,000 to \$100,000.
 - Apply indexation, provided a cost-benefit analysis supports this option.
- Raise the tribunal ceilings for consistency and to reflect the new, higher threshold for the definition of ‘consumer’.
- Define tribunals as Courts, to enable easier and more affordable resolution of cross-border consumer guarantee disputes.