

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

Legal Aid NSW submission to  
Consumer Affairs Australia and New  
Zealand

*April 2018*

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**Legal Aid**   
NEW SOUTH WALES

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access

to essential social services. Consumer issues constitute the largest category of service for our Civil Law Division, with 4,962 advice and 3,568 minor assistance services provided in the 2016/2017 financial year in areas such as credit, debt, motor vehicles, essential services, insurance and mortgage hardship. Legal Aid NSW, in conjunction with the NSW Civil and Administrative Tribunal (NCAT), is facilitating a pilot duty advice service in the General Consumer and Motor Vehicle list at the Sydney and Penrith Registries of NCAT.

Legal Aid NSW welcomes the opportunity to make a submission to Consumer Affairs Australia and New Zealand regarding the Consultation Regulation Impact Statement. Should you require any further information, please contact

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## Introduction

Thank you for the opportunity to comment on the Consultation Regulation Impact Statement (**Consultation RIS**), which contains proposals relating to the consumer guarantee regime under the Australian Consumer Law (**the ACL**).

This submission focuses on Chapter 1, 2 and 3 of the Consultation RIS and provides views based on our casework experience assisting consumers.

## Chapter 1: Increase the threshold in the definition of “consumer” from \$40,000 to \$100,000

Legal Aid NSW supports Option 2: ‘Increase the threshold in the definition of consumer from \$40,000 to \$100,000’. This reform would promote the policy objective of ensuring that the ACL continues to be fit for purpose and continues to protect individual and small business consumers when purchasing goods or services not ordinarily acquired for personal, domestic or household use.

The increased threshold would restore the real value of the threshold and achieve parity with the protection available when the current threshold was established in 1986.

Legal Aid NSW agrees with the contention in the Consultation RIS that, as only the threshold amount will increase, and the law is otherwise unaffected, the costs associated with compliance may be minimal.<sup>1</sup>

## Chapter 2: Clarifying the consumer guarantees

### Failure within a short period of time

Legal Aid NSW supports Option 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, with a proposed period of 30 days’.

Currently, if a product or service fails, the remedy depends on whether the failure is defined as ‘major’. If a failure is major, consumers can choose a refund or replacement. If a failure is non-major, traders can choose the remedy, including repair.

However, if there is a dispute about whether a failure is major, consumers must spend time and money obtaining expert evidence, usually in the form of a written report, to establish a major failure has occurred.

Option 2 would eliminate these expenses if the failure occurs within 30 days. This option is also significantly less complicated than the current regime. It is likely that it will be easier for consumers to understand this provision and to exercise their rights under the ACL.

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<sup>1</sup> Consumer Affairs Australia and New Zealand (**CAANZ**) Consultation RIS [44].

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Information could be presented to consumers and traders in a straightforward manner, for example, 'Failure within 30 days of purchase = refund or replacement'.

Option 2 also:

- provides certainty for consumers and traders. It is likely to lead to faster resolution of disputes if it is not necessary to pursue a matter through a tribunal or a court, and
- protects consumers by giving them the choice to retain the goods if they wish and seek a repair. They also retain the right to reject the goods after a major failure and seek a remedy under the consumer guarantees, outside the 30 day period.

The case studies of Alex and Peter, below, demonstrate the difficulties encountered when traders refuse to acknowledge failure that occurs within 30 days. Had the consumer been able to take the goods back to the retailer within 30 days and been provided with a refund or replacement, they would have avoided the cost and loss of productivity associated with a lengthy consumer dispute, which included Tribunal proceedings.

#### ***Case Study – Alex***

Alex bought a new motor scooter in 2017. Within days of the purchase the motor scooter was regularly breaking down and would not start. Alex complained to the retailer and explained that the motor scooter had never worked properly. The retailer attempted to repair the motor scooter on four occasions, without success. Alex spent 11 months attempting to have the motor scooter repaired. Alex incurred the costs associated with taking the motor scooter back and forth for repair and the cost of not having transport during that time. Alex finally sought to reject the motor scooter and sought a refund. The retailer refused and Alex took the matter to the Tribunal.

#### ***Case Study – Peter***

Peter bought a wooden outdoor lounge chair for \$1,000. Peter had made known to the retailer that the chair would be in full sun, uncovered and he wanted a low maintenance product that would look good. The retailer recommended a particular chair and assured Peter it was made with high quality materials, required no maintenance and would last in the conditions Peter had described. Within one month of purchase the chair had developed black marks, the wood had started to disintegrate and the appearance of the chair was so poor that Peter put a cover over it. Peter spent 12 months attempting to resolve the matter with the retailer. The retailer confirmed that the chair could not be repaired. Peter sought a refund from the retailer which was refused, and eventually he took the matter to the Tribunal.

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We do not support Option 3b (an exemption for high value goods). This option would create further complexity, and would create serious disadvantage for consumers of high value goods that fail within 30 days of purchase.

## Multiple failures

Legal Aid NSW supports Option 2: 'Clarify that multiple non-major failures can amount to a major failure'. As the Consultation RIS notes, the law is currently unclear about whether multiple non-major failures can collectively be considered a major failure.<sup>2</sup> We are concerned that a lack of clarity on this issue can lead to confusion and frustration for consumers.

In NSW, consumers are encouraged to bring consumer disputes to the NSW Civil and Administrative Tribunal (**NCAT**), where there are no legal representatives without leave. As consumers are usually representing themselves, it is essential for the ACL to provide clear guidance to consumers and traders regarding their rights and the remedies available. Clarification that multiple non-major failures amount to a major failure could make Tribunal proceedings shorter or avoid them altogether. Consumers may also save time and money, as they may avoid the need to obtain expensive expert reports.

As the case study of Harriet, below, illustrates, it is important that the ACL provide that all failures to meet the consumer guarantees would be considered in the assessment of 'multiple failures', not just those related to another failure or subject to attempts to repair. In Harriet's case, both the engine and the gearbox were faulty, and the failures were potentially unrelated, but the dealer only attempted to repair the gearbox.

### ***Case Study – Harriet***

Harriet purchased a second hand car from a car dealer for approximately \$15,000. Within two months Harriet began to experience problems with the car, namely that the engine would stop unexpectedly. Harriet returned to the car dealer who made multiple attempts to fix the problem. After each repair the car worked for a period of time but then the same problem re-occurred. Harriet paid for an inspection by an independent mechanic who advised there were significant faults with the gearbox and that the car was unsafe to drive. Harriet returned to the car dealer and sought to reject the car and seek a refund. The car dealer refused a refund and instead replaced the gearbox.

Within a matter of weeks, the same problem with the engine occurred. Harriet returned to the car dealer who refused to accept there was anything substantially wrong with the car and instead fitted another gearbox. After the last repair, the car still did not work properly and Harriet noticed the same rattling sound in the engine which always

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<sup>2</sup> Consultation RIS p 2-28.

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preceded a breakdown. Harriet returned to the car dealer again to reject the car and seek a refund. The car dealer refused and Harriet applied to the Tribunal.

At the Tribunal the car dealer said that, as the car was currently working, they would not agree to a refund. Harriet was advised by the Tribunal that she needed evidence of the car's current problems in order to proceed. Harriet attempted to obtain a report from an independent mechanic detailing the history of faults and multiple repairs and an assessment that the car was likely to continue to breakdown. However, Harriet was unable to find a mechanic willing to prepare such a report about the history of repairs and likely future problems. Harriet was faced with having to either withdraw her application to the Tribunal, wait for the car to breakdown and then commence fresh proceedings, or proceed with the hearing without the evidence that the Tribunal had required her to submit.

A further advantage of Option 2 is that it may prevent consumers being trapped in a cycle of repeat repairs. This was the experience of Jade and Wayne, below.

We are concerned that Option 3, which would prescribe a set number of non-major failures that amount to major failure, would not effectively avoid this outcome. Option 2 leaves flexibility for tribunals or courts to consider each matter on a case by case basis, and consider all the relevant factors.

#### ***Case Study – Jade***

Jade purchased a second hand car from a car dealer. Jade noticed a problem with the brakes consistently shuddering. Within a period of 12 months Jade had taken the car to be repaired on six separate occasions. After each repair the car worked for a period of time but then the brakes started shuddering again. Jade had sought to reject the car and seek a refund however the car dealer refused, as the car was currently working. Jade then applied to the Tribunal but was faced with having to establish a major failure, ideally with expert evidence, at a time when the car was working.

#### ***Case Study – Wayne***

Wayne purchased a computer specifically to use for computer gaming. The computer did not work properly and Wayne returned to the retailer on two occasions to have the computer repaired. After the second repair attempt, Wayne was still unable to play computer games on the computer. Wayne returned to the retailer for a third time and the retailer advised that they did not believe there was a problem and demanded that Wayne collect the computer. Wayne requested a replacement or a refund, which the retailer refused. Wayne then lodged a claim in the Tribunal.

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The Option 2 proposal would make it easier for the consumers in the above case studies to establish a major failure, as they could rely on the documented repair attempts as evidence of this. It could also reduce the need for the consumer to pay for an expert report.

Legal Aid NSW agrees with the Consultation RIS that the compliance costs of Option 2 are likely to be minor, because Option 2 reflects the legislative intent of the ACL and existing regulator interpretation.

### Chapter 3: Enhanced disclosure for extended warranties

Legal Aid NSW supports Option 3: 'Oral and written disclosure with an opt-in process. That is, a requirement for consumers to confirm the extended warranty after a specified period'.

We consider that where an extended warranty represents very little or no value to consumers, these products should not be offered to consumers at all. We note our comments in our submission to Treasury's Design and Distribution and Product Intervention Power Proposals Paper<sup>3</sup> that insurers, including warranty providers where the product amounts to a contract of insurance, should be required to design products that meet the needs of a clearly identified target market, and that provide a tangible benefit for these consumers at reasonable value. Insurers and distributors should ensure that their products do not reach consumers for whom they are ill-suited and offer little benefit.

However, if extended warranties are to be sold to consumers, Legal Aid NSW supports Option 3, a disclosure regime and an opt-in process regarding sales of extended warranties.

In our casework experience we have observed significant risks to some consumers in purchasing extended warranties. In particular, because cover under these products often commences only after the manufacturer's warranty ends, they typically represent little, if any, value to consumers. This is illustrated by the case of Daniel below.

#### ***Case Study – Daniel***

Daniel purchased a second hand vehicle from a car dealership. At the point of sale, Daniel was told that he should purchase an extended warranty to protect him in case the car breaks down. Daniel initially said that he did not want the warranty, but the sales person told him that he would regret it if his car broke down, so he agreed to purchase the insurance at a significant cost.

Daniel was not told that the warranty that he purchased would not come into effect for seven years. Three years later, Daniel sold the car, at which point the car was still under

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<sup>3</sup> Legal Aid NSW submission to the Treasury, *Design and Distribution Obligations and Product Intervention Power*, March 2017.

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the manufacturer's warranty. Daniel lost money paying the premium for this product before he was even entitled to make a claim under it.

## Disclosure regime

Should Option 3 be adopted, we consider that the written agreement provided should be user-tested and written in plain English. In addition to the features already proposed to be included in the agreement, it should also provide:

- notice to the consumer that they are not required to purchase an extended warranty in order to buy the goods
- information about the recent claims ratio for the warranty
- information about the commissions that the intermediary receives from the insurer or warranty provider
- the total cost of the product, including a worked example of what the consumer would pay with and without the extended warranty
- links to Moneysmart calculators so the consumer can calculate the costs of products
- information about referrals to financial counsellors and legal advice, including Legal Aid NSW and community legal centres, and
- where the product is an extended warranty purchased for a car, a clear statement about any applicable state-based motor dealer legislation, in addition to the consumer's rights under the ACL.

## Opt-in process

The opt-in process proposed in Option 3 would ensure that only consumers who genuinely wish to proceed with the sale are obliged to do so.

Legal Aid NSW suggests that the opt-in mechanism could be modelled on the approach now taken with regard to VET FEE-HELP loans, where students who have enrolled in a course are not permitted to apply for a loan for two days after enrolling.

The opt-in mechanism for extended warranties should allow the consumer two days to consider the purchase. There should then be a five-day period during which the consumer can opt in to the sale. Neither the trader, warranty provider nor any other related entity should be permitted to contact the consumer during the seven-day period. The trader should bear the costs of termination of the contract if the consumer does not opt in.