

7 February 2022

Director
Consumer Policy and Currency Unit
Market Conduct Division
The Treasury
Australian Government
consumerlaw@treasury.gov.au

Dear Director

Consultation Regulation Impact Statement: Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law

Legal Aid NSW welcomes the opportunity to provide feedback to the Treasury on the Consultation Regulation Impact Statement on improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law.

Legal Aid NSW's feedback is informed by the legal services we provide to consumers in NSW, including our direct casework experience. We advise and assist a range of consumers, including those living in metropolitan, regional or remote communities, Aboriginal and Torres Strait Islander people, people from a culturally and linguistically diverse background, people living with a disability, people experiencing vulnerability and socially and economically disadvantaged people.

We provide below our comments in response to key questions in the Consultation Regulation Impact Statement.

PART A: Receiving remedies

Question 1: 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.

Legal Aid NSW provides advice and assistance on accessing consumer guarantee remedies under the Australian Consumer Law.

Consumer Law is a core area of our civil practice. In the 2020–21 financial year, of the top five matter types that Legal Aid NSW provided advice about, consumer goods and services ranked third. To date, in the 2021–22 financial year, it is ranked second.

In the past three financial years, Legal Aid NSW delivered 5,893 legal advices about consumer goods and services; almost one fifth of those related to motor vehicle purchases and services.¹ The table below provides a breakdown of the data per financial year. We note that the onset of COVID-19 correlated with a drop in our service numbers across most matter types.

Financial year	Number of legal advices delivered by Legal Aid NSW about consumer goods and services	Number of those legal advices that related to motor vehicle purchases and services
2018–19	2,298	408
2019–20	1,996	343
2020–21	1,599	375
Total	5,893	1,126

In broad terms, consumers generally approach Legal Aid NSW for legal advice after they have unsuccessfully attempted to resolve their matter with the trader/supplier and after they have contacted NSW Fair Trading. From our experience, many consumers are ultimately unable to access a consumer guarantee remedy due to the complexity of commencing legal proceedings as a self-represented applicant in the NSW Civil and Administrative Tribunal (**NCAT**), the time required to undertake the proceedings, and the difficulty and cost of obtaining independent expert reports of a suitable evidentiary standard such that they will be accepted by the Tribunal.

Question 3: Do you have any information or data to support the view consumers are ‘gaming’ the system to obtain replacement new motor vehicles or refunds?

Whilst Legal Aid NSW has more limited exposure to consumers who have purchased new motor vehicles, our experience of consumers seeking a replacement motor vehicle or refund indicates that consumers are unlikely to be “gaming” the system.

Among other factors, there is a significant power imbalance between an individual consumer and a car supplier/manufacture, which presents a challenge for the consumer from the outset. The financial, physical and emotional costs of pursuing a consumer guarantee remedy up to and including tribunal or court proceedings are disproportionately borne by the consumer. In addition, consumers face difficulties in obtaining technical expert evidence, which is less of a burden for the car supplier/manufacture. We are aware of instances of mechanics being reluctant to

¹ This includes both new and used motor vehicles.

provide reports adverse to major car manufacturers, due to a concern it may have consequences for the mechanic's ongoing business.

Question 11: Have you experienced issues with a trader not agreeing to provide your requested remedy for a major failure? If yes, please provide details. For example, what were the circumstances, including the types of goods or services involved, the nature of the problems experienced with the goods or services and how the trader dealt with your issue?

Question 12: If you have experienced issues where a trader has offered to repair rather than refund or replace a good with a major failure:

- a. What direct financial costs did you incur during the period the good was being repaired (for example, visiting the retailer, taking the matter to a court or tribunal, or hiring a replacement for the good)?
- b. How much time did you spend dropping off the good for repair, collecting the repaired good and/or negotiating with the trader?
- c. Have you had different experiences with lower value goods (for example, toaster, kettle) than with higher value goods (for example, a white good or motor vehicle)?

We have experienced issues with traders failing to repair motor vehicles following a major failure to comply with the consumer guarantees, significant delays with repairs, and our clients incurring direct financial costs during the process. The following case study illustrates these issues experienced by one of our clients.

Tiffany's story²

Tiffany is a young single mother with two young children. She lives in regional NSW and has limited financial means.

Tiffany was looking for a safe and reliable car for her family and found a second-hand Kia for sale at a car dealership in Sydney. Tiffany attended the car dealership, traded in her existing car, and purchased the Kia for \$14,990. She was advised by the car dealer that the car was in "good condition". She did not have an opportunity to test drive the car.

While driving the car home, Tiffany noticed that each time she applied the brakes the car would shudder and vibrate. The car also made a knocking sound. She could not drive at more than 80 kilometres per hour for fear that the car would break down.

² This case study has been de-identified.

Tiffany contacted the car dealer the next day to try to resolve the matter. She engaged in a lengthy text message exchange with the car dealer, who acknowledged that there were problems with the car. The car dealer requested that Tiffany obtain assessments and quotes to repair the car.

Tiffany spent time ringing various mechanics and, two weeks after the car purchase, paid \$130 for an inspection and repair report from a mechanic. Tiffany was advised that the car was unsafe due to suspension problems, which would cost approximately \$6,000 to fix.

Tiffany engaged in further exchanges with the car dealer, who eventually agreed to collect the car from her a week later and take it back to Sydney for repair.

The car remained in Sydney for nearly seven weeks and Tiffany regularly contacted the car dealer for updates on the progress of the repairs. Tiffany was informed by the car dealer that the car was fixed, and she paid \$500 to have the car transported back to her home.

Tiffany discovered that the car was not repaired, and experienced the same problems as before. The mechanic who previously inspected the car advised her that the car was in a worse condition, was still unsafe, and would be expensive to repair.

Tiffany then commenced proceedings in NCAT against the car dealer, claiming that the car was defective and unsafe, and that there had been a major failure to comply with the consumer guarantee as to acceptable quality. She sought to reject the goods and obtain a full refund of the purchase price.

Tiffany took the car to another mechanic and paid \$160 for an inspection and repair report.

Tiffany found the process of conducting the matter at NCAT by herself overwhelming, and was granted leave to be legally represented.

Tiffany then paid to have the car towed to another mechanic for an inspection, safety check and preparation of an expert report for the NCAT proceedings, at a cost of approximately \$500.

Tiffany has not had a reliable car for over eight months, and has been unable to drive the car at all for the past five months. The matter is still progressing, six months after proceedings were commenced.

Question 14: Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?

Yes. The introduction of a civil prohibition would be a positive step to strengthen consumer protections under the Australian Consumer Law. Enforcement of a civil prohibition by the regulators could act as an effective deterrent against traders failing to provide a consumer guarantee remedy to consumers who are entitled to one. It may encourage the early resolution of disputes and reduce the need for consumers to undertake proceedings in courts and tribunals.

Thank you again for the opportunity to provide feedback to this consultation. If you have any questions or would like to discuss this matter further, please contact [REDACTED], [REDACTED], [REDACTED] on [REDACTED] or at [REDACTED].

Yours sincerely

Monique Hitter
Acting Chief Executive Officer