



**Australian
Competition &
Consumer
Commission**

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31 October 2014

Mr David Stephens
Director – Regulatory Policy Reform
Surface Transport Policy Division
Department of Infrastructure and Regional Development

Sent electronically: MVSAreview@infrastructure.gov.au

Dear Mr Stephens

Re: 2014 Review of the Motor Vehicle Standards Act 1989

The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to make a submission to the Department of Infrastructure and Regional Development Options Discussion Paper for the 2014 Review of the *Motor Vehicle Standards Act 1989* (**MVSA**).

The ACCC supports the reduction of barriers for the parallel importation of new and quality used vehicles. There are a number of significant benefits which would likely flow from easing restrictions on the parallel importation of vehicles including increased competition, greater consumer choice and ultimately lower priced vehicles, as evidenced by New Zealand's experience.

We believe there are potential safety issues, but they can be addressed appropriately through relevant regulatory and compliance frameworks and consumer education and business engagement. In progressing the proposed options, we believe that parallel importation will raise some complex issues for consumers requiring significant consumer education.

The ACCC supports strengthening the MVSA recall powers, so that the Minister for Infrastructure has clearer responsibility for all vehicle recalls and for how they are conducted, without reliance on the Australian Consumer Law (ACL) recall provisions and without reliance on intervention by the ACCC or its staff in administering vehicle safety.

This submission sets out the ACCC's role as a regulator in administering the ACL in conjunction with State and Territory fair trading agencies and sets out our observations on how the ACL framework is likely to apply in an environment where consumers have the capacity to parallel import vehicles. Specifically, this submission sets out the framework in relation to consumer guarantees (in fitness for purpose, acceptable quality, repairs and spare parts, express warranties), provides a discussion on benefits of parallel importation including increased competition and reduced vehicle prices as evidenced by New Zealand and the operation of the vehicle recall provisions.

Should you wish to discuss any matters of this submission, please do not hesitate to contact Mr Ian Lawrence by phone (02) 6243 1058 or email ian.lawrence@accc.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marcus Bezzi', written in a cursive style.

Marcus Bezzi

Executive General Manager Competition Enforcement

1. Role of the ACCC

The ACCC is an independent statutory authority responsible for enforcing compliance with the *Competition and Consumer Act 2010 (CCA)* and the Australian Consumer Law (**ACL**) contained in Schedule 2 of the CCA. The ACL is a single, national law covering consumer protection and fair trading laws and is enforced by the ACCC, and State and Territory fair trading regulators.

The purpose of the CCA is to enhance the welfare of Australians by promoting fair trading, competition and the provision of consumer protections. The CCA provides protection to consumers through a range of controls including consumer guarantees to ensure goods are fit for purpose and of acceptable quality and prohibits businesses from engaging in misleading conduct, unconscionable conduct, or making false representations.

The CCA also provides protection for consumers through its product safety framework, which regulates the mandatory reporting of deaths and injuries, mandatory notification of recalls, compulsory recall powers, and mandatory safety and information standards and bans.

2. Increasing Competition and Reducing Prices through Parallel Importation

The ACCC supports the reduction of barriers to the parallel importation of new and quality used vehicles, with, potential safety issues addressed appropriately through relevant regulatory and compliance frameworks, consumer education, and business engagement.

Parallel importation provides alternative sources of goods, which can promote competition, provide consumers with lower cost products, and improve the international competitiveness of user industries.¹ Empirical research conducted on New Zealand's economy found that the removal of parallel import restrictions on vehicles provided net economic benefits, which tended to reduce consumer prices and increase competition.² Academic research provided to the New Zealand Government found that parallel importation was a factor in the reduction of vehicle prices in New Zealand and provided positive benefits for the economy.³ On this basis, we expect similar economic benefits to occur in Australia.

¹ Reinventing Australia's Competition Policy: ACCC Submission to the Competition Policy Review, ACCC submission to Harper Review, <http://accg.gov.au/about-us/consultations-submissions/accg-submissions#competition-policy-review> p60.

² Deloitte Access Economics, The Costs and Benefits of Preventing Parallel Imports into New Zealand, Report commissioned by the New Zealand Minister of Economic Development (27 Feb 2012) pp15, 46.

³ New Zealand Institute of Economic Research (1998), Parallel Importing: A Theoretical and Empirical Investigation, Report to the Ministry of Commerce, Working Paper 98/4.

3. Consumer Guarantees

The ACL provides consumers with a range of guarantees when they purchase a new or used vehicle, which cannot be excluded, even by agreement:

1. Suppliers and manufacturers guarantee that vehicles are of acceptable quality.
2. Suppliers guarantee that vehicles will be reasonably fit for any purpose the consumer or supplier has specified.
3. Suppliers and manufacturers guarantee that their description of vehicles is accurate (for example, in a catalogue or television commercial).
4. Suppliers guarantee that vehicles will match any sample or demonstration model.
5. Suppliers and manufacturers guarantee that vehicles will satisfy any extra promises – or 'express warranties' – made about them.
6. Suppliers guarantee they have the right to sell the vehicle (clear title), unless they alerted the consumer before the sale that they had 'limited title'. Note that licensing laws in some states or territories may require vehicle traders to guarantee clear title.
7. Suppliers guarantee 'undisturbed possession' or that no one will try to repossess or take back the vehicle, or prevent the consumer using it, except in certain circumstances.
8. Suppliers guarantee that vehicles are free of any hidden securities or charges and will remain so, except in certain circumstances.
9. Manufacturers or importers guarantee they will take reasonable steps to make spare parts and repair facilities available for a reasonable time after purchase.

The ACL consumer guarantees regime applies to goods supplied to a 'consumer', which includes new and used vehicles purchased under \$40,000 or vehicles above this amount if they are bought for personal, domestic or household use. Further, vehicles or trailers

acquired primarily for use in the transportation of goods on public roads are covered by consumer guarantees irrespective of cost.⁴

It is important to note that vehicles bought at auction are only covered by the guarantees as to title, undisturbed possession and undisclosed securities.⁵ This applies equally for vehicles purchased through an auction in Australia as it does to an auction overseas. This is particularly relevant given use of auction houses appears to be the main method adopted by New Zealand in parallel importing vehicles. It is on this basis, we expect that if an Australian consumer purchased a parallel imported vehicle the consumer guarantee provisions would be primarily confined to sales involving vehicles parallel imported by independent local vehicle dealers. That is, most of the consumer guarantees would not apply in situations where the vehicle was purchased at auction.

For more information on how consumer guarantees apply specifically in relation to vehicles please see: [Motor vehicle sales and repairs: An industry guide to the Australian Consumer Law \(Attachment A\)](#).

4. Remedies Available

The type of remedy available to the consumer depends on the circumstances and may include a repair, replacement, refund, compensation for damages and loss, or having the service performed again. It is important to note that for vehicles the fault must go beyond regular wear and tear expected from day-to-day driving e.g. where a car accelerates uncontrollably rendering it inoperable.

For more detailed information on the operation of consumer guarantees, please see the [Consumer Guarantees: A guide for businesses and legal practitioners \(Attachment B\)](#).

5. Vehicle Recall Provisions under the ACL

Vehicle suppliers may initiate voluntary recall of vehicles where they become aware of safety issues or non-compliance with Australian Design Rules (ADRs). Compulsory recalls may be ordered in instances where the relevant consumer Minister is satisfied under the ACL that:

- the vehicle was supplied in trade or commerce

⁴ ACL, s3 provides the meaning of 'consumer'.

⁵ However, implied warranties under state and territory sale of goods legislation may apply to auction sale contracts, unless excluded by the contract.

- is a 'consumer good'⁶,
- can be shown not to comply with a ban or mandatory safety requirement (which includes the ADRs) or presents an unacceptable safety risk, and
- where that supplier has not taken satisfactory action to prevent the goods causing injury to a person (for example, initiated an effective voluntary recall).

The purpose of a recall is to prevent injury by removing the source of the hazard and to remedy the hazard by repair, replacement or refund. Recalls are an appropriate remedy for unsafe vehicles brought into Australia via either mainstream or parallel importation by an Australian business. The ACL recall provisions make no distinction between importer, wholesaler or retailer – they are all 'suppliers' when it comes to recalls. This means that any 'supplier' in the supply-chain can be considered a potential recaller for the unsafe vehicle they have sold. A recalled vehicle is not automatically considered 'unsafe' for the purposes of failing the guarantee of acceptable quality under the consumer guarantees.

In practice, the recall provisions may be difficult to apply in relation to parallel imported vehicles because there may be no local 'supplier'. Other mechanisms to address the safety of such vehicles via state and territory vehicle registration frameworks may be possible, noting that in the event of a recall, the consumer may be required to bear the cost of addressing the problem. This also highlights the importance of education regarding the possible implications for consumers of the parallel importation of a vehicle that may be subject to a recall.

The ACCC also supports strengthening the MVSA recall powers, so that the Minister for Infrastructure has clearer responsibility for all vehicle recalls (including for commercial vehicles that are not 'consumer goods') and for how they are conducted, without reliance on the ACL recall provisions and without reliance on intervention by the ACCC or its staff in administering vehicle safety.

6. Consumer Education and Business Engagement

There are many potential economic benefits to be reaped in Australia should barriers to the personal importation of vehicles be reduced, but this may raise some complex issues for both consumers and businesses. The protections available to consumers under the ACL will vary significantly depending on how the consumer purchases the parallel imported vehicle

⁶ ACL, s2.

(e.g. a foreign auction house compared to an Australian supplier). As a matter of practice, consumers are likely to encounter some complications in enforcing their statutory consumer rights against a foreign business.

Currently, where a consumer purchases a vehicle from an Australian business there are mechanisms in place to advise consumers of a recall. If parallel imports are to be progressed, consideration should be given to how the recalls framework should operate for vehicles supplied by a foreign business. We believe potential safety issues can be appropriately addressed through relevant regulatory and compliance frameworks, consumer education and business engagement. As an example, the New Zealand Government alerts consumers of the need to check for vehicle recalls before making their purchase and to be aware of the risks that their vehicle may become subject to a recall for the life of the vehicle.

In this context, ongoing consumer education and businesses engagement will be a vital in addressing potential issues that may arise from information asymmetries. It is important for both consumers and businesses, whether located in Australia or overseas to be aware of their rights, responsibilities and obligations under the ACL, state and territory regulations and safety laws in importing/exporting vehicles to Australia.

Australian Competition and Consumer Commission

31 October 2014

Attachment A: [Motor vehicle sales and repairs: An industry guide to the Australian Consumer Law](#)

Motor vehicle sales and repairs

An industry guide to the Australian Consumer Law



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

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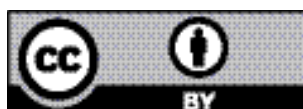
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Introduction

The Australian Consumer Law (ACL) is Australia's national consumer law, replacing previous consumer protection laws in the Commonwealth, states and territories. The ACL applies at the Commonwealth level and in each state and territory.

This guide provides information on the ACL for the motor car and motorcycle sales and repair industries.

It covers issues about which industry bodies have requested more detailed guidance and which consumers have frequently reported to national, state and territory consumer protection agencies.

This information will be relevant to:

- > licensed motor vehicle traders (including of cars and motorcycles)
- > mechanics and repair shops
- > motor vehicle manufacturers
- > motor vehicle industry associations.

The guide's main focus is on consumer issues related to defects and failures (both one-off and repeated) in new and used motor vehicles.

In particular, it provides guidance on the legal rights and obligations created by consumer guarantees provided by the ACL. Remedies are available when motor vehicles do not meet the consumer guarantees in a way that is a:

- > major failure
- > minor failure that cannot be fixed, or
- > minor failure that can be fixed but is not fixed within a reasonable time.

What is not in this guide

This guide gives general information and examples – not legal advice or a definitive list of situations where the ACL applies. You should not rely on this guide for complete information on all your obligations under the ACL.

In addition, this guide does not cover your obligations under state and territory motor car trader licensing laws.

Other ACL guides and information

This guide supplements the ACL guides for business and legal practitioners, available from consumerlaw.gov.au:

- > Consumer guarantees
- > Sales practices
- > Avoiding unfair business practices
- > A guide to unfair contract terms law
- > Compliance and enforcement: how regulators enforce the Australian Consumer Law
- > Product safety.

For more information, view:

Australian Consumer Law website
consumerlaw.gov.au

Australian Competition & Consumer Commission (ACCC)
acc.gov.au

State and territory consumer protection agencies

Australian Capital Territory: Office of Regulatory Services
ors.act.gov.au

New South Wales: Fair Trading
fairtrading.nsw.gov.au

Northern Territory: Consumer Affairs
consumeraffairs.nt.gov.au

Queensland: Office of Fair Trading
fairtrading.qld.gov.au

South Australia: Consumer and Business Services
cbs.sa.gov.au

Tasmania: Consumer Affairs and Fair Trading
consumer.tas.gov.au

Victoria: Consumer Affairs Victoria
consumer.vic.gov.au

Western Australia: Department of Commerce
commerce.wa.gov.au

Terminology

For the purposes of this guide:

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells products or services to a consumer.

A **manufacturer** is a person or business that makes or puts products together or has their name on the products. It includes the importer, if the maker does not have an office in Australia.

Trade or commerce means in the course of a supplier's or manufacturer's business or professional activity, including a not-for-profit business or activity.

A **consumer** is a person who buys any of the following:

- > any type of products or services costing up to \$40,000 (or any other amount set by the ACL in future) – for example, a small car or vehicle repairs
- > a vehicle or trailer used mainly to transport goods on public roads. The cost of the vehicle or trailer is irrelevant
- > products or services costing more than \$40,000, which are normally used for personal, domestic or household purposes – for example, a large car or caravan.

A person is **not** a consumer if they buy products to:

- > on-sell or resupply
- > use, as part of a business, to:
 - » manufacture or produce something else (for example, as an ingredient)
 - » repair or otherwise use on other goods or fixtures.

Motor vehicle is used in this guide to refer to both motor cars and motorcycles.

Major failure and **minor failure** refer to failures to comply with consumer guarantees. The ACL does not use the term 'minor'; it only makes reference to a failure that is 'major' and 'not major'. However, throughout this guide the term 'minor failure' is used for simplicity and will apply to circumstances where a failure will not be major.

A **representation** is a statement or claim.

Consumer guarantees on motor vehicles

Under the ACL, there are nine consumer guarantees that apply to new and used motor vehicles sold to a consumer:

1. Suppliers and manufacturers guarantee that motor vehicles are of acceptable quality
2. A supplier guarantees that motor vehicles will be reasonably fit for any purpose the consumer or supplier has specified
3. Suppliers and manufacturers guarantee that their description of motor vehicles (for example, in a catalogue or television commercial) is accurate
4. A supplier guarantees that motor vehicles will match any sample or demonstration model
5. Suppliers and manufacturers guarantee that motor vehicles will satisfy any extra promises – or 'express warranties' – made about them
6. A supplier guarantees they have the right to sell the motor vehicle (clear title), unless they alerted the consumer before the sale that they had 'limited title'. Note that licensing laws in some states or territories may require motor car traders to guarantee clear title
7. A supplier guarantees 'undisturbed possession' or that no one will try to repossess or take back motor vehicles, or prevent the consumer using them, except in certain circumstances
8. A supplier guarantees that motor vehicles are free of any hidden securities or charges and will remain so, except in certain circumstances
9. Manufacturers or importers guarantee they will take reasonable steps to make spare parts and repair facilities available for a reasonable time after purchase.

Consumer guarantees cannot be excluded, even by agreement.

Vehicles bought from private sellers

Vehicles bought from one-off sales by private sellers are only covered by the guarantees as to title, undisturbed possession and undisclosed securities. However, the implied warranties under state and territory sale of goods legislation apply to private sales, unless excluded by the contract.

Vehicles bought at auction

Vehicles bought at auctions are only covered by the guarantees as to title, undisturbed possession and undisclosed securities. However, the implied warranties under state and territory sale of goods legislation apply to auction sale contracts, unless excluded by the contract.

Leased or hired vehicles

Leased or hired vehicles are covered by the consumer guarantees, with the exceptions of the guarantees as to title and undisclosed securities. The guarantee for undisturbed possession applies only for the term of the lease or hire.

For more information on rental vehicles, see the *Australian Consumer Law industry guide: Rental cars*, available from consumerlaw.gov.au.

Linked credit providers

Sometimes vehicle sellers have 'linked credit providers' – for example, a finance company to which they regularly refer people under an agreement with that company. These credit providers can be liable under the ACL for the loss or damage someone suffers when that seller fails to meet certain consumer guarantees.

Other exclusions

Other types of vehicles not covered by consumer guarantees include those:

- > bought before 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > bought on sell or resupply. These sales are covered by the implied fitness for purpose warranties under state and territory sale of goods legislation, unless excluded by the contract.

Acceptable quality

The test for acceptable quality is whether a reasonable consumer, fully aware of a motor vehicle's condition (including any defects) would find it:

- > fit for all the purposes for which vehicles of that kind are commonly supplied
- > acceptable in appearance and finish
- > free from defects
- > safe
- > durable.

This test takes into account:

- > the nature of the motor vehicle – for example:
 - » a new car would be expected to last longer than a used car
 - » a dedicated four-wheel-drive vehicle may have a higher standard for off-road use than a 'soft off-roader'
 - » a high-performance vehicle may require more maintenance to keep up its performance level

- > the price of the motor vehicle – for example, a consumer may reasonably expect a top-of-the-range model in a particular vehicle class to be more durable than a cheaper competing model in the same class
- > representations made about the vehicle; for example, in any advertising, on the manufacturer's or dealer's website or in the vehicle manual
- > anything the dealer told the consumer about the vehicle before purchase, and
- > any other relevant facts, such as the way the consumer has driven or used the vehicle.

The guarantee of acceptable quality does not apply if:

- > the dealer alerts the consumer to the defect in the vehicle before the consumer agrees to the purchase
- > the consumer examines the vehicle before buying and the examination should have revealed it was not of acceptable quality. The examination does not require the consumer to find hidden defects or ones that are difficult to detect; for example, engine, brake or gear box faults, which may not be easily detected
- > the consumer uses the motor car in an abnormal way. 'Abnormal' use has not been defined under the ACL; however, certain uses for certain vehicles will be inherently abnormal for example, a small hatchback is not designed for towing a horse float. Information provided in the manufacturer's handbook and any other operating instructions may also be relevant.

Major vs minor failures

When a motor vehicle fails to meet a consumer guarantee, your rights and obligations depend on whether the failure is major or minor.

Major failures

A major failure to comply with the consumer guarantees is when:

- > a reasonable consumer would not have bought the motor vehicle if they had known about the full extent of the problem. For example, no reasonable consumer would buy a new car with so many recurring faults that the car has spent more time off the road than on it because several mechanics have been unable to solve the problem
- > the motor vehicle is significantly different from the description, sample or demonstration model shown to the consumer. For example, a consumer orders a car with a diesel engine after test-driving the demonstration model, but the car delivered has a petrol engine
- > the motor vehicle is substantially unfit for its normal purpose and cannot easily be made fit within a reasonable time. For example, the engine of a pick-up vehicle, with a stated towing capacity of 3500 kilograms and normally used for towing, has a design flaw that causes it to overheat when it tows a load of more than 2500 kilograms
- > the motor vehicle is substantially unfit for a purpose that the consumer told the supplier about, and cannot easily be made fit within a reasonable time. For example, a sports utility vehicle does not have enough towing capacity to tow a consumer's boat, despite the consumer telling the supplier the boat's specifications

- > the motor vehicle is unsafe. What is 'unsafe' will depend on the circumstances of each case. For example, a truck has faulty brakes that cause the vehicle to require a significantly greater braking distance than safe for normal use.

When there is a major failure to comply with a consumer guarantee, the consumer can choose to:

- > reject the motor vehicle and choose a refund or an identical replacement (or one of similar value if reasonably available), or
- > keep the motor vehicle and ask for compensation for any drop in its value caused by the problem.

Minor failures

Minor failures to comply with the consumer guarantees of acceptable quality or fitness for purpose include those where a vehicle has a fault that significantly affects its operation, but can be fixed within a reasonable time. For example:

- > a vehicle where the windscreen wipers stop working
- > a vehicle with a small fault in its transmission, which the manufacturer can quickly resolve by, for example, replacing the entire transmission rather than repairing only the faulty component.

A minor failure does not initially allow the consumer to reject the motor vehicle and demand a refund, replacement or compensation for the difference in value.

Example:

A consumer buys a new car, and it soon develops a slight rattling noise that does not interfere with its normal operation. The consumer returns the car to the dealer, who inspects it, determines the cause of the noise and offers to repair it in two days. The consumer refuses this offer and demands a refund, claiming a major failure to comply with the guarantee of acceptable quality. However, in these circumstances, the fault would most likely be considered a minor failure. The dealer would not have to offer a refund in this case.

When the failure to comply with a consumer guarantee is minor, you are not held to repairing it. You can choose between providing a repair or offering the consumer a refund or an identical replacement (or one of similar value if reasonably available).

If you have identified a minor failure, but have not been able to fix it within a reasonable time, the consumer can choose to get the job done elsewhere and charge you the reasonable costs of this repair or can treat the failure as major. This applies even if the delay is due to unavailability of parts. See 'Inability to repair within a reasonable time' on page 7.

Major failure - rejection period

A consumer cannot reject a vehicle if the:

- > rejection period has passed
- > consumer has lost, destroyed or disposed of the vehicle
- > vehicle was damaged after being delivered to the consumer
- > vehicle, part or component has been attached to, or incorporated in, some other property and cannot be detached without damaging it
- > consumer has caused the problem through their own action or inaction – see 'Abnormal use' below.

The 'rejection period' is the period commencing from the time a consumer bought a vehicle, during which it would be reasonable to expect a problem to appear.

In determining whether the rejection period has passed, it is relevant to consider the:

- > type of vehicle
- > way in which the consumer is likely to use it
- > length of time, and amount of use, that would reasonably be expected to elapse before the problem becomes apparent.

Abnormal use

Vehicles are not expected to be indestructible; a consumer's use of a vehicle can affect its durability.

The guarantee of acceptable quality will not apply if the consumer:

- > uses a vehicle abnormally
- > causes the quality of a vehicle to become unacceptable
- > fails to take reasonable steps to avoid the quality becoming unacceptable.

The law does not define 'abnormal use'. However, examples of abnormal use would include:

- > a soft-top car is left out in the rain with its roof open, resulting in damage to the interior
- > a four-wheel drive vehicle is used to tow a load that exceeds the vehicle's stated towing capacity.

There is a difference between damage caused by abnormal use, and gradual deterioration (also called 'wear and tear') caused by a consumer's normal use of a vehicle. Wear and tear involves the eventual wearing out of parts to the point where they no longer work, as well as such things as scuffing, scratching or discolouration that would predictably occur over time when the vehicle is used normally.

If a consumer uses a vehicle normally, and its condition deteriorates faster or to a greater extent than would usually be expected, then the vehicle may have failed to meet the guarantee of acceptable quality and the consumer may be entitled to a remedy.

Inability to repair within a reasonable time

A reasonable repair time, for the purpose of determining whether a fault is major, is assessed taking into account the nature of the problem and the difficulty in identifying it. Otherwise, the assessment is on the basis of all things being normal or equal; for example, that parts are available.

A failure that is initially assessed as minor but which is not fixed within a reasonable time (for example, because parts subsequently become unavailable, or because of any other reason beyond your control) gives the consumer the right to reject the vehicle.

If you initially consider the fault can be repaired within a reasonable time, the consumer must give you a chance to do so.

Example 1:

A car developed an engine fault that caused the car to seize. The supplier initially assessed the repair as taking a day or two but was unable to repair the vehicle after 11 weeks. This indicates that the fault was not one that could be fixed within a reasonable time and the consumer was entitled to reject the vehicle under the consumer guarantees.

Example 2:

A car had an intermittent electrical fault that caused a warning light to activate from time to time. The consumer accepted that the fault was minor and asked the supplier to repair it, but the warning light did not activate while the car was in for repair, so it was not possible to identify the cause of the problem. The consumer returned the vehicle for a second and third attempted repair, and the supplier was eventually able to identify and repair the fault. The consumer was not entitled to reject the vehicle, as the time taken to remedy the fault was reasonable when the nature of the fault was taken into account.

Change of mind

You do not have to give a refund when a consumer simply changes their mind about a vehicle; for example, they no longer like it, or they found it cheaper elsewhere.

However, you can choose to have a policy to offer a refund, replacement or credit note when a consumer changes their mind. If so, you must abide by this policy.

State or territory laws may have a mandatory cooling-off period for cars purchased from licensed motor car traders.

Suppliers' right to seek reimbursement from a manufacturer

Where a consumer asks you, not the manufacturer, to deal with a problem where a vehicle:

- > is not of acceptable quality
- > does not match a description provided by or on behalf of the manufacturer, or
- > is not fit for a purpose made known to the manufacturer either directly or through you as the supplier

the manufacturer must reimburse you.

You have three years to ask the manufacturer for reimbursement, from the date that:

- > you fixed any problems with the consumer's vehicle, or
- > the consumer took legal action against you.

The amount can include any compensation paid to the consumer for reasonably foreseeable consequential losses. For more information on consequential loss, refer to *Consumer guarantees: a guide for business and legal practitioners*, available from consumerlaw.gov.au.

Manufacturers cannot contract out of this obligation to reimburse you. However, you and the manufacturer can make an agreement about what you will each cover, as this does not affect the consumer's rights.

Product recalls

You may need to recall a vehicle if it is found to be hazardous or non-compliant with a mandatory standard or subject to a ban. Recalls are usually initiated voluntarily by a business, but they may also be ordered by the Commonwealth or a state or territory minister responsible for competition and consumer policy.

The purpose of a recall is to prevent injury by removing the source of the hazard and to offer affected consumers a remedy in the form of a repair, replacement or refund.

A recalled vehicle is not automatically considered 'unsafe' for the purposes of failing the guarantee of acceptable quality under the consumer guarantees. The two regimes operate independently and the reason for the recall will still need to be considered in relation to the test of 'acceptable quality'.

A recall remedy will normally be consistent with the consumer guarantees obligations. However, the consumer guarantees provide rights that exist despite any remedy offered by a supplier under a recall. For example, where the failure amounts to a major failure, a consumer will still be entitled to reject the vehicle and choose a refund despite the offer of replacement under the supplier's recall.

The Department of Infrastructure and Transport is responsible for monitoring motor vehicle recalls in Australia. You must notify the Department if you are advised (or become aware) that a vehicle, part, accessory or service may have a safety-related defect.

For more information, refer to:

- > the Department of Infrastructure and Transport website at infrastructure.gov.au, for information on vehicle standards and safety
- > *Product safety: a guide for businesses and legal practitioners*, available from consumerlaw.gov.au
- > the Recalls Australia website at recalls.gov.au, where you can register to receive automatic alerts whenever a new recall is listed.

Warranties

Warranties against defects or 'manufacturer's warranty'

You, or the vehicle manufacturer, may provide a warranty that promises consumers that:

- > products (such as vehicles) or services will be free from defects for a certain period of time
- > defects will entitle the consumer to repair, replacement, refund or other compensation.

This is called a 'warranty against defects', also commonly called a 'manufacturer's warranty'.

Example:

A consumer buys a car that comes with a manufacturer's warranty. The warranty says the manufacturer will repair the vehicle at no cost if it has a mechanical failure within three years of the purchase date.

A warranty against defects document must meet a number of requirements, including that it:

- > contains the mandatory text:
'Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.'

- > is expressed in a transparent way – in plain language, legible and presented clearly
- > prominently states the warrantor’s name, business address, phone number and email address (if any), and
- > sets out relevant claim periods or procedures.

Warranties against defects may set out requirements that consumers must comply with. For example, a warranty against defects on a motor vehicle may require the consumer to ensure any servicing is carried out:

- > by qualified staff
- > according to the manufacturer’s specification
- > using appropriate quality parts where required.

If you wish to seek to restrict a consumer’s freedom to choose, for example, who they use as a repairer, you should get legal advice on the prohibitions on ‘exclusive dealing’ found in the *Competition and Consumer Act 2010*. Exclusive dealing broadly involves a trader imposing restrictions on a person’s freedom to choose with whom, in what or where they deal. For more information, see ‘Exclusive dealing notifications’ on the ACCC website at acc.gov.au.

Express warranties

An express warranty is different from a warranty against defects or ‘manufacturer’s warranty’. As one of the consumer guarantees, vehicles must satisfy any extra promises – ‘express warranties’ – you or a manufacturer has made about them.

An express warranty focuses on a promise or promises, for example, about what the vehicle will look like, will do (or is capable of doing) and for how long.

Sometimes a warranty against defects may contain an express warranty.

Example:

When a consumer buys a utility vehicle, the written warranty (the warranty against defects) states that the tray can hold up to 1000 kilograms. This is an express warranty about what the vehicle can do. If the tray breaks after a load weighing 500 kilograms is placed on it, the consumer can insist that the express warranty contained in the warranty against defects be honoured. If not, they will be entitled to a remedy.

Extended warranties

An extended warranty offered at the point of sale or at the end of a manufacturer’s warranty extends the coverage provided in the original manufacturer’s warranty, usually at an additional cost.

The consumer guarantees provide rights to consumers that exist despite anything the supplier or manufacturer may say or do. Extended warranties are optional. They are in addition to, and do not replace, the consumer guarantees.

If you are selling extended warranties, you need to ensure that you are offering something of value to the consumer – something that does not simply mirror consumers’ rights under the law as this may be misleading.

You must not:

- > pressure consumers to buy an extended warranty
- > tell a consumer that they must purchase an extended warranty when such a warranty does not provide them with any benefits above and beyond their consumer guarantees rights.

When selling extended warranties, you should explain to the consumer what an extended warranty would provide, over and above the consumer's rights under the consumer guarantees.

Extended warranties may set out requirements that consumers must comply with. For example, an extended warranty on a motor vehicle may require the consumer to ensure any servicing is carried out:

- > by qualified staff
- > according to the manufacturer's specification
- > using appropriate quality parts where required.

If you wish to seek to restrict a consumer's freedom to choose, for example, who they use as a repairer, you should get legal advice on the prohibitions on 'exclusive dealing' found in the *Competition and Consumer Act 2010*. Exclusive dealing broadly involves a trader imposing restrictions on a person's freedom to choose with whom, in what or where they deal. For more information, see 'Exclusive dealing notifications' on the ACCC website at acc.gov.au.

Warranties and consumer guarantees

A warranty does not change your responsibilities under the ACL. The consumer guarantees apply in the same way regardless of whether a vehicle is covered by a manufacturer's warranty, an express warranty or an extended warranty, or whether those warranties have expired.

Statutory warranties on used cars

State and territory motor car trader licensing laws require you to provide a statutory warranty on used vehicles that meet particular criteria. These warranties are in addition to the consumer guarantees.

After a statutory warranty has expired, the consumer may still have rights to a remedy under the ACL if there is a problem with the car; however, the level of protection will depend on things such as the vehicle's age and condition.

For more information on statutory warranties that apply to your business, check with your state or territory consumer protection agency or licensing authority.

Used cars not covered by statutory warranties

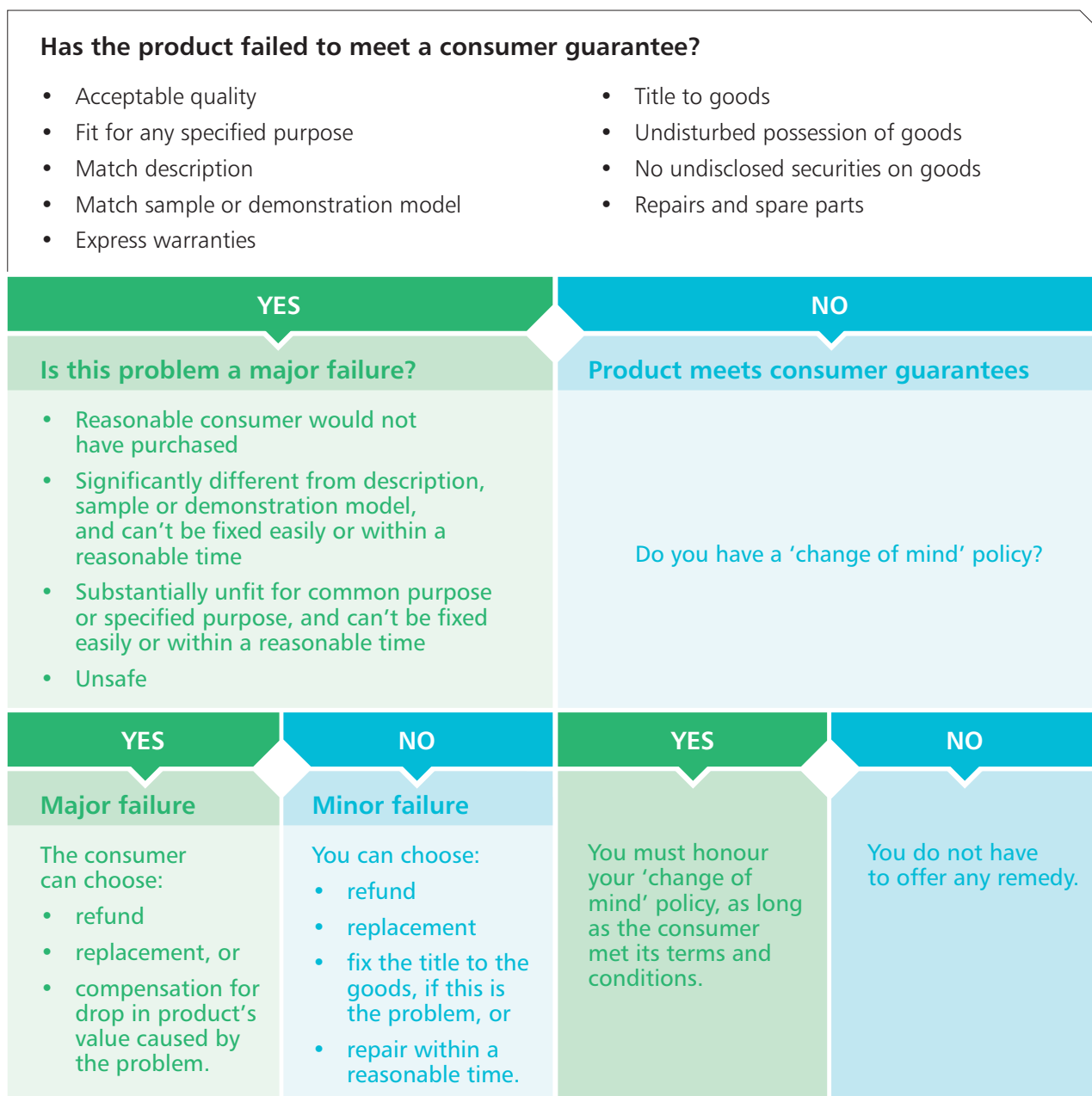
Even if a used car sold by a licensed trader is not covered by a statutory warranty, it will still be covered by the consumer guarantees.

Example:

A consumer buys a used four-wheel drive vehicle which is not covered by a statutory warranty in the state or territory where the dealer is licensed as it has travelled too many kilometres.

However, it is a top-of-the-range vehicle and is only three years old, so when the motor seizes one month after purchase, this is likely to be a failure to meet the guarantee of acceptable quality under the ACL and the supplier should provide an appropriate remedy.

Summary decision chart – Refunds, replacements and repairs



Consumer guarantees on services

Under the ACL, you must meet the consumer guarantees of providing services:

- > **with due care and skill**
You guarantee to use an acceptable level of skill or technical knowledge when providing the services, and take all necessary care to avoid loss or damage
- > **which are fit for any specified purpose**
You guarantee that services will be reasonably fit for any purpose specified by the consumer; and any products resulting from the services are also fit for that purpose. You also guarantee that services, and any resulting products, are of a standard expected to achieve any desired results that the consumer told you about
- > **within a reasonable time (when no time is set)**
You guarantee to supply the service within a reasonable time. What is 'reasonable' will depend on the nature of the services.

The consumer guarantees apply to services sold in trade or commerce, that:

- > were purchased on or after 1 January 2011
- > cost up to \$40,000 (or any other amount set by the ACL in future), regardless of purpose or use – for example, servicing a car
- > cost more than \$40,000, and are normally acquired for personal, domestic or household purposes – for example, restoration of a classic car.

Services **not** covered by consumer guarantees include:

- > services bought before 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > services costing more than \$40,000, which are for commercial use – for example, installation of farm irrigation systems or factory machinery repairs
- > transportation or storage of products for the consumer's business, trade, profession or occupation.

Major vs minor failures

When a service fails to meet a consumer guarantee, your obligations depend on whether the failure is major or minor.

A major failure with services is when:

- > a reasonable consumer would not have acquired the services if they had known the full nature and extent of the problem. For example, a reasonable consumer would not have their car serviced if they had known a major engine fault would not be identified
- > the services are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a consumer asks a panel beater to fix hail damage to their car, but the work is of such poor quality that all the car's panels would have to be removed and replaced
- > the consumer told the supplier they wanted the service for a specific purpose but the services, and any resulting product, do not achieve that purpose and cannot easily or within a reasonable time be made to achieve it. For example, a consumer specifies they want their four-wheel-drive (4WD) vehicle serviced and fitted with new tyres suitable for driving on 4WD-only tracks; but the vehicle becomes bogged while driving on one of these tracks, because the new tyres fitted were not suitable for the specified purpose
- > the consumer told the supplier they wanted a specific result but the services, and any resulting product, were not of a standard that would reasonably be expected to achieve that result. For example, a consumer asks a repairer to perform a power upgrade to reduce their car's acceleration time by a specified amount; but the repairer uses parts that would not be expected to achieve this result
- > the supply of the services has created an unsafe situation. For example, a mechanic incorrectly installs a part, causing a brake failure.

When there is a major failure, the consumer can:

- > cancel the services and get a refund for any unconsumed services, or
- > get compensation for the difference in value between the service delivered and what they paid for.

The consumer gets to choose, not the supplier.

When the problem is minor, the consumer cannot cancel the service and demand a refund immediately. They must give you an opportunity to fix the problem:

- > free of charge, and
- > within a reasonable time.

If you refuse or take too long to fix the problem, the consumer can get someone else to fix the problem and ask you to pay reasonable costs, or cancel the service and get a refund, as above.

Repair notices

If you use refurbished parts to fix defective products (rather than new parts), or replace defective products with a refurbished version, you must always give the consumer a 'repair notice' before accepting products for repair.

This notice must include the following specific wording required by the ACL:

'Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods'.

You must provide this repair notice whether or not you know, before inspecting the products, that you will use refurbished parts or supply refurbished products instead of repairing the products.

You can include a repair notice in another document (for example, terms and conditions for the repair) as long as:

- > the document states the repair notice is given under the ACL, and clearly distinguishes it from other information
- > the repair notice is easy to see (for example, not hidden in fine print)
- > you provide the document before accepting the products for repair.

For more information on repair notices, view consumerlaw.gov.au.

For more information on consumer guarantees applying to services, refer to *Consumer guarantees: a guide for business and legal practitioners*, available from consumerlaw.gov.au.

Common issues

Choice of repairer under the consumer guarantees

Consumers are sometimes confused about the differences between the consumer guarantees, warranties against defects and extended warranties. This is especially the case when dealers and manufacturers make broad statements that consumers will 'void their warranties' or similar if they go to an independent repairer (for example, a repairer who is not affiliated with the manufacturer or part of the manufacturer's network).

Any suggestion by car manufacturers or dealers that motor vehicles need to be serviced at a licensed dealer to maintain the owner's consumer guarantee rights is not correct.

For more information, see 'Warranties against defects' on page 8 and 'Extended warranties' on page 9 of this guide.

Component pricing

You must not promote or state a price that is only part of the cost, unless also prominently advertising the single (total) price.

The single price must include any charge payable, along with the amount of any tax, duty, fee, levy or other additional charge (for example, GST, import tax, dealer fees or stamp duty).

The single price must be displayed at least as prominently as any component price.

A prominent single price is one that:

- > stands out so that it is easily seen by a consumer
- > is clear, eye-catching and very noticeable.

What is 'prominent' may vary on a case-by-case basis and you should consider factors such as the size, placement, colour and font of the price, as well as the background of the advertisement. For example, if a single price is smaller or in a font colour that is harder to read than any component price, then this is likely to mean that it is not as prominent.

This applies equally to all forms of advertising that include price representations, regardless of whether the advertisements are placed by a dealer, manufacturer or cooperatively.

Components you do not need to include in a single price are:

- > optional extras – additional charges that a consumer may choose to pay. However, if an optional extra is depicted in the advertisement, you must include the price for that optional extra
- > sending charges – while mandatory charges for sending products need to be specified in the advertisement, they do not have to be included in the total price. You could, however, choose to do so. It is important to note that in the regulators' view, 'dealer delivery' as currently imposed within the motor vehicle industry would be considered as a component of the single price
- > any components which are not quantifiable at the time the representation is made
- > amounts your business pays to a third party that are not passed on to the consumer
- > amounts a consumer is required to pay directly to a relevant authority (such as in used vehicle sales).

Determining whether a component is quantifiable

An amount is quantifiable if, at the time you are making the representation, you are able to readily convert it into a dollar amount.

If a total price is comprised of a number of components, you must quantify and add up each component to the extent to which you are able.

Where a total price involves:

- > a combination of quantifiable and non-quantifiable components, or
- > a component amount that fluctuates or varies (e.g. changes in foreign currency)

you calculate the total price using those components that are quantifiable at the time.

You also need to clearly advise consumers of the basis on which the amounts were calculated and that they may change as not all components were able to be included in the single price. This will allow you to provide consumers with the minimum total cost they need to pay to obtain the vehicle.

Vehicles with pre-existing damage

You have specific obligations when selling new vehicles with pre-existing damage – for example, hail damage that occurred while a car was displayed outdoors.

If you are selling a damaged new car at a discounted price and you have informed a consumer of the reason for the discounted price, they cannot then claim that the identified damage is a failure to comply with a consumer guarantee. However, if you do not disclose the damage at the point of sale, there is a risk that the vehicle may later be found to be of unacceptable quality, especially if the damage is not evident or cannot be discovered through a reasonable examination of the vehicle before purchase.

If you are selling a second-hand or damaged car that is still within an original warranty period, you should provide the consumer with information about the status of the manufacturer's warranty, so they can be aware of any limits to the warranty before buying.

Consumers seeking refunds for minor problems

If a failure to comply with a consumer guarantee is not major and can be fixed within a reasonable time, the consumer cannot reject the vehicle and demand a refund.

You can choose to:

- > provide a refund
- > replace the vehicle
- > fix the title to the vehicle, if this is the problem, or
- > repair the vehicle in a reasonable time.

Example:

A new car had a problem with a small part in its front-end. The consumer believed this was a major failure to comply with the consumer guarantee of acceptable quality, and requested a refund.

However, when the dealer assessed the problem, they found it was a minor problem and could be repaired within a reasonable time simply by replacing the part.

In this case, the consumer was not entitled to demand a refund, as the problem could be fixed quickly.

However, if the dealer had been unable to fix the problem within a reasonable time, then the consumer would have been entitled to the same remedies as if it were a major failure.

For more information about major and minor failures, see page 5.

If you and a consumer disagree about the seriousness or cause of a problem, the consumer can obtain an independent mechanical inspection and written report from an independent mechanic or an automobile association.

The consumer will have to pay for this report, but can claim its cost as a consequential loss if the report confirms the fault's existence. However, the consumer cannot make such a claim if the report finds there was only a minor failure to comply with a consumer guarantee. See 'Consequential loss' on page 17.

If you disagree with an independent mechanical inspection report, and believe there has not been a failure to comply with a consumer guarantee or that the failure is not a major one, the consumer can lodge an application with a tribunal or court for a determination under the ACL.

Availability of spare parts

Manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities (a place that can fix the consumer's vehicle), for a reasonable time after purchase.

How much time is 'reasonable'?

This will depend on the type of vehicle. However, for a new motor vehicle, it would be reasonable to expect that spare parts will be available for many years after its purchase.

Example:

A consumer has an accident while driving his motor scooter, which he bought new a year ago for \$2000. He contacts the importer and asks where he can get it repaired. The importer advises they no longer supply parts for that model of scooter. A reasonable consumer would expect a one-year-old scooter to be repairable. The manufacturer has not taken reasonable steps to provide spare parts or facilities, so the importer must provide a remedy.

When the guarantee on repairs and spare parts does not apply

A manufacturer or importer does not have to meet the guarantee on repairs and spare parts if they advised the consumer in writing, at the time of purchase, that repair facilities and spare parts would not be available after a specified time.

Unauthorised repairs

If you supply products or services (such as repairs) to someone who has not agreed to buy or receive them, this may be considered 'unsolicited supplies'. It is unlawful to request payment for unsolicited products or services. You must refund any payments that you may have accepted for such services.

Example:

A consumer booked a vehicle service, which the mechanic advised him would cost between \$350 and \$450.

When the consumer returned to collect his vehicle, he was stunned after being charged \$4500 for a reconditioned transmission.

The supplier did not advise the consumer about the need for this work and the associated costs before the repairs were carried out.

As the extra work was unsolicited, the consumer does not have to pay for any work other than what he initially agreed to. This would not be the case if the mechanic had asked his permission before replacing the transmission, and he had agreed.

If there is a dispute over unauthorised repairs, the onus will be on you (as the business demanding payment) to prove you have a legitimate right to payment.

For more information on unsolicited supplies, refer to *Sales practices: a guide for businesses and legal practitioners*, available from consumerlaw.gov.au.

Consumers getting vehicles repaired by another business

Disputes often arise when a consumer has a vehicle repaired by someone other than the original supplier, then makes a claim on that supplier for the repair costs.

If you sell a vehicle and a fault develops, the consumer must give you a reasonable opportunity to meet any obligations under the consumer guarantees or a statutory warranty.

However, if you refuse or fail to repair the vehicle within a reasonable time, the consumer can have the repairs done elsewhere and seek to recover 'reasonable costs' from you. The consumer does not have to get your agreement or provide quotes.

'Reasonable costs' for a repair would be within the normal range charged by repairers of that type of vehicle, and include:

- > the cost of the repair
- > any other associated costs incurred by having the vehicle fixed elsewhere, such as transport costs.

Example:

A consumer buys a used European vehicle from a licensed motor car supplier who sells used cars of all makes. The vehicle soon develops a problem that entitles the consumer to have it repaired under the consumer guarantees. However, the dealer is unable to repair it because they only have expertise to repair Japanese makes. The consumer is therefore entitled to take the vehicle to another repairer and claim reasonable costs from the dealer.

Consequential loss

Consequential loss is the reasonably foreseeable associated cost to a consumer of a problem with products or services. It is usually financial but can include other costs, such as lost time or productivity.

A consumer can claim compensation for consequential loss from a supplier who failed to comply with one or more of the consumer guarantees. The loss or damage must have been reasonably foreseeable.

Suppliers do not have to pay for losses or damages:

- > that are not caused by their conduct or the products they supplied, and
- > that are caused by something completely independent of their business, after the products left their control.

Compensation should put the consumer in the position they would have been in if the products or services had complied with the consumer guarantees.

Example:

A consumer was driving her new four-wheel-drive vehicle when the engine started smoking, then burst into flames.

Although the driver escaped without injury, the vehicle and its interior were severely damaged. The fire also destroyed the consumer's wedding dress, which she had placed on the back seat.

As this occurrence amounted to a major failure to meet the consumer guarantees, the consumer was entitled to choose a refund or replacement for her vehicle. She was also entitled to claim compensation for consequential loss from the vehicle's supplier for the cost of her

wedding dress as it was reasonably foreseeable that any personal belongings that were in the vehicle would also be damaged.

For more information on consequential loss, see *Consumer guarantees: A guide for businesses and legal practitioners*, available from consumerlaw.gov.au.

Novated leases

A novated lease is a three way agreement between an employer, employee and leasing company. The employee leases a vehicle from the leasing company, and the employer agrees to take on the employee's obligations under the lease. Either the leasing company buys the vehicle from the dealer or the consumer buys the vehicle, transfers it to the leasing company and then leases it back through the novated leasing agreement.

Any rights or remedies under the consumer guarantees belong to the person acquiring the vehicle, even though they may not have the direct benefit of any remedy (such as a refund, replacement or repair).

However, where the person acquires the vehicle for the purpose of re-supplying it, the person would not have any rights under the consumer guarantees and would have to pursue alternative remedies, if any, under the contract or the state or territory sale of goods legislation.

Resupply includes a sale, exchange, lease, hire or hire-purchase of the vehicle.

Resupply may not occur where a consumer acquires a vehicle and subsequently transfers title to the leasing company without consideration. In that case, the consumer may still be able to seek a remedy against the dealer for a breach of the consumer guarantees.

Vehicles purchased on credit

A consumer (whether an individual or a company) who buys a vehicle on credit has the same rights under the consumer guarantees as someone who has paid cash.

If the consumer purchased the car from a dealer, with the credit supplied by a finance company, the rights are against the dealer.

If the consumer purchased the vehicle from the finance company, the rights are against the finance company.

In both cases, if the consumer is entitled to reject the vehicle and receive a refund because of a major failure, the consumer is also entitled to cancel the finance contract.

The consumer should notify both the dealer and finance company (as the case may be) that they are rejecting the vehicle.

The dealer or the finance company (depending on who supplied the vehicle to the consumer) will have to refund the deposit, the value of any trade-in, as well as any repayments on the loan. The consumer may also be entitled to a refund of any interest paid on the loan for the period they were unable to use the vehicle.

The terms and conditions of the finance contract may require the consumer to pay certain fees and charges upon termination of the contract.

If finance has been arranged through a linked provider, both the dealer and finance company may be jointly responsible for returning the amount of any such fees or charges to the consumer.

A linked credit arrangement is where the dealer supplies the vehicle to the consumer either directly or by requiring the consumer to collect it from a finance company with which the dealer has a contract or arrangement.

If the finance company is not a linked credit provider for the dealer, the consumer may be able to recover any termination fees or charges as consequential loss only from the dealer.

Minor failures

For minor failures with a vehicle purchased on credit, the dealer will ultimately be responsible for fixing the problem. Consumers should not stop making payments on their credit contract while the vehicle is being fixed. This could result in penalty interest or late payment fees, or the finance company taking steps to repossess.

Businesses as consumers

Under the ACL, a business has certain consumer rights when it purchases products or services. You cannot refuse a remedy to a customer simply because their purchase was made for or on behalf of a business.

A business is protected by consumer guarantees if it buys:

- > products or services that cost up to \$40,000
- > products or services that cost more than \$40,000 and are of a kind ordinarily acquired for domestic, household or personal use or consumption
- > a vehicle or trailer primarily used to transport goods on public roads.

However, the consumer guarantees will not apply if a business buys products to resell or transform into a product to sell.

Example:

A small business owner buys a motor scooter costing \$3000 to make deliveries for her business. She tells the dealer she wants it to be able to carry up to 40 kilos on its carry rack, and he tells her it can.

However, when she takes delivery of the scooter and reads the owner's manual, she discovers it is not fit for the purpose she had specified to the dealer. She takes it back and seeks a refund so she can buy another, more suitable vehicle.

The small business owner can rely on the consumer guarantees for a remedy to this problem. However, if she had bought the scooter to resell to a consumer, she would not be able to rely on the consumer guarantees.

Where a product is not normally acquired for personal, domestic or household purposes, liability for failure to comply with a consumer guarantee can be limited by contract to one or more of the following:

- > replacement of the product or the supply of an equivalent product
- > repair of the product
- > payment of the cost of replacing the product or acquiring an equivalent product
- > payment of the cost of having the product repaired.

For more information, contact your local consumer protection agency.

Australian Capital Territory

Office of Regulatory Services

GPO Box 158
Canberra ACT 2601
T. (02) 6207 3000
ors.act.gov.au

Queensland

Office of Fair Trading

GPO Box 3111
Brisbane QLD 4001
T. 13 QGOV (13 74 68)
fairtrading.qld.gov.au

Northern Territory

Northern Territory Consumer Affairs

PO Box 40946
Casuarina NT 0811
T. 1800 019 319
consumeraffairs.nt.gov.au

Tasmania

Consumer Affairs and Fair Trading

GPO Box 1244
Hobart TAS 7001
T. 1300 654 499
consumer.tas.gov.au

South Australia

Consumer and Business Services

GPO Box 1719
Adelaide SA 5001
T. 131 882
cbs.sa.gov.au

Western Australia

Department of Commerce

Locked Bag 14
Cloisters Square WA 6850
T. 1300 30 40 54
commerce.wa.gov.au

Victoria

Consumer Affairs Victoria

GPO Box 123
Melbourne 3001
T. 1300 55 81 81
consumer.vic.gov.au

Australian Competition and Consumer Commission

GPO Box 3131
Canberra ACT 2601
T. 1300 302 502
acc.gov.au

New South Wales

NSW Fair Trading

PO Box 972
Parramatta NSW 2124
T. 13 32 20
fairtrading.nsw.gov.au

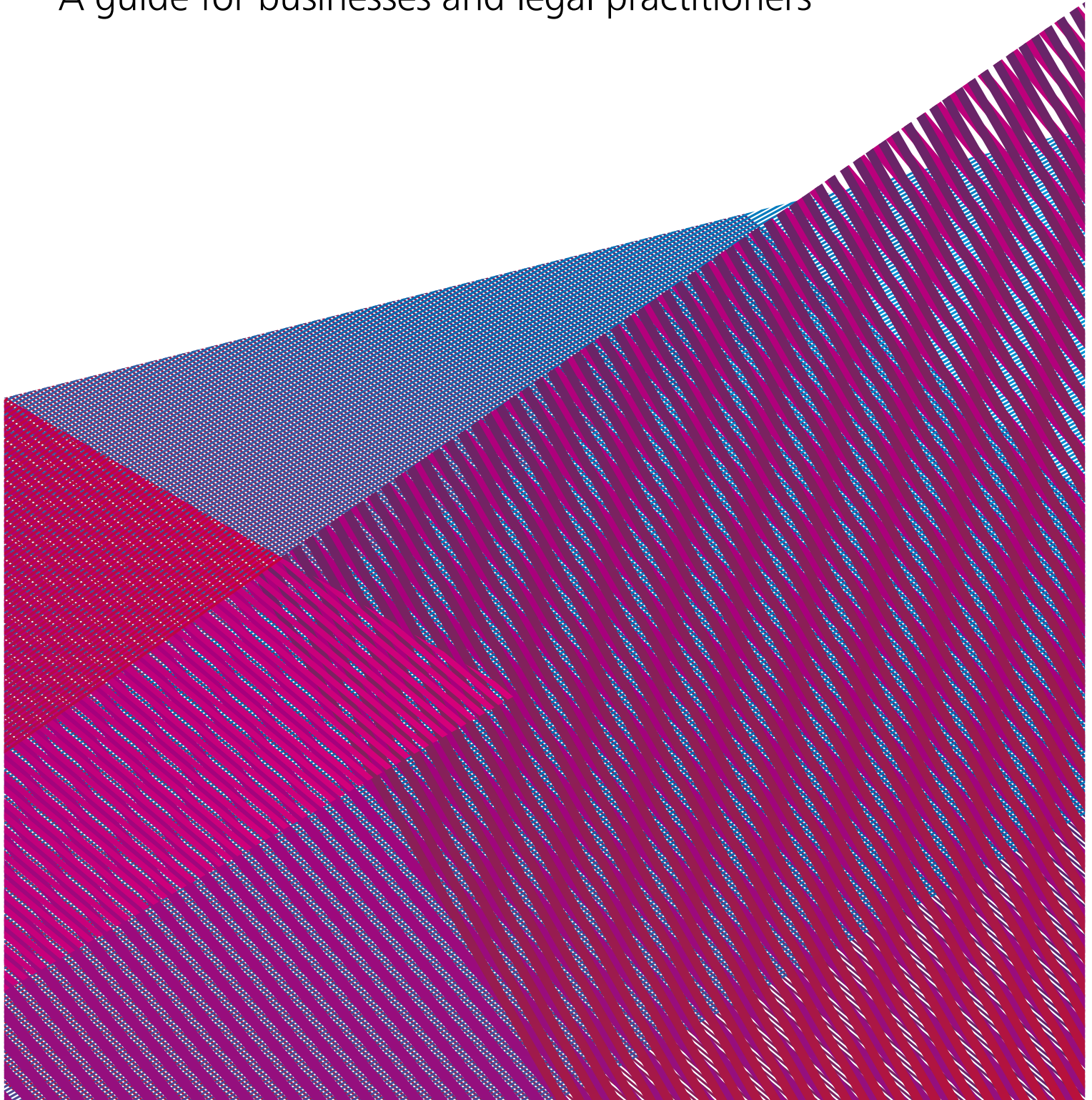
Australian Securities and Investments Commission

PO Box 9827
(in your capital city)
T. 1300 300 630
asic.gov.au

Attachment B: [Consumer Guarantees: A guide for businesses and legal practitioners](#)

Consumer guarantees

A guide for businesses and legal practitioners



This guide was developed by:

- Australian Capital Territory Office of Regulatory Services
- Australian Competition and Consumer Commission
- Australian Securities and Investments Commission
- Consumer Affairs and Fair Trading Tasmania
- Consumer Affairs Victoria
- New South Wales Fair Trading
- Northern Territory Consumer Affairs
- Office of Consumer and Business Affairs South Australia
- Queensland Office of Fair Trading
- Western Australia Department of Commerce, Consumer Protection

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Attorney-General's Department
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Introduction

This is one of six guides to the Australian Consumer Law (ACL), developed by Australia's consumer protection agencies to help businesses understand their responsibilities under the law.

These guides:

- > explain the law in simple language but are no substitute for the legislation
- > give general information and examples – not legal advice or a definitive list of situations where the law applies.

About this guide

This guide will help you understand:

- > what consumer guarantees apply to certain goods and services
- > who is responsible for satisfying the requirements of the consumer guarantees
- > when remedies, such as a refund, repair and replacement, will be available.

This guide is based on material prepared by the New Zealand Ministry of Consumer Affairs about their legislation, the *Consumer Guarantees Act 1993*. Consumer guarantees in the ACL are very similar to the New Zealand legislation.

About the other guides

The other guides in this series cover:

- > **sales practices**
explains unsolicited supplies, unsolicited consumer agreements (door-to-door and telemarketing), lay-by agreements, pricing, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion
- > **product safety**
covers safety standards, recalls, bans, safety warning notices and mandatory reporting requirements
- > **unfair business practices**
covers misleading or deceptive conduct, unconscionable conduct, country of origin, false and misleading representations, information standards
- > **unfair contract terms**
outlines what an unfair term is and which contracts are affected by the law
- > **compliance and enforcement**
outlines how consumer protection agencies will enforce the law.

The Australian Treasury also publishes information about the ACL – see *The Australian Consumer Law – a guide to provisions*, available from the Australian Treasury website at treasury.gov.au or the Australian Consumer Law website at consumerlaw.gov.au.

About the Australian Consumer Law

The ACL aims to protect consumers and ensure fair trading in Australia.

It is a national, state and territory law from 1 January 2011 and includes unfair contract terms legislation introduced on 1 July 2010.

Under the ACL, consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

Australian courts and tribunals (including those of the states and territories) can enforce the ACL. The regulators of this law include:

- > the Australian Competition and Consumer Commission (ACCC)
- > the Australian Securities and Investments Commission (ASIC)
- > each state and territory consumer protection agency.

The ACL replaces previous Commonwealth, state and territory consumer protection legislation. It is contained in a schedule to the *Competition and Consumer Act 2010* (CCA).

Aspects of the ACL are reflected in the *Australian Securities and Investments Commission Act 2001 (Cth)* (ASIC Act), to protect consumers of financial products and services.

Consumer guarantees – relationship to implied warranties and conditions

Consumer guarantees provide consumers with a comprehensive set of rights for the goods and services they acquire.

The consumer guarantees are based on the same core principles as implied warranties and conditions that previously existed in state and territory fair trading laws and the Commonwealth *Trade Practices Act 1974*. They do not create significantly different rights and obligations, but set out the rights and obligations in a clearer way.

Existing case law and legal precedents that apply to the previous law may assist when interpreting and applying the consumer guarantees.

Warranties for financial services set out in the ASIC Act continue to apply and will be administered separately by ASIC.

Meanwhile, eligible goods and services bought before 1 January 2011 are covered by the implied warranties and conditions in state and territory fair trading laws and the *Trade Practices Act 1974*.

01

Consumer guarantees: who guarantees what?

Suppliers and manufacturers automatically provide guarantees about certain goods they sell, hire or lease, and services they provide to consumers. These rights exist regardless of any warranty provided by the supplier or manufacturer.

A **supplier** is anyone – including a trader, a retailer or a service provider – who, in trade or commerce, sells goods or services to a consumer.

A **manufacturer** is a person or business that makes or puts goods together or has their name on the goods. It includes the importer, if the maker does not have an office in Australia.

A *supplier* and a *manufacturer* of goods guarantee that goods are of acceptable quality and match any description. They also guarantee that any express warranties will be honoured.

A supplier guarantees that a consumer is buying goods:

- > that have clear title, unless otherwise stated
- > that do not have undisclosed securities
- > that are fit for any disclosed purpose
- > with a right to undisturbed possession
- > that match sample or demonstration model.

A supplier guarantees that services are provided:

- > with due care and skill
- > which are fit for any specified purpose
- > within a reasonable time (when no time is set).

A *manufacturer* guarantees the availability of repairs and spare parts.

Consumer guarantees apply to goods and services bought on or after 1 January 2011 by a consumer from a supplier or manufacturer, in the course of trade. They apply to:

- > any type of goods or services costing up to \$40,000
- > goods or services costing more than \$40,000, which are normally used for personal, domestic or household purposes
- > a vehicle or trailer. The cost of the vehicle or trailer is irrelevant.

If a good or service fails to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or failure to meet an obligation.

When the problem with the good or service is minor, the supplier can choose between providing a repair or offering the consumer a replacement or a refund.

When there is a major failure, the consumer can:

- > reject the goods or services and either choose a refund or a replacement, or
- > ask for compensation for any drop in value of the goods or services.

For more information about whether a problem with the good or service is major, see page 21.

Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the consumer guarantees.

ACL reference:

- > Division 1 of Part 3-2 of the ACL sets out consumer guarantees that goods and services must meet when sold by a supplier or manufacturer.
- > Part 5-4 of the ACL sets out the remedies available to consumers if a good or service fails to meet a guarantee.

02

What do the consumer guarantees cover?

Which goods are covered?

Goods are covered by the consumer guarantees as long as they are sold in trade or commerce and bought by a *consumer*. Second-hand, leased or hired goods are also covered.

However, some consumer guarantees apply regardless of whether the goods are sold in trade or commerce. These are the guarantees as to title, undisturbed possession and undisclosed securities.

Trade or commerce means in the course of a supplier's or manufacturer's business or professional activity, including a non-profit business or activity.

A *consumer* is a person who buys:

- > any type of goods or services costing up to \$40,000 (or any other amount set by the ACL in future) – for example, a photocopier or cash register
- > a vehicle or trailer used mainly to transport goods. The cost of the vehicle or trailer is irrelevant
- > goods or services costing more than \$40,000, which are normally used for personal, domestic or household purposes – for example, a car or landscaping design.

At the time of publication, Australian courts had found three goods were not normally used for personal, domestic or household purposes. These are listed in the definition of 'consumer' in the glossary, page 36.

Which goods are not covered?

Goods not covered by consumer guarantees include those:

- > bought **before** 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > bought from one-off sales by private sellers, such as garage sales and fêtes
- > bought at auctions, where the auctioneer acts as agent for the owner
- > costing more than \$40,000 that a person would normally buy for business use – for example, machinery and farming equipment
- > a person buys to on-sell or re-supply
- > a person wants to use, as part of a business, to:
 - manufacture or produce something else – for example, as an ingredient
 - repair or otherwise use on other goods or fixtures.

Which services are covered?

Services sold in trade or commerce, that:

- > cost up to \$40,000 (or any other amount set by the ACL in future), regardless of purpose or use
- > cost more than \$40,000, and are normally acquired for personal, domestic or household purposes – for example, car repairs or legal services.

Which services are not covered?

Services not covered by consumer guarantees include:

- > services bought **before** 1 January 2011. These are covered by statutory implied conditions and warranties under the *Trade Practices Act 1974* and state and territory legislation in force before 1 January 2011
- > services costing more than \$40,000, which are for commercial use – for example, installation of farm irrigation systems or factory machinery repairs
- > transportation or storage of goods for the consumer's business, trade, profession or occupation
- > insurance contracts.

Goods bought at auction, where the auctioneer acts as agent for the owner, are not covered by consumer guarantees.

03

'No refund' signs and other statements about consumer guarantees

Summary

Signs and statements that limit, or seem to limit, consumers' rights are unlawful – including 'no refund' signs. Suppliers and manufacturers cannot:

- > limit, restrict or exclude consumer guarantees, or
- > avoid their obligations by getting the consumer to agree that the law of another country applies to the contract or to any dispute.

A supplier must not tell a consumer that they are required to pay for any rights equivalent to a consumer guarantee.

This means that, when selling an extended warranty, a supplier or manufacturer should be very clear exactly what it offers over and above the consumer guarantees.

Consumers cannot sign away their consumer guarantee rights. If suppliers or manufacturers attempt to put terms in their contracts to avoid responsibility, they may also be misleading the consumer about their legal right to compensation for consequential loss. Any such terms may be considered unfair contract terms.

There are special allowances for recreational service providers.

ACL reference: section 64

CCA reference: section 139A

What can't a supplier say about consumers' rights?

A supplier must not tell a consumer that a consumer guarantee:

- > does not exist
- > may be excluded, or
- > may not have a particular effect.

Consumers cannot surrender their rights by agreeing that the consumer guarantees do not apply.

'No refund' signs

Suppliers must be very careful about what they say to consumers and in the wording of any signs, advertisements or any other documents.

Signs that state 'no refunds' are unlawful, because they imply it is not possible to get a refund under any circumstance – even when there is a major problem with the goods. For the same reason, the following signs are also unlawful:

- > 'No refund on sale items'
- > 'Exchange or credit note only for return of sale items'.

However, signs that state 'No refunds will be given if you have simply changed your mind' are acceptable.

A supplier must not tell a consumer that they are required to pay for any rights equivalent to a consumer guarantee (*See Extended warranties, page 11*).

The maximum civil penalty for providing false or misleading information is \$1.1 million for a body corporate and \$220,000 for an individual. Criminal penalties for the same amounts may also be imposed.

Extended warranties

Some suppliers or manufacturers offer extended warranties to lengthen the coverage of their basic manufacturer's warranty.

Usually, consumers are offered the chance to buy an extended warranty after, or at the time, they buy the goods.

Some suppliers or manufacturers also tell the consumer an extended warranty provides extra protection, which the consumer would not have unless they buy it.

This is not necessarily true. The consumer guarantees provide rights that exist despite anything the supplier or manufacturer may say or do. Extended warranties are optional.

Suppliers and manufacturers must not:

- > pressure consumers to buy an extended warranty
- > tell a consumer that they must pay for an extended warranty when such a warranty provides rights that are equivalent to a consumer's rights under a consumer guarantee.

When selling extended warranties, suppliers and manufacturers should explain to the consumer what an extended warranty would provide, over and above the consumer's rights under the consumer guarantees.

For example:

- > A consumer buys a plasma television for \$6000. It stops working two years later. The supplier tells the consumer they have no rights to repairs or another remedy as the television was only under the manufacturer's warranty for 12 months. The supplier says the consumer should have bought an extended warranty, which would have given five years' cover.

A reasonable consumer would expect more than two years' use from a \$6000 television. Under the consumer guarantees, the consumer therefore has a statutory right to a remedy on the basis that the television is not of acceptable quality. The supplier must provide a remedy free of charge.

This may also amount to misleading a consumer about their rights.

Signs to inform customers about consumer guarantee rights

Suppliers can display a sign, at the point of sale, alerting consumers to their rights under the consumer guarantees. Online suppliers also have this option.

A standard sign will be available from consumer protection agencies from 1 January 2011. Suppliers may also develop their own sign.

It is not compulsory to display a sign. However, the Commonwealth minister responsible for administering the ACL can make this mandatory and specify the content, size, form and positioning of the sign to ensure consumers notice it.

ACL reference: sections 66 and 169

Responsibility for 'consequential loss'

'Consequential losses' are the reasonably foreseeable costs to the consumer in time and money because something went wrong with the goods or services.

Suppliers or manufacturers cannot write a term into their sales contract that says that they will not be responsible for extra loss suffered. In doing so, they would be misleading the consumer about their legal right to compensation for consequential loss.

This misleading conduct is a breach of the ACL. For more information on consequential loss, see *Putting a value on consequential loss*, page 29.

Allowances for recreational service providers

Under the CCA and some state and territory fair trading laws, suppliers of recreational services can exclude, limit or modify liability when they do not meet the consumer guarantees to provide services:

- > with due care and skill
- > fit for any particular purpose
- > within a reasonable time (when no time is set).

Suppliers may only limit their liability for death or personal injury, including illness (mental or physical), but not for property loss.

Recreational service providers should get legal advice to establish whether they can limit their liability.

CCA reference: section 139A

04

Consumer guarantees applying to goods

Summary

There are nine guarantees that apply to goods:

1. suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer – see page 13
2. a supplier guarantees that goods will be reasonably fit for any purpose the consumer or supplier specified – see page 14
3. suppliers and manufacturers guarantee that their description of goods (for example, in a catalogue or television commercial) is accurate – see page 15
4. a supplier guarantees that goods will match any sample or demonstration model and any description provided – see page 15
5. suppliers and manufacturers guarantee that the goods will satisfy any extra promises made about them (express warranties) – see page 16
6. a supplier guarantees they have the right to sell the goods (clear title), unless they alerted the consumer before the sale that they had 'limited title' – see page 17
7. a supplier guarantees that no one will try to repossess or take back goods, or prevent the consumer using the goods, except in certain circumstances – see undisturbed possession page 17
8. a supplier guarantees that goods are free of any hidden securities or charges and will remain so, except in certain circumstances – see page 17
9. manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities for a reasonable time after purchase – see page 17.

ACL references: sections 51 – 59

Acceptable quality

Suppliers and manufacturers guarantee that goods are of acceptable quality when sold to a consumer.

Test for acceptable quality

The test is whether a reasonable consumer, fully aware of the goods' condition (including any defects) would find them:

- > fit for all the purposes for which goods of that kind are commonly supplied – for example, a toaster must be able to toast bread
- > acceptable in appearance and finish – for example, a new toaster should be free from scratches
- > free from defects – for example, the toaster's timer knob should not fall off when used for the first time
- > safe – for example, sparks should not fly out of the toaster
- > durable – for example, the toaster must function for a reasonable time after purchase, without breaking down.

This test takes into account:

- > the nature of the goods – for example, a major appliance such as a fridge is expected to last longer than a toaster
- > the price paid for the goods – for example, a cheap toaster is not expected to last as long as a top-of-the-range one
- > any statements about the goods on any packaging or label on the goods – for example, the toaster box shows a special defroster function
- > any representation made about the goods by the supplier – for example, the supplier said the crumb tray was easy to detach and clean
- > any other relevant circumstances relating to supply of the goods.

Second-hand goods – acceptable quality

Second-hand goods sold in trade or commerce are covered by the guarantee of acceptable quality, but age, price and condition must be taken into account.

For example:

- > A consumer buys a second-hand washing machine for \$250 from a shop. The supplier said it was two years old and in good condition but it breaks down after two months. A reasonable consumer would expect to get more than two months' use from this machine. The consumer would be entitled to a remedy from the supplier.

Leased or hired goods – acceptable quality

Consumers 'hire' goods when they pay suppliers for the right to use goods on a temporary basis (usually short-term). A 'lease' is similar but usually involves payment in regular instalments over a longer term.

Consumer goods leased or hired to a consumer must be of acceptable quality.

For example:

- > A consumer pays to hire a steam cleaner for one day to clean her carpet but the machine does not generate steam and leaks. She is entitled to a remedy because the steam cleaner is not of acceptable quality.
- > Two tourists hire a campervan to tour Australia for five weeks. Fifty kilometres along the road, the van breaks down. A mechanic says the van has not been properly maintained or serviced for some time. The tourists would have the right to a remedy.

The guarantee of acceptable quality does not apply when:

> the supplier alerts the consumer to any hidden defects

Some goods may not be of acceptable quality due to problems already known to the supplier – for example, goods with cosmetic defects sold as 'seconds'.

Defective goods can be sold, usually for lower prices, if the consumer is alerted to the defects before sale. For instance, the supplier:

- tells the consumer before selling the goods, or
- displays a written notice with the goods. This must be clearly presented, legible and expressed in plain language.

It is not enough to simply describe the goods as 'seconds', 'sale' items or 'as is'. However, a consumer is assumed to be aware of defects if a written notice setting out the defects was displayed with the goods.

When a consumer is alerted to defects in goods before sale, they will not have the right to a remedy if those particular defects later cause problems with the goods.

However, the consumer may be entitled to a remedy for a different fault.

For example:

- > A consumer finds a bargain in a shoe shop – shoes labelled as 'seconds'. A tag attached to the shoes advises there is a problem with the stitching. He buys the shoes. When the stitching splits, he cannot claim the shoes were not of acceptable quality. However, he may be entitled to a remedy if another fault develops, such as the sole cracking.

> the consumer examines the goods

A consumer is not entitled to a remedy if they had an opportunity to examine the goods before purchase and did not find defects that they should have noticed.

For example:

- > Second-hand goods and antiques are often sold on an 'as-is' basis. An antiques dealer is not required to give a remedy for defects that a consumer should have noticed when examining the goods, such as chipped surfaces or faded paint.

The amount of effort that a consumer should take examining goods, if given the opportunity, depends on the nature of the goods. For new goods, very limited or no examination would be expected.

However, a consumer may be entitled to a remedy for defects that they would not have found with even the most careful inspection.

> the consumer uses the goods in an 'abnormal' manner

Goods are not expected to be indestructible; a consumer's use of goods can affect the durability of those goods.

The guarantee of acceptable quality will not apply if the consumer:

- uses the goods abnormally
- causes the quality of the goods to become unacceptable
- fails to take reasonable steps to avoid the quality becoming unacceptable.

The law does not define 'abnormal use'. However, examples of abnormal use include:

- a mobile phone is dropped in water or is left out in the rain
- a television is broken by an object hitting the screen
- a small electric lawnmower is used to mow four hectares every fortnight
- a laptop is picked up by the corner of its screen, which then cracks down the middle.

Fit for any specified purpose

Purpose specified by the supplier

A supplier guarantees that goods will be reasonably fit for any purpose that they told the consumer the goods would be fit for. For example:

A diver buys a watch, which the supplier says will be suitable for diving. A couple of weeks later, the diver goes for her first dive wearing the new watch, only to surface and see the dial filled with water. She would have the right to a remedy from the supplier.

Purpose specified by the consumer

Consumers might want goods to do a specific job or achieve a specific purpose, different from the normal use or purpose of those goods.

A supplier guarantees that goods will be fit for such a special job or purpose if the consumer, before buying the goods:

- > expressly or implicitly told the supplier what they want to use the goods for, and
- > relied on the supplier's knowledge or expertise when deciding whether the goods were suitable for that use or purpose.

For example:

- > A consumer tells a car dealer that he wants a car capable of towing his boat. The dealer sells him a car that the dealer says will do that job. The car's normal purpose is to transport people but, as the consumer has told the dealer that he wants to use the car to tow a boat, then the car must be able to do so.
- > A consumer buys a middle-of-the-range lawnmower, but does not mention to the supplier that she wants to use it to mow four hectares of land each week. Because she did not disclose her intended purpose, the lawnmower would only be expected to mow the lawn of an ordinary suburban house for several years without any significant problems. She cannot claim the lawnmower is not fit for purpose.

When the 'fit for any specified purpose' guarantee does not apply

A supplier does not have to provide a remedy if they can show that:

- > the consumer did not rely on the supplier's skill or judgment when buying the goods
- > under the circumstances, it was unreasonable for the consumer to have relied on the supplier's skill or judgment (or lack of it).

For example:

- > A consumer tells a fellow customer at a discount department store that he wants a television capable of showing all available digital channels. The other customer tells the consumer that a particular television "looks like one my dad bought, which I think does what you want". After buying the television, the consumer discovers that it is analogue and will not capture digital signals.
- > The consumer did not rely on the supplier when buying the goods, so is not entitled to a remedy.

Match description

Suppliers and manufacturers guarantee that their description of goods (for example, in a catalogue or television commercial) is accurate. This does not apply to goods bought at auction.

A consumer who buys goods that do not match the description – for example the goods are a different colour or size – is entitled to a remedy.

A supplier or manufacturer cannot argue that the consumer inspected the goods before purchase and should have picked up any errors in the description.

Goods must also match any sample or demonstration model shown to the consumer.

Match sample or demonstration model

Suppliers guarantee that when a consumer buys goods based on their model or sample, the goods will match the sample or demonstration model and any description provided.

For example:

- > A sample of fabric is used to sell a couch but the couch delivered to the consumer is a different colour from the sample. The consumer has a right to a remedy.

This guarantee does not apply to goods bought at auction.

No hidden defects

Goods sold by relying on a sample or demonstration model must not have any hidden defects.

A hidden defect is a problem that would:

- > make the goods of unacceptable quality, and
- > not be noticeable to someone looking at the goods.

Unavoidable differences

The guarantee that goods will match any sample or demonstration model applies even if the differences are unavoidable, provided they are substantial.

For example:

- > If shading, piling or colouring in an installed woollen carpet is substantially different from the sample used to sell it, the consumer may be entitled to remedy.

Legal reference: *Cavalier Marketing (Australia) Pty Ltd v Rasell* (1990) 96 ALR 375)

Reasonable time to compare the goods

The consumer must be given a reasonable amount of time to compare the goods with the original sample. This does not apply to demonstration models.

For example:

- > A consumer buys a car based on a demonstration model shown to them by the car dealer. The dealer can sell the demonstration model to someone else – he does not have to keep it to allow the consumer to compare their car to that model.
- > However, a furniture retailer would easily be able to keep a sample of the fabric used to sell a couch, to allow a consumer to compare it with the couch supplied.

If the supplier shows a sample or demonstration model to the consumer and provides a description of the goods, the goods must also match that description.

Express warranties

Suppliers and manufacturers often make extra promises (sometimes called 'express warranties') about such things as the quality, state, condition, performance or characteristics of goods.

If so, they guarantee that the goods will satisfy those promises.

For example:

- > A supplier tells the consumer that a bed will last for 10 years. If the bed only lasts for six years, the consumer will be entitled to a remedy.

Warranties against defects or 'manufacturer's warranty'

Suppliers or manufacturers may provide a warranty that promises consumers that:

- > goods or services will be free from defects for a certain period of time
- > defects will entitle the consumer to repair, replacement, refund or other compensation.

For example:

- > A consumer buys a deck chair that comes with a written warranty. The warranty says the manufacturer will replace the deck chair if it breaks within two years of the purchase date.

This is called a 'warranty against defects', also commonly called a 'manufacturer's warranty'.

From 1 January 2012, a warranty against defects must be in writing and:

- > be expressed in a transparent way – in plain language, legible and presented clearly
- > contain the warrantor's name, business address, phone number and email address (if any)
- > set out relevant claim periods or procedures, and
- > include a statement that rights under the warranty sit alongside the consumer guarantees, which cannot be excluded.

Failing to meet these criteria may lead to a maximum civil penalty of \$50,000 for a body corporate and \$10,000 for an individual. Criminal penalties for the same amounts also apply.

A warranty against defects, also known as a manufacturer's warranty, is different from an express warranty.

'Warranties against defects' versus 'express warranties'

A warranty against defects, also known as a 'manufacturer's warranty', is different from an express warranty.

A warranty against defects deals with what the manufacturer promises to do when something goes wrong with goods.

An 'express warranty' focuses on a promise or promises, for example, about what the goods will look like, will do (or are capable of doing) and for how long.

Sometimes a warranty against defects may contain an express warranty.

For example:

- > When a consumer buys a deck chair, the written warranty (the warranty against defects) states that the chair can hold up to 100 kilograms. This is an express warranty about what the goods can do. If the chair breaks after a person weighing 50 kilograms sits on it, the consumer can insist that the express warranty contained in the warranty against defects be honoured. If not, they will be entitled to a remedy.

However, an advertisement or a promotional brochure that simply mentions that a car comes with a 'four-year warranty' would need to give further detail about the nature of the warranty in order to determine whether it is a warranty against defects or an express warranty.

ACL references: sections 59, 102, 192.

Title to goods

A supplier guarantees they have the right to sell the goods (clear title), unless they alerted the consumer before the sale that they had 'limited title'.

If goods are sold with limited title, any other person with ownership rights – for example, a person owed money by the previous owner – can ask a court for permission to take the goods back from the consumer.

This happens most often when goods are sold from deceased estates. While alive, the person may have pledged the goods as security. People owed money by the deceased sometimes try to repossess the goods after the items were sold as part of the deceased estate.

Undisturbed possession of goods

A supplier guarantees that no one will try to repossess or take back goods bought by a consumer, or prevent the consumer from using those goods, except when:

- > a consumer has not met their obligations under the sale, hire or lease contract
- > before the sale, the supplier told the consumer that another person had a security interest over the goods
- > the consumer hired or leased the goods and the hire or lease period has ended
- > at the time of buying the goods, the consumer was aware the supplier only had limited title.

No undisclosed securities on goods

A supplier guarantees that goods bought by a consumer are free of any hidden securities or charges and will remain so, unless the security or charge was either:

- > placed on the goods with the consumer's permission
- > brought to the consumer's attention in writing before they bought the goods.

A supplier who makes it clear to the consumer there is limited title before sale can claim to have disclosed all known securities or charges over the goods.

For example:

- > A financier claims to be owed money by the former owner of some goods, who may have used

the goods as security for a loan. If the consumer did not know about the outstanding debt when buying the goods, the supplier would have to provide a remedy – for example, replacement goods.

Repairs and spare parts

Manufacturers or importers guarantee they will take reasonable steps to provide spare parts and repair facilities (a place that can fix the consumer's goods), for a reasonable time after purchase.

For example:

- > A consumer drops his digital camera, which he bought new a year ago for \$2000. He contacts the importer and asks where he can get it repaired. The importer advises they no longer supply parts for that model of camera. A reasonable consumer would expect a one-year-old camera to be repairable. The manufacturer has not taken reasonable steps to provide spare parts or facilities, so the importer must provide a remedy.

How much time is 'reasonable'?

This will depend on the type of goods. For instance:

- > it would be reasonable to expect that tyres for a new car will be available for many years after its purchase
- > it may not be reasonable to expect that spare parts for an inexpensive children's toy are available at all.

When the guarantee on repairs and spare parts does not apply

A manufacturer or importer does not have to meet the guarantee on repairs and spare parts if they advised the consumer in writing, at the time of purchase, that repair facilities and spare parts would not be available after a specified time.

05

Consumer guarantees applying to services

Summary

A supplier must meet the consumer guarantees of providing services:

- > with due care and skill
- > which are fit for any specified purpose
- > within a reasonable time (when no time is set).

This means they must:

- > use an acceptable level of skill or technical knowledge when providing the services, and
- > take all necessary care to avoid loss or damage when providing the services.

Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and any product resulting from the services are also fit for that purpose.

The guarantee that services will be fit for a purpose, or for achieving a result made known to the supplier, does not apply to professional services provided by a qualified architect or engineer.

The supplier also guarantees to supply the service within a reasonable time. What is 'reasonable' will depend on the nature of the services.

ACL reference: sections 60 – 63

Due care and skill

Suppliers guarantee their services are provided with due care and skill. This means they must:

- > use an acceptable level of skill or technical knowledge when providing the services and
- > take all necessary care to avoid loss or damage when providing the services.

For example:

- > A consumer hires a painter to paint her house. Before starting the job, the painter does not remove all of the old, flaking paint. Six months later, the new paint starts to flake. The painter has not met the 'due care and skill' guarantee.
- > While painting the consumer's house, the painter knocks over a can of paint, which spills over her newly paved driveway. The painter has not met the guarantee and must fix the damage.

Fit for a particular purpose

Services must achieve the consumer's stated purpose

Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and any products resulting from the services are also fit for that purpose.

For example:

- > A consumer asks a carpenter to build a carport to cover his 4WD vehicle, which is two metres wide. If the carpenter builds a 1.8m-wide carport that does not cover the car, the carpenter will not have met the 'fit for purpose' guarantee.

Services must be of sufficient quality to achieve desired results

Suppliers guarantee that services, and any resulting products, are of a standard expected to achieve the desired results that the consumer made known to the supplier.

For example:

- > A consumer asks a handyman to fix double gates at the entrance to his driveway. The gates are poorly aligned and make a loud metal scraping noise when opened. The consumer tells the handyman that he wants to stop the noise. The handyman realigns the gates but in less than two days the problem returns. The handyman will have to fix the problem free of charge, as the service did not achieve the desired result.

When the consumer does not rely on the supplier in choosing the services

The 'fit for a particular purpose' guarantee will not protect the consumer if they did not rely, or it was unreasonable for them to rely, on the supplier's skill or judgment in agreeing to particular services.

For example, it may not be reasonable for a consumer to rely on a receptionist in a large service company for advice about which service is suitable.

Are there any industries where this guarantee does not apply?

The guarantee that services will be fit for a purpose, or for achieving a result made known to the supplier, does not apply to professional services provided by a qualified architect or engineer. (This maintains an exemption granted by previous law.)

However, an architect or engineer who provides a service outside their area of professional expertise (for example, building services) must still meet the guarantee.

Architects or engineers must provide services with due care and skill.

Services must be supplied within a reasonable time (if no time set)

A contract or agreement for the supply of services usually states when the services will be provided and the date they will be completed.

If not, the supplier guarantees they will supply the service within a reasonable time.

What is 'reasonable' will depend on the nature of the services. For example, the time needed to build a house will be longer than the time required to lop a tree.

Suppliers guarantee that services will be reasonably fit for any purpose specified by the consumer and achieve any desired results.

06

When goods or services do not meet a consumer guarantee

Summary

A consumer has the right to a remedy if goods or services do not meet a consumer guarantee.

The consumer guarantees apply to both major (serious) and minor problems.

The type of remedy, and who must provide it, will depend on the problem and which consumer guarantee was not met.

Gift recipients have the same rights as a consumer who has bought goods directly.

ACL reference: Division 1 of Part 5-4

Who can the consumer claim a remedy from?

The *supplier*, if goods do not meet the consumer guarantees as to:

- > fitness for any disclosed purpose
- > matching sample or demonstration model
- > title
- > undisturbed possession, or
- > undisclosed securities.

The *manufacturer*, if goods do not meet the consumer guarantees as to repairs and spare parts.

Both the *manufacturer* and the *supplier*, if goods do not meet the consumer guarantees as to acceptable quality, express warranties and matching description.

The *supplier*, if services do not meet the consumer guarantees as to:

- > due care and skill
- > fitness for particular purpose, or
- > completion within a reasonable time (where no time was set).

For further information on remedies available from a manufacturer, see Consumer claims against the manufacturer, page 30.

Consequential loss

A consumer may also seek compensation from the supplier or manufacturer for any consequential or associated loss or damage resulting from failure to meet the consumer guarantees. The loss or damage must have been reasonably foreseeable and not caused by something outside human control, such as a cyclone.

For example:

- > A faulty toaster sets fire to a consumer's house or burns the consumer's hand. The consumer is entitled to compensation to make up for that loss and damage, not just to a refund for the faulty toaster.

For more information, see *Compensation for consequential loss*, page 28.

What sort of problems do the consumer guarantees deal with?

Consumer guarantees apply to both major and minor failures with goods and services.

What is a major failure?

A major failure with *goods* is when:

- > a reasonable consumer would not have bought the goods if they had known about the problem. For example, no reasonable consumer would buy a washing machine if they knew the motor was going to burn out after three months
- > the goods are significantly different from the description, sample or demonstration model shown to the consumer. For example, a consumer orders a red bicycle from a catalogue, but the bicycle delivered is green
- > the goods are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a ski jacket is not waterproof because it is made from the wrong material
- > the goods are substantially unfit for a purpose that the consumer told the supplier about, and cannot easily be made fit within a reasonable time. For example, a car is not powerful enough to tow the consumer's boat because its engine is too small – despite the consumer telling the supplier they needed the car to tow a boat.
- > the goods are unsafe. For example, an electric blanket has faulty wiring.

A major failure with *services* is when:

- > a reasonable consumer would not have acquired the services if they had known the nature and extent of the problem. For example, a reasonable consumer would not pay to have acrylic nails attached if they knew the nails would fall off within an hour
- > the services are substantially unfit for their normal purpose and cannot easily be made fit, within a reasonable time. For example, a carpet-cleaning service changes the colour of the consumer's carpet in some places
- > the consumer told the supplier they wanted the service for a specific purpose but the services, and any resulting product, do not achieve that purpose and cannot easily or within a reasonable time be made to achieve it. For example, a consumer tells a pay TV company they want to watch the Olympics. They sign up to a 24-month contract but the Olympics are over before the company installs the service
- > the consumer told the supplier they wanted a specific result but the services, and any resulting product, do not achieve that result and cannot easily or within a reasonable time be made to achieve it. For example, a consumer asks a technician to increase the memory capacity of a computer. When installing an extra drive, the technician damages the hard drive. Repairs will take six weeks but the consumer needs the computer within a week.
- > the supply of the services has created an unsafe situation. For example, an electrician incorrectly wires wall sockets in a consumer's new kitchen, which makes the electrical outlets unsafe.

Rights of gift recipients

People who receive goods and services as gifts have the same rights and responsibilities and are entitled to the same remedies as consumers who buy goods directly.

When is a consumer not entitled to a remedy?

A consumer is not entitled to a remedy when a supplier does not meet one of the consumer guarantees due to something:

- > someone else said or did (excluding the supplier's agents or employees), or
- > beyond human control that happened after the goods or services were supplied.

For example:

- > It takes a qualified painter three weeks to paint a house but the job has taken four weeks. The sole reason for the delay was the weather, which is outside the painter's control. The consumer would not be entitled to a remedy.

This exception does not apply when a supplier has not met the guarantee of due care and skill.

Sometimes, a manufacturer may recall goods in order to fix a potential safety issue – for example, a car manufacturer may recall a car of a particular make and model because of a possible brake defect.

If so, the potential safety issue with the good does **not automatically** amount to a major failure on the basis that the car is unsafe. Each of the goods subject to the recall would need to be considered individually.

Goods – dealing with problems

Summary

If goods fail to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or failure to meet an obligation.

When the problem is minor, the supplier can choose between providing a repair or offering the consumer a replacement or a refund.

When there is a major failure, the consumer can:

- > reject the goods and choose a refund or a replacement, or
- > ask for compensation for any drop in value of the goods.

ACL reference: Division 1 of Part 5-4

Remedies for major failures with goods

If there is a major failure, the consumer can:

- > reject the goods and get a refund
- > reject the goods and get an identical replacement, or one of similar value if reasonably available, or
- > keep the goods and get compensation for the drop in value caused by the problem.

The consumer gets to choose, not the supplier or manufacturer.

Can a consumer get a refund for changing their mind?

A supplier does not have to give a refund when a consumer simply changes their mind about the goods or services.

But a supplier can have a store policy to offer a refund, replacement or credit note when this happens. If so, they must abide by this policy.

Consumer responsibilities when rejecting goods

A consumer must advise the supplier if they intend to reject goods, and explain why. They must:

- > return the rejected goods to the supplier, or
- > ask the supplier to collect the rejected goods, if the goods cannot be returned without significant cost to the consumer.

Sometimes, faced with a major failure, a consumer may agree to or request a repair – for example, if they did not know they were entitled to a refund or replacement. If so, the consumer does not lose their right to a refund or replacement. The problem with the goods is still 'major', so they may reject the goods at any time and ask for a refund or replacement.

When a consumer cannot reject goods

A consumer cannot reject goods when:

- > the goods have been thrown away, destroyed, lost or damaged through no fault of the supplier, after delivery to the consumer
- > the goods have been attached to other property and cannot be removed without damage. For example, removing wallpaper will damage it
- > too much time has passed. The right to reject the goods runs from the date of supply to the consumer, until the fault or problem would reasonably be expected to appear. This depends on:
 - the type of goods
 - how a consumer is likely to use the goods
 - the length of time the goods could reasonably be used, and
 - the amount of use the goods could reasonably be expected to tolerate before the problem or fault became apparent.

Even if the consumer has lost the right to reject the goods, they will still have the right to keep the goods and ask for compensation for any drop in the goods' value.

Responsibility for returning goods

When the consumer notifies the supplier they are returning the goods, the goods become the supplier's property.

The consumer must return the goods to the supplier unless the cost of returning, removing or transporting is significant; for example, due to the:

- > size or height of the goods, or the way the goods are installed (if any)
- > type of problem with the goods. For instance, a consumer would not usually be able to remove a light fitting that has melted and stuck to a wall.

If the cost to the consumer would be significant, the supplier must collect the goods at their own expense and within a reasonable time.

Examples of goods a supplier would have to collect:

- > a 127 cm LCD TV
- > a bed
- > a swimming pool filter connected to a pool by fixed pipes
- > an extension ladder stuck in the extended position.

When the consumer chooses a refund

The supplier must repay any money paid by the consumer for the returned goods, and return any other form of payment made by the consumer – for example, a trade-in.

If this is not possible, they must refund the consumer the value of the other form of payment.

A supplier must not:

- > offer a credit note, exchange card or replacement goods instead of a refund
- > refuse a refund, or reduce the amount, because the goods were not returned in the original packaging or wrapping.

A consumer will usually need to show a receipt or other 'proof of purchase'. For more information, see *Receipts and other proof of purchase* on page 34.

Services connected to returned goods (linked service contracts)

Consumers often buy goods linked to a contract for services. An example is a mobile telephone, often linked to a contract for network services.

A consumer who has returned goods within a reasonable time and is entitled to a refund, may also cancel the linked service contract. They can do this when returning the goods, or within a reasonable time.

Such contracts do not terminate automatically.

For example:

- > A consumer signs up for a package that includes a modem and internet access. She rejects the modem because it turns out to be faulty but chooses to keep her internet connection. Alternatively, she could reject the faulty modem and cancel the connection.

A consumer who cancels a linked service contract is entitled to a refund or can refuse to pay for any services not yet received.

The supplier does not have to give a refund for any services the consumer has received up to the time they reject the related goods.

For example:

- > A consumer subscribes to 12 editions of a cooking magazine for \$200, including \$80 for delivery. She receives only three editions in six months, so cancels the subscription and delivery. The supplier must refund \$150 for nine magazines not received – \$90 for the magazines and \$60 for delivery.

When the consumer chooses a replacement

The supplier must provide goods of the same type and similar value. If such a replacement is not reasonably available, the consumer may choose a repair or a refund.

The consumer must return goods to the supplier. If this involves significant cost to the consumer, the supplier must collect the goods at their own expense (see page 23).

The consumer guarantees that applied to the original goods will apply to the replacements.

For example:

- > A consumer buys a new mobile phone. Due to a problem, the supplier replaces it. Consumer guarantees apply to the replacement phone as if it were a new mobile phone.

Remedies for minor problems with goods

If a failure of goods is not major and can be repaired within a reasonable time, the consumer cannot reject the goods and demand a refund.

They can ask the supplier to fix the problem. The supplier may choose to:

- > provide a refund
- > replace the goods
- > fix the title to the goods, if this is the problem
- > repair the goods.

For example:

- > *Fixing problems with title*
When there is a problem with the title to goods, the supplier may deal with the problem, for example, by paying money owed to the person who has a security interest in the goods.
- > *When replacement may be preferable*
If the cost of repairing the goods is more than the value of the goods, the supplier might instead offer the consumer a replacement.

It is the supplier's responsibility to return goods to the manufacturer for repair.

Reasonable costs

If the consumer has no option but to take goods elsewhere for repair, they do not have to get the original supplier's agreement or provide quotes. However, the supplier only has to pay the 'reasonable costs' of repair.

A reasonable cost would be within the normal range charged by repairers of such goods, and include:

- > the cost of the repair
- > any other associated costs incurred by having the goods fixed elsewhere, such as transport costs.

For example:

- > The zip on a pair of trousers breaks after one week. The retailer tells the consumer the repair will take a month. The consumer explains he needs the trousers for work urgently but the retailer offers no other option. The consumer gets the zip replaced by a tailor for \$25. When the consumer asks the retailer to pay for this, the retailer says that their tailor would have done it for \$20. If the higher price is a normal price for a tailor to fix the trousers, the retailer would have to reimburse the consumer.

What if the supplier is unable to repair the goods?

If a supplier cannot repair the goods (for instance, because the supplier does not have the requisite parts) or cannot do so within a reasonable time, the consumer can:

- > reject the goods and seek either a refund or replacement, or
- > have the goods fixed elsewhere and claim reasonable costs from the supplier.

For example:

- > Several buttons came off a consumer's new shirt due to poor stitching. The tailor who made the shirt could not supply matching buttons. The consumer is entitled to ask for a replacement or refund.

How long can a supplier take to fix goods?

The supplier must fix the problem within a reasonable time. What is 'reasonable' will depend on the circumstances.

For example:

- > A supplier would be expected to respond quickly to a request for a repair to an essential household item, such as a water heater. For goods used less often, such as a lawnmower, the reasonable time for repair would be longer.

When a supplier refuses or takes too long to repair goods

If the supplier refuses or takes more than a reasonable time to repair the goods, the customer can:

- > take the goods elsewhere to be fixed and ask the supplier to pay reasonable costs of this repair
- > reject the goods and ask for a refund, or
- > reject the goods and ask for a replacement, if one is reasonably available to the supplier.

There are some restrictions on rejecting goods. See *When a consumer cannot reject goods*, page 23.

Refunds cannot be reduced if the consumer has brought the goods back without their original packaging. See *When the consumer chooses a refund*, page 23.

Consumer guarantees will also apply to replacement goods. See *When the consumer chooses a replacement*, page 24.

Prescribed requirements for repairs of consumer goods

A *repairer* of goods (whether or not this is the supplier) must notify the consumer of particular information before accepting the goods for repair, as follows:

- > The repairer must tell the consumer if the repairer intends to replace defective goods with refurbished goods of the same type rather than repairing the problem with the original goods, or to use refurbished parts to repair the goods. The ACL Regulations prescribe certain wording about refurbished goods.
- > For goods capable of storing data created by the user of the goods (user-generated data), the repairer must advise the consumer that repairing the goods may result in loss of the data. User-generated data includes, for example, songs, photos, telephone numbers and electronic documents.

Repairers who fail to comply may face:

- > a civil penalty of \$50,000 for a body corporate and \$10,000 for an individual
- > a criminal penalty for the same amount
- > an infringement notice
- > legal action (for example, an injunction) by either a consumer protection agency or the consumer.

08

Services – dealing with problems

Summary

If services fail to meet a guarantee, a consumer will have rights against the supplier and, in some cases, the manufacturer, who will have to provide a 'remedy' – an attempt to put right a fault, deficiency or a failure to meet an obligation.

When the problem is minor, the supplier can choose between providing a repair or offering the consumer a refund. If the supplier refuses or takes too long, the consumer can get someone else to fix the problem and ask the supplier to pay reasonable costs, or cancel the service and get a refund.

When there is a major failure, the consumer can:

- > cancel the services and get a refund, or
- > keep the contract and get compensation for the difference in value.

ACL reference: Division 1 of Part 5-4

Remedies for major failures with services

When there is a major failure with a service, a consumer can choose to:

- > cancel the service contract with the supplier and get a refund, or
- > keep the contract and get compensation for the difference in the service delivered and what they paid for.

For example:

- > A consumer has signed a building contract that sets out the specifications for her new house. When the house is completed, the consumer notices a few windows are not in the right place. Because the builder has not met the standard required by the contract, the consumer is entitled to compensation.

Can a consumer get a refund for changing their mind?

A supplier does not have to give a refund when a consumer simply changes their mind about the services.

But a supplier can have a policy to offer a refund or credit note when this happens. If so, they must abide by this policy.

How can a consumer cancel services?

A contract for services ends when the consumer tells the supplier of their intention to cancel the services – verbally, in writing or, if this is not possible, by any other means.

A consumer can cancel a contract for services at any time.

Refunds for cancelled services

Cancelling a contract for services gives the consumer the right to a refund.

The amount will depend on whether some or all of the services provided were unsatisfactory, or provided at all.

For example:

- > A hairdresser has cut and permed a consumer's hair. The cut is good but the perm has 'fallen out' after a day. The consumer must pay for the cut but not for the perm, as another hairdresser will not need to cut her hair to fix the problem.

What happens to goods connected with cancelled services?

As stated earlier, consumers often buy goods linked to a contract for services. When a consumer is entitled to cancel a contract for services, they may also reject goods linked to the contract for services. The consumer is entitled to a refund of any money or other type of payment made for the goods.

To get a refund, the consumer must return the goods to the supplier. If this involves significant cost to the consumer, the supplier must collect the goods at their own expense.

Remedies for minor problems with services

If a minor problem with a service can be fixed, the consumer cannot cancel and demand a refund immediately.

The consumer must give the supplier who provided the services an opportunity to fix the problem:

- > free of charge; and
- > within a reasonable time. This depends on the circumstances (see *How long can a supplier take to fix goods?* page 25).

For example:

- > A reasonable time to fix a problem with a haircut would be much shorter than the reasonable time to fix a problem with a landscaping project.

If the supplier refuses to fix the problem or takes too long, the consumer can:

- > get someone else to fix the problem (deliver the services) and ask the supplier to pay reasonable costs; or
- > cancel the contract and get some or all of their money back, if they have already paid. A consumer who has not yet paid, or only partly paid, can refuse to pay for the defective services at all, or pay less than the agreed price.

When does cancellation take effect?

A service is cancelled when the consumer notifies the supplier that they want to cancel it.

Compensation for consequential loss

Summary

A consumer can claim compensation for consequential loss from a supplier who failed to meet one or more of the consumer guarantees.

Consequential loss is the cost to a consumer of a problem with goods or services.

Compensation should put the consumer in the position they would have been in if the goods or services had met the consumer guarantees.

What is consequential loss?

Consequential loss is the cost to a consumer of a problem with goods or services. It is usually financial but can include other costs, such as lost time or productivity.

A consumer can claim compensation for consequential loss from a supplier who failed to meet one or more of the consumer guarantees.

The consumer can apply directly to the supplier for compensation. If the supplier declines or an agreement cannot be negotiated, the consumer can take the matter to formal dispute resolution services or pursue legal action.

For more information about dispute resolution, contact the relevant consumer protection agency (these are listed on page 38).

Is the supplier required to pay for all losses?

A supplier will have to pay for losses that:

- > could have been expected to result from a failure to meet a consumer guarantee; and
- > are reasonably foreseeable.

In other words, a consumer can recover losses that would probably result from the supplier's failure to meet the guarantee.

Suppliers do not have to pay for:

- > problems unrelated to their conduct or the goods they supplied; and
- > losses caused by something completely independent of the supplier, after the goods left their control.

For example:

- > A consumer recently bought a car, which leaked oil on her driveway. A neighbour's dog ran through the oil and into the car owner's house, dirtying the carpet. The car dealer would not have to pay for carpet cleaning, as the dealer could not predict that a dog would run through the oil and into the house – the cost was not reasonably foreseeable.
- > A consumer's washing machine breaks down due to a fault. As a result, there is water damage to carpet in part of the house. The supplier will be responsible for the cost of replacing the carpet damaged by flooding from the faulty washing machine.

Putting a value on consequential loss

It can be hard to put a dollar figure on consequential loss.

Compensation should put the consumer in the position they would have been in if the goods or services had met the consumer guarantees.

For example:

- > A consumer used a liquid cleaner according to instructions on the pack to remove a stain on his new curtains. The product badly damaged a curtain in the living room. As the curtain was new, the supplier would probably have to meet the cost of replacement. Compensation would be less for curtains in poorer condition.

A consumer can recover reasonably foreseeable losses that would probably result from the supplier's failure to meet a consumer guarantee.

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Consumer claims against the manufacturer

Summary

Consumers will usually deal with suppliers but may sometimes ask the manufacturer to fix a problem. Manufacturers are responsible for meeting certain consumer guarantees.

A manufacturer includes a person or business that:

- > makes or puts goods together
- > has their name on the goods, or
- > imports the goods (if the maker does not have an office in Australia).

ACL reference: Division 2 of Part 5-4

When is a manufacturer responsible?

A manufacturer must provide a remedy when goods fail to meet the consumer guarantees for:

- > acceptable quality
- > matching description
- > repairs and spare parts.

A manufacturer must also honour any additional promise or representation they made about the goods – for example, an express warranty (see *Express warranties*, page 16)

The manufacturer must honour a consumer's rights under consumer guarantees, regardless of whether the goods are covered by any other warranty.

Manufacturer failure to honour an express warranty

If the manufacturer refuses to honour an express warranty or fails to do so within a reasonable time, the consumer can take legal action to enforce the warranty in a tribunal or court.

The consumer can also:

- > assert their rights under the consumer guarantees
- > ask for compensation for consequential loss due to the manufacturer's failure to meet the warranty (see *Compensation for consequential loss*, page 39).

What if there is no express warranty?

If there is no express warranty and the manufacturer has not met a consumer guarantee, the consumer can assert their rights under the consumer guarantees.

How much compensation does the manufacturer have to pay?

A consumer is entitled to ask for an amount covering any drop in the value of the goods. This amount must be equal to or less than the difference between the current value of the goods and the lowest of either:

- > the average retail price of the goods at the time of purchase, or
- > the actual price paid.

For example:

- > A consumer bought goods for \$30. The average retail price at the time was \$28. The goods are worth only \$10 due to failure to meet a consumer guarantee. The manufacturer must pay the consumer \$18 – the difference between the average retail price of \$28 (because it is lower than the price paid) and the value of the goods as a result of the problem.

The consumer can also ask for compensation for any reasonably foreseeable loss suffered due to the manufacturer's failure to meet the consumer guarantees.

'Reasonably foreseeable' costs include the cost of inspecting and returning the goods to the manufacturer. See *Compensation for consequential loss* on page 28.

What if the manufacturer did not cause the problem?

Manufacturers are not responsible for problems with goods beyond their control.

They do not have to pay damages if goods do not meet the consumer guarantees due to:

- > an act, default, omission or representation made by some other person (excluding an employee or agent of the manufacturer). For example:
 - A mechanic, not employed by the manufacturer, uses the wrong engine oil in a car. This damages the engine. The mechanic, not the manufacturer, would have to compensate the consumer
- > a cause independent of human control that occurs *after* the goods left the manufacturer's control. For example:
 - The day after a supplier finishes building a gazebo for a consumer, gale force winds lift two sheets of iron off the gazebo roof
- > the supplier charging a higher price than the recommended or average retail price for the goods. This covers situations where there is a higher standard of acceptable quality expected of goods due to their price. Manufacturers will be held to the standard required if the goods were sold at the recommended retail price or the average retail price.

Goods bought directly from the manufacturer

Manufacturers and importers act as suppliers when they sell goods directly to consumers and have the same responsibilities under consumer guarantees.

11

Limits on compensation for non-household goods or services

Suppliers and manufacturers can limit their liability under the consumer guarantees for goods or services not used for personal, domestic or household purposes.

They can limit remedies to:

- > replacing or repairing goods
- > reimbursing the consumer for repairing or replacing the goods
- > re-supplying services
- > reimbursing the consumer for paying someone else to supply the services.

For example:

- > A supplier has a contract to provide accounting software to a large Australian company. The supplier may insert a term into the contract providing that, in the event of a problem with the software, the supplier is only required to replace the software for free. This means they would not have to, for example, provide a refund.

A supplier or manufacturer can only do this if it is fair or reasonable. What is 'fair or reasonable' will depend on the circumstances, including whether:

- > the consumer had no choice but to agree to limit compensation
- > the consumer was given something in return for buying the goods or services from that particular supplier or manufacturer, at the expense of buying from someone else
- > the consumer knew or should have known about the limit on compensation
- > the goods were a special order for the consumer.

ACL reference: section 64A

12

When a supplier fixes a problem that is not their fault (manufacturer's indemnity)

Some goods may not be of acceptable quality due to a manufacturing defect, may not match a description given by the manufacturer or are unfit for a purpose specified to the manufacturer.

A consumer may ask a supplier, not the manufacturer, to deal with the problem. If so, the manufacturer must reimburse the supplier. The amount can include any compensation paid to the consumer for reasonably foreseeable consequential losses.

How long does a supplier have to ask for reimbursement?

A supplier has three years to ask the manufacturer for reimbursement, from the date that:

- > they fixed any problems with the consumer's goods, or
- > the consumer took legal action against the supplier.

Are there any limits on reimbursement?

Manufacturers cannot contract out of this obligation to reimburse the supplier.

However, when goods are not used for personal, domestic or household purposes and it is fair and reasonable to do so, the manufacturer can limit their liability to the lowest cost among the following:

- > replacing the goods
- > obtaining equivalent goods, or
- > repairing the goods.

Suppliers and manufacturers can also make an agreement about what they will each cover, as this does not affect the consumer's rights.

ACL reference: sections 274, 276A

A supplier has three years to ask a manufacturer for reimbursement.

13

Receipts and other 'proof of purchase'

A consumer who wants to make a claim about faulty goods or services against a supplier or manufacturer will generally need to show that they obtained the goods or services from that supplier or manufacturer. The same applies to people who received the goods or services as a gift.

Businesses are understandably concerned to ensure that claims made to them about goods and services are genuine.

The best proof of purchase is a tax invoice or receipt, and consumers are strongly advised to obtain one and keep it.

A number of other forms of evidence are also generally acceptable. Among these are:

- > a lay-by agreement
- > a confirmation or receipt number provided for a telephone or internet transaction
- > a credit card statement
- > a warranty card showing the supplier's or manufacturer's details and the date or amount of the purchase
- > a serial or production number linked with the purchase on the supplier's or manufacturer's database.

Sometimes a consumer may need to provide more than one type of proof of purchase to support their claim – for example, when a receipt does not clearly itemise the faulty goods or service.

If a consumer cannot show that they bought the goods or services, a supplier or manufacturer may still choose to accept the consumer's claim.

If a dispute arises about whether a supplier should accept a claim without proof of purchase, the consumer may seek the opinion of an Australian court or tribunal.

For example:

- > A consumer buys a well-known brand of toaster using cash at a medium-sized store. The toaster malfunctions within the first week.

The consumer takes the toaster back to the supplier but has lost the receipt. The supplier has no record of the transaction and declines to provide a replacement or repair.

The consumer contacts the manufacturer, who identifies the serial number of the toaster as one of a recent batch and agrees to accept the claim.

Had the toaster been part of an older product line (three or four years old), it may have been difficult for the manufacturer to know whether the problem was a malfunction or due to wear and tear by the consumer.

For information about supplier responsibilities when issuing proof of purchase, see another guide in this series – *Sales practices: a guide for businesses and legal practitioners*.

The best proof of purchase is a tax invoice or receipt, and consumers are strongly advised to obtain one and keep it. Some other forms of evidence are also acceptable.

Glossary and abbreviations

Term	Definition
acquire	to take possession of something by hiring, leasing or buying it, or by exchange or gift
body corporate	includes a company registered under the Corporations Act 2001, an incorporated association, a co-operative or an owners corporation
buy	see 'acquire'
consumer	<p>a person who buys:</p> <ul style="list-style-type: none">> any type of goods or services costing up to \$40,000 (or any other amount stated in the ACL Regulations)> goods or services costing more than \$40,000 which would normally be for personal, domestic or household use, or> goods which consist of a vehicle or trailer used mainly to transport goods on public roads. <p>Australian courts have said that the following are not normally used for personal, domestic or household purposes:</p> <ul style="list-style-type: none">> an airseeder – <i>Jillawarra Grazing Co v John Shearer Ltd</i> (1984) ATPR 40-441> a large tractor – <i>Atkinson v Hasting Deering (Queensland) Pty Ltd</i> (1985) 6 FCR 331> an industrial photocopier – <i>Four Square Stores (QLD) Ltd v ABE Copiers</i> (1981) ATPR 40-232 at 43,115.
goods	<p>include, among other things:</p> <ul style="list-style-type: none">> animals, including fish> gas and electricity> computer software> second-hand goods> ships, aircraft and other vehicles> minerals, trees and crops, whether on or attached to land> any component part of, or accessory to, goods.

Term	Definition
liability	an obligation to put right a problem – for example, fixing a defective product, providing compensation or taking other action
manufacturer	includes a person who: <ul style="list-style-type: none"> > grows, extracts, produces, processes or assembles goods > holds him/herself out to the public as the manufacturer of goods > causes or permits his/her name, business name or brand mark to be applied to goods he/she supplies > permits him/herself to be held out as the manufacturer by another person, or > imports goods into Australia where the manufacturer of the goods does not have a place of business in Australia.
remedy	an attempt to put right a fault, deficiency or a failure to meet an obligation
services	duties, work, facilities, rights or benefits provided in the course of business. For example: <ul style="list-style-type: none"> > dry cleaning > installing or repairing consumer goods > providing swimming lessons > lawyers' services.
supplier	someone who, in trade or commerce, sells goods or services and is commonly referred to as a 'trader', 'retailer' or 'service provider'
supply	includes: <ul style="list-style-type: none"> > in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase, and > in relation to services – provide, grant or confer.

Abbreviations

ACL	Australian Consumer Law
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
CCA	Competition and Consumer Act 2010

Contacts



**Australian
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Commission**

Australian Competition and Consumer Commission

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T. 1300 654 499
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Victoria

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Government of **Western Australia**
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Consumer Protection

Western Australia

Department of Commerce

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ASIC

Australian Securities & Investments Commission

**Australian Securities and
Investments Commission**

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