

Clarification, simplification and modernisation of  
**THE CONSUMER GUARANTEE  
FRAMEWORK**  
APRIL 2018

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## **Clarification, simplification and modernisation of the consumer guarantee framework**

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To whom it may concern,

### **About the ARA**

The Australian Retailers Association (ARA) is the retail industry's peak representative body representing Australia's \$310 billion sector, which employs more than 1.2 million people. The ARA works to ensure retail success by informing, protecting, advocating, educating and saving money for its 7,500 independent and national retail members, which represent more than 50,000 shopfronts throughout Australia. The ARA ensures the long-term viability and position of the retail sector as a leading contributor to Australia's economy.

Members of the ARA include Australia's most trusted retailers, from the country's largest department stores and supermarkets, to specialty retail, electronics, food and convenience chains, to mum-and-dad operators.

### **Executive Summary**

The ARA welcomes the opportunity to submit to the Australian Consumer Law (ACL) Clarification, simplification and modernisation of the consumer guarantee framework.

The ARA is broadly supportive of the consumer protections provided by the ACL with some initiatives suggested by the potentially enhancing the current framework. However, the Government needs to



consider the unintended consequences of some changes on already existing problems particularly for smaller retailers and the use of market power by suppliers and manufacturers.

We are also aware there could be significant impacts for specific rules intended to deal with particular issues like the auto industry impacting clothing and food industries.

No retailer wants to have customers that are unhappy with the service or products they received. As such, retailers are focused on ensuring that Australia has clear, consistent and comprehensive consumer protection laws. Further retailers want to ensure the right balance is struck between fairness for consumers and the regulatory burden on retailers.

For this submission retailers refer to their supply chain as suppliers and manufacturers.

The submission follows the general structure of the proposals addressing specific retail issues raised by our members.

## Regulatory Impact Statement (RIS) Proposals

### Increasing the threshold in the definition of 'consumer'

The ARA understands there is a need to increase the threshold in the definition of 'consumer' from \$40,000 to \$100,000 because of inflationary outcomes since the figure was initially imposed.

As the Consultation Regulation Impact Statement (RIS) states, the current threshold amount of \$40,000 has not changed since its introduction in 1986. Accounting for an average annual inflation rate of 3.1% between 1986 and 2017, \$40,000 in 1986 would equate to around \$100,000 in 2017. However, this increase will also ensure a larger proportion of small businesses will be considered as consumers, increasing the coverage of ACL's consumer guarantee provisions for small businesses.

The ARA's main concern to increasing the threshold would be the potential of giving major businesses rights under the ACL over small businesses who have large contracts with larger enterprises. The right to reject provision under the proposals on consumer guarantees would be an example where a small business has an item rejected within a short period. An item such as a computer server which could have teething issues as most complex equipment does. The major business may have had a better offer since the installation which would leave the small business with an effective unprovable change of





mind and a very costly item which they may not be able to supply to another client because of the special nature of the item.

There could also be a need for a phased approach to allow the market necessary time to accommodate changes in the definition of 'consumer' into their business practices.

### Clarifying consumer guarantees remedies

The ARA has several concerns relating to the proposals in Chapter 2 of the RIS.

The proposed ACL amendment to specify that consumers can choose a refund or replacement, regardless of whether the failure(s) is major, or if the failure(s) occurred within a short period of time after purchase overlooks the significant cost this would impose on businesses and consumers. The ARA's biggest concern is the lack of market asymmetry when it comes to supplier manufacturer power over particularly small retailers.

Despite retailers currently having the legal right to claim failed goods back from a supplier or manufacturer, there seems to be continual issues with suppliers and manufacturers refusing to compensate a retailer when a good had clearly failed. In fact, when the issues was raised with our members as part of this submission it became clear that this overlooked provision is easily the single biggest issue for retailers under the ACL when it comes to financial compensation. Very few small retailers know their rights to claim costs under the ACL and some who do gave examples where they were told if they took the matter further the supplier/manufacturer would cease to supply. We thought this was a small business issue until some larger retailers informed the ARA they build in costs to the business because there are major technology companies who were extremely difficult to deal with on replacing clearly failed products.

As part of our dealings with retailers and Treasury in this RIS process, the ARA has put retailers directly in contact with Treasury to supply examples. We have also been given many examples where a supplier/manufacturer will not allow retailers to deal with a failure without their assessment. Under this proposal retailers without technical expertise could be required to make a judgment on a highly technical item or issue around unreasonable wear and tear without expert input, and a likelihood without that input would mean retailers would not be compensated by their supplier/manufacturer.





Often, a repair is sufficient to rectify a failure identified by a consumer. A repair is also often the most cost-effective approach in rectifying non-major failures. Implementing a blanket rule to require businesses to replace or refund essentially new goods will significantly increase the cost of providing these goods to consumers. These increased costs will, in turn, increase the price of these goods for consumers.

Finally, the RIS needs to consider the cost to consumers and businesses if this was imposed. There is no doubt by having an automatic right to return product will go to waste as local and overseas suppliers and manufacturers will not recompense businesses which will increase costs to both retailers and the overall economy.

A blanket provision which provides consumers with the choice to receive a refund or replacement will discourage consumers from requesting repairs of goods where a failure occurred as consumers could be enticed to select a 'quick fix' option, rather than one which is most cost effective.

### Non-major failures

The proposed ACL amendment to specify the number of multiple non-major failures that amount to a major failure could be frivolous.

While some retailers have indicated they would like to see an option which would allow them to avoid offering costly repairs, retailers have again raised the issue around suppliers and manufacturers refunding consumers when they have exercised that right.

As the RIS confirms, the ACL currently states multiple non-major failures can be considered collectively as a major failure. Some retailers have also raised that they would like the right to enforce a refund instead of a replacement for multiple repairs as failures may be from continual and improvable misuse. However, the amount of multiple failures would need to be examined for each item as technical products will differ in complexity to simple items.

The ARA recognises that uncertainty continues to exist around the concept of a 'major failure' under the ACL. However, this is inevitable as the consumer guarantee framework must include principles to provide the necessary flexibility in transactions involving different goods and services.





## Enhanced disclosure for extended warranties

The RIS identifies a concern that extended warranties do not always provide consumers with significant benefits over and above a consumer's existing rights, particularly rights provided under the ACL. This, in turn, could make it difficult for consumers to determine whether extended warranties provide value for money.

The ARA supports, in the first instance, an education campaign that increases consumer awareness and understanding of their rights under existing regulatory provisions. Increased knowledge and awareness of consumer rights will assist consumers to better understand the additional protections provided under extended warranties, and whether it is worth the additional cost for them.

As a general observation, retailers feel more comfortable in refunding and rectifying goods and services when extended warranties apply. This is due to perceived and actual issues regarding indemnification between suppliers and manufacturers. We ask the review to consider the benefit these warranties provide to both retailers and consumers in efficiently resolving product issues.

Further, the ARA is concerned about the costs associated with retraining staff and ensuring compliance given the high staff turnover in retail. Unfortunately, the dynamic climate of retail has the potential for incorrect advice to be given even where all reasonable steps are taken by retailers to mitigate risks.

## Access to consumer guarantees for goods sold at auctions

The reasons for selling goods at auction are varied. For example, reasons could include auctioning lost and surrendered property by organisations and auctioning goods of bankrupted entities by liquidators.

The extension of consumer guarantees for goods sold at auctions might make auctions unviable for many organisations, decreasing the opportunity for consumers to purchase goods that are generally significantly discounted because of the inability to inspect the goods when they are sold online.

There are also items sold by smaller producers which can have a very long life (such as wine) which rely heavily on storage by the purchaser for product protection. Therefore there is a big question of how the quality and nature of a product is judged.





The ARA questions whether the benefit of extending consumer guarantees to goods sold at auctions is worth the disadvantage of decreased auction listings and the lost cost savings to consumers. Further, the misconceptions around product description and expectation can be confusing.

## Conclusion

While there are a series of issues within the current framework, we believe there is opportunity to rectify these issues. The ARA believes there needs to be a regular process in allowing retailers to raise failures as they occur within the system, especially considering the constantly evolving retail environment.

Our members thank Treasury for the opportunity to be involved in this consultation and we would be pleased to discuss this submission further, at your convenience.

Kind regards,



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