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21 November 2024

By email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

**Re: Submission to Australia's Treasury Consultation on 'Consumer Guarantees and Supplier Indemnification under Consumer Law'<sup>1</sup>**

1. Almost three years ago I provided a Submission on a similar Treasury-led consultation.<sup>2</sup> Appendix II reproduces that Submission for convenience. I also take this opportunity to urge Treasury to follow government best practice and upload Submissions soon after consultation periods close rather than years later. (That practice is adopted by the Productivity Commission, Law Commissions and various govt departments, parliamentary committees and others, and allows more informed and timely public debate.)
2. I stand by my earlier Submission's analysis, evidence and recommendations that the ACL should indeed be reformed by allowing regulators eg to issue civil pecuniary penalties if suppliers do not provide remedies to consumers for violating consumer guarantees. In addition:
  - a. Limiting scope to products with higher problem rates, by Regulation under the ACL, may remain a good compromise.
  - b. So might be limiting it to "major failures" in the ACL guarantees but that could be more difficult to enforce.
  - c. Another possibility is to limit penalties to particular types of consumer guarantee violations, such as lack of product safety.
  - d. A further compromise could be to limit penalties to cases where remedies are not given to individual consumers transacting for non-business purposes, who are arguably more vulnerable than other types of purchasers.

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<sup>1</sup> <https://treasury.gov.au/consultation/c2021-224294>

<sup>2</sup> <https://treasury.gov.au/consultation/c2021-223344>

- e. I also believe it is important that regulators should be held accountable to show transparently how they use or do not use the new proposed powers to issue civil penalties.<sup>3</sup> This is because even when powers have been added to the ACL (eg in 2010 allowing regulators to bring representative actions for consumers opting in, for damages from violations of consumer guarantees) or by state regulators (eg NSW OFT being permitted compensation orders mandating suppliers to pay damages), they have not been used.
3. The proposed reform seems particularly valuable now that Australian governments have seemingly decided not to proceed with the 2020 proposal to add to the ACL any General Safety Provision (GSP), as in the EU since 1992 and then several other countries, making it a contravention to put unsafe products on the marketplace.<sup>4</sup> Instead, there is only now a revived proposal to make it easier for the Minister to adopt overseas safety standards for specific products (Appendix III is my Submission on that consultation).<sup>5</sup>
4. The current proposal is useful as it goes some way towards a GSP. This is because the s54 consumer guarantee of acceptable quality includes “safety”, and even if civil penalties were to be limited to situations of a “major failure” in a consumer guarantee, that includes safety issues with products. To avoid the possibility of new civil pecuniary penalties, suppliers should take more care in sourcing safer products. However, even if dealing in unsafe products, suppliers would be able to avoid penalties by simply providing remedies under the ACL if and when a consumer brought a complaint about an unsafe product. A full-on GSP would allow regulators to take enforcement action in wider situations. It also has the benefit of more guidance on what makes a product safe as well as related provisions such as requiring suppliers proactively to conduct and document risk

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<sup>3</sup> Compare problems with enforcement data identified by this recent CPRC report: <https://cprc.org.au/report/am-i-the-only-one>

<sup>4</sup> Nottage, Luke R., Improving the Effectiveness of the Consumer Product Safety System: Australian Law Reform in Asia-Pacific Context (February 3, 2020). *Journal of Consumer Policy* (2020) 43:829-850, Sydney Law School Research Paper No. 20/05, Available at SSRN: <https://ssrn.com/abstract=3530671>

<sup>5</sup> <https://treasury.gov.au/publication/p2024-582678>

assessments of products.<sup>6</sup> The current proposal is therefore not as optimal in addressing product safety concerns that persist in Australia. Nonetheless, I suppose “the perfect is the enemy of the good”.

5. The proposal to allow civil penalties for violations of consumer guarantees is also consistent with the amendment to the ACL now in force allowing the same for first-time use of unfair terms in consumer contracts. The scale of the underlying problems experienced by consumers seems quite similar.
6. For further consistency, consideration should be given to allowing also civil pecuniary penalties against manufacturers if they do not pay compensation to consumers harmed by unsafe products, pursuant the other route under the ACL: namely Part 3-5 triggered by “safety defects” in products.

\* \* \*

7. Over the last three years I have experienced personally or read about many examples of poor supplier responses to fairly clear violations of consumer guarantees, including around product safety. Appendix I gives a few examples.
8. Other empirical evidence also suggests that the situation for consumers has continued to deteriorate. For example, a 2023 CPRC Survey of Victorians revealed that 42% has been given incorrect information about ACL consumer guarantee rights, yet 13% had a broken or faulty item (41% regarding second-hand cars, 31% even for new cars).<sup>7</sup>
9. Nationwide, the 2023 Consumer Survey<sup>8</sup> (p26) shows that consumers are less likely to perceive that organisations (like consumer regulators) exist ensure ACL compliance (76% compared to 80% in the 2011 survey – but the Report is incorrect that this is “fourteen percentage points down”). A

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<sup>6</sup> See also the recently strengthened EU General Product Safety Regulation: [https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation_en) and <https://www.sgs.com/en-au/news/2024/03/cc-q1-2024-understanding-the-eu-general-product-safety-regulation-commonly-asked-questions>

<sup>7</sup> <https://cprc.org.au/report/consumer-issues-in-victoria-survey>

<sup>8</sup> <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey>

new question in 2023 further reveals that only 56% reveal that “businesses that sell unsafe products will be adequately penalised”.

### 5.1 Perceptions of enforcement and compliance

Three quarters (76%) of consumers believe there are organisations that exist to ensure businesses comply with Australian consumer protection laws. Agreement with this statement has declined significantly since 2011 (down 14 percentage points, from 80% in 2011 to 76% in 2023), however disagreement remains low at 5%.

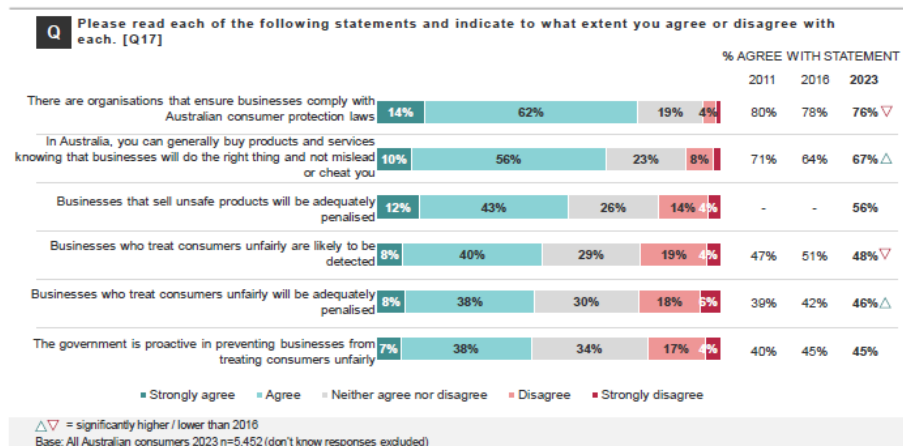
Two in three (67%) of consumers believe that in Australia you can generally buy products and services knowing the business will do the right thing, and not try to mislead or cheat you. Indeed, agreement that Australian businesses are well intentioned has increased since 2016 (was 64%, now 67%). Just less than half of consumers (46%) share a growing sentiment that businesses who treat consumers unfairly will be adequately punished, with this a significant increase since 2016 (42%).

Just over half (56%) of consumers believe that a business selling unsafe products will be adequately penalised.

Significantly fewer consumers believe that businesses who treat consumers unfairly will be detected (48%), compared to 2016 (51%).

The proportion of consumers who feel the government is proactive in preventing businesses from treating consumers unfairly has remained unchanged since 2016 (45%).

Figure 10. Perceptions of enforcement and compliance

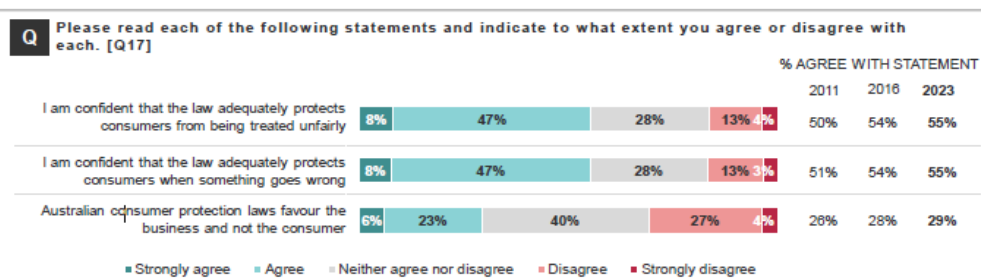


56% could be seen as quite a high percentage given that the only “penalties” under the current ACL are if a supplier continues trading in products not complying with

a specific standard<sup>9</sup> or subject to a ban, or for not providing a mandatory report about a serious product-related accident. But the response suggests consumers feel that there is too much supply of unsafe products. This is also consistent with Australia’s comparatively high volumes of “voluntary” recalls, of which quite a few involve belated withdrawal of products found (sometimes by regulators) to be violating existing product-specific standards.<sup>10</sup>

10. More broadly, the 2023 Survey (p28) shows an ongoing though gradual increase in those who perceive the ACL as favouring the business rather than the consumer (29% compared to 26% in 2011)

Figure 11. Perceptions of Australian consumer law

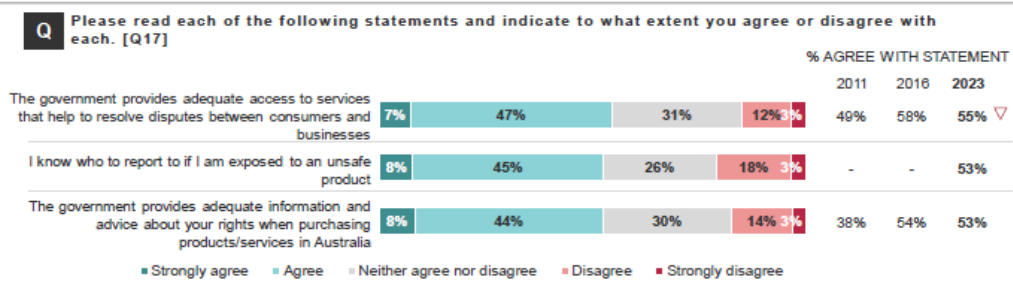


11. Fewer consumers (55%) believe that the government provides adequate access to dispute resolution services (compared to 58% in 2016, though better than in 2011). This is important because currently the ACL regime relies primarily on consumers themselves accessing dispute resolution (including tribunals and ultimately courts) to obtain consumer guarantee remedies.

<sup>9</sup> There are currently 52: <https://www.productsafety.gov.au/business/search-mandatory-standards> . For an example of non-compliance, yet again, for konjac jelly snacks see <https://www.nsw.gov.au/departments-and-agencies/fair-trading/news/more-than-11000-potentially-deadly-mini-jelly-cups-destroyed-nsw-fair-trading-sting>

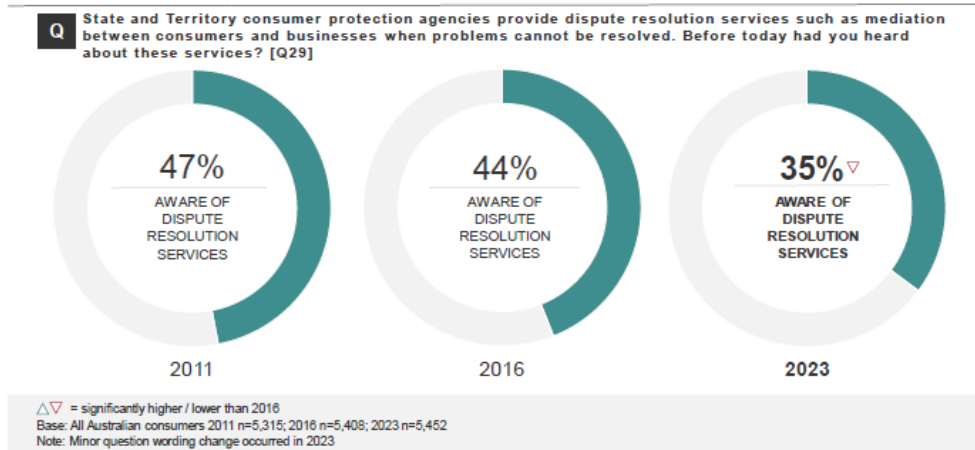
<sup>10</sup> See generally Catherine Niven’s PhD thesis (2020) at <https://eprints.qut.edu.au/203461/>

Figure 12. Perceptions of access to information and services



Overall awareness of dispute resolution services has also been declining steadily among consumers.

Figure 19. Awareness of dispute resolution services over time



12. Consumers have experienced more problems with most products over the last two years compared to the previous Survey:

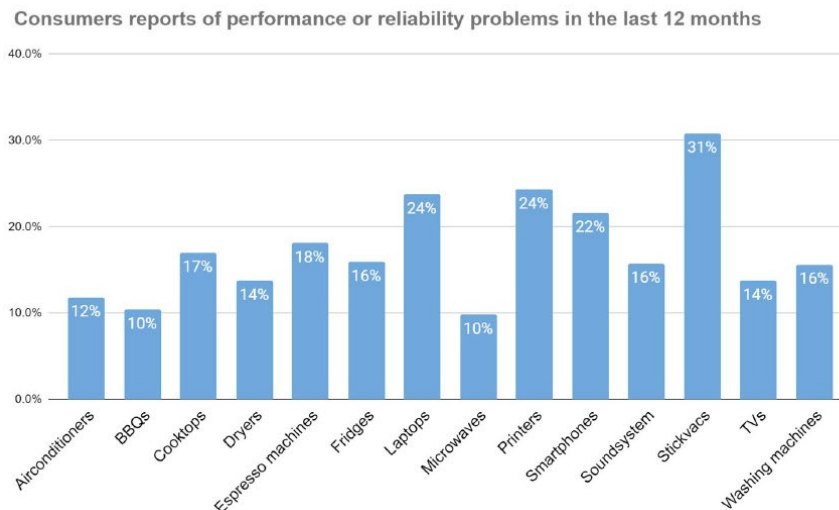
Figure 26. Incidence of problems by category

**Q** Thinking again about the past two years, have you experienced any problems when purchasing any of the following product or service categories? [Q32]

	2023	2016		2023	2016
Personal products and services	20%	-	Entertainment	11%	△ 6%
Subscriptions / streaming services	19%	-	Motor vehicle, including fuel	11%	△ 8%
Food and drink	18%	△ 18%	Private health care products or services	10%	△ 7%
Digital products and services and downloads	18%	-	Recreation or leisure activities	10%	9%
Telecommunication products or services	17%	▽ 26%	Gift vouchers	10%	△ 7%
Electronics/electrical appliances	16%	▽ 19%	Public transport	9%	▽ 10%
Internet service provider	15%	▽ 25%	Renting a residential property	9%	▽ 16%
Travel services	15%	△ 12%	Real estate	8%	▽ 12%
Utility services	13%	▽ 15%	Sporting goods	7%	6%
Banking or financial products/services	13%	△ 11%	Work tools or work wear	7%	7%
Household goods	12%	△ 9%	Legal or professional services	6%	▽ 9%
Building / renovations, repairs / home maintenance	11%	▽ 17%	Baby and children's products	6%	-

△▽ = significantly higher / lower than 2016

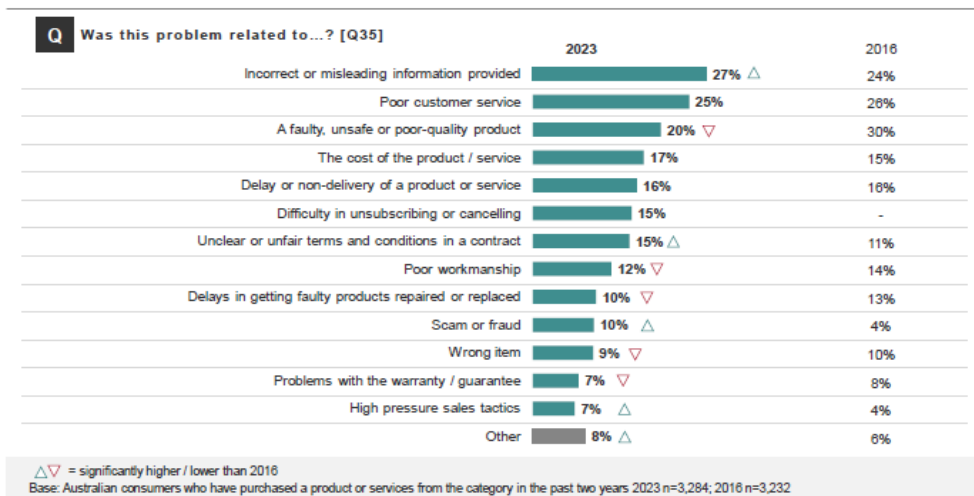
13. An exception is electronics/electrical appliances, although Choice research show that some of those attract many complaints as mentioned in my 2022 Submission:



Source: Choice reliability surveys (2019-2020), responses sourced from over 5,000 CHOICE members.

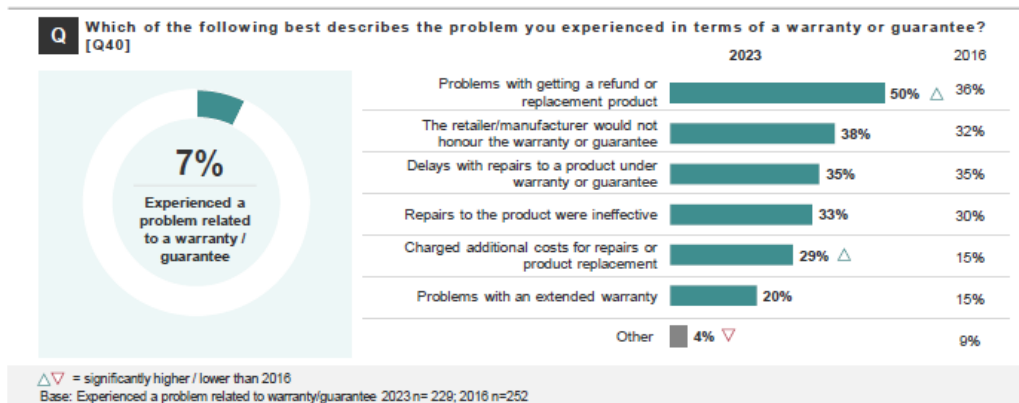
14. Significantly fewer consumers in the 2023 Consumer Survey (20%) reported problems with “a faulty, unsafe or poor-quality product” (potentially covered by consumer guarantees), compared to 2016, and 7% (rather than 8%) specifically mentioned “problems with the warranty / guarantee”:

Figure 27. Type of problems experienced over time



Of those 7%, however, 50% experienced problems with getting a refund or replacement product (a big increase compared to 36% in 2016):

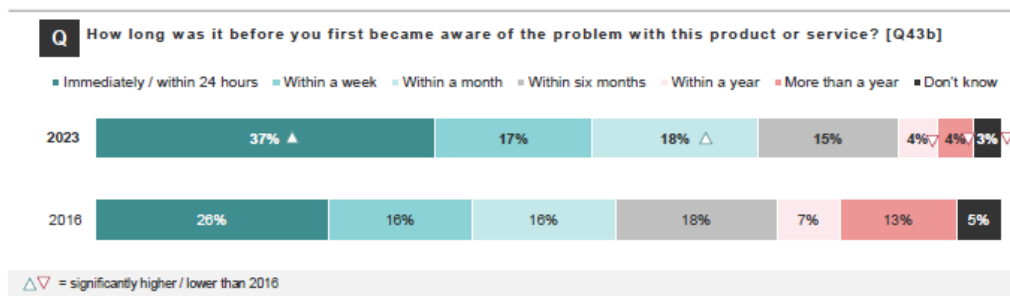
Figure 31. Specific problems relating to the clarity or fairness of the contract over time





15. Significantly more consumers also identified problems early on (37% within 24 hours), suggesting more poor-quality products (but also services) on the market:

Figure 41. When the problem was recognised over time

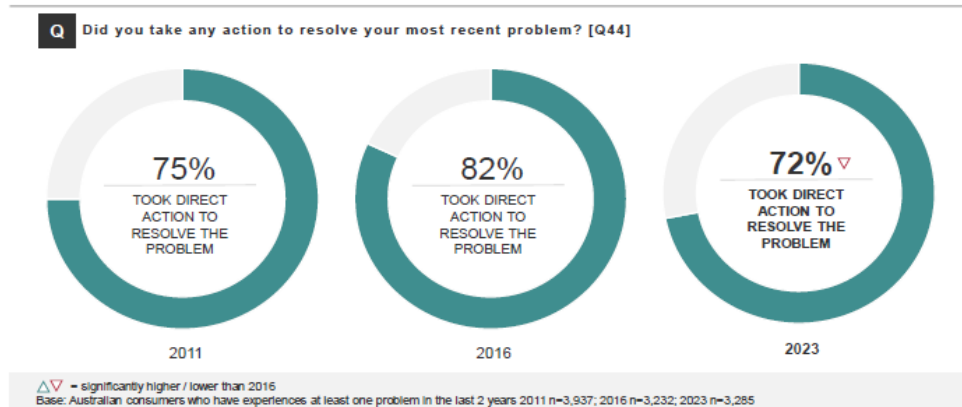


This was evident not just in foodstuffs but also childrens' products (which parents are probably very sensitive to), motor vehicles (a longstanding problem in Australia)<sup>11</sup> and personal products.

16. After an improvement in 2016, fewer consumers (72%) than even 2011 took direct action to resolve complaints, which is primarily envisaged by the current consumer guarantees regime, suggesting that suppliers and legal advisors are nowadays playing more "hard ball" (per my original Submission).

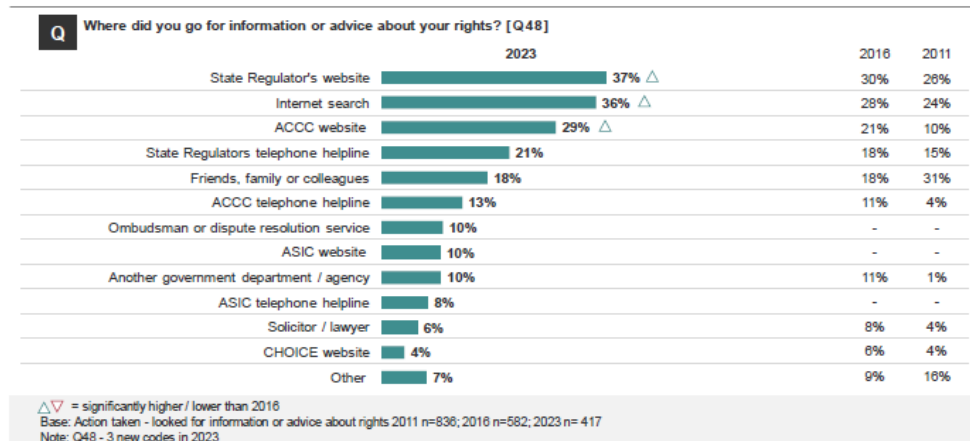
<sup>11</sup> See eg <https://cprc.org.au/detours-and-roadblocks/>

Figure 43. Action taken to resolve problem over time



17. The problem does not seem to be a lack of general information about consumer rights, as accessing this from government sources has been improving:

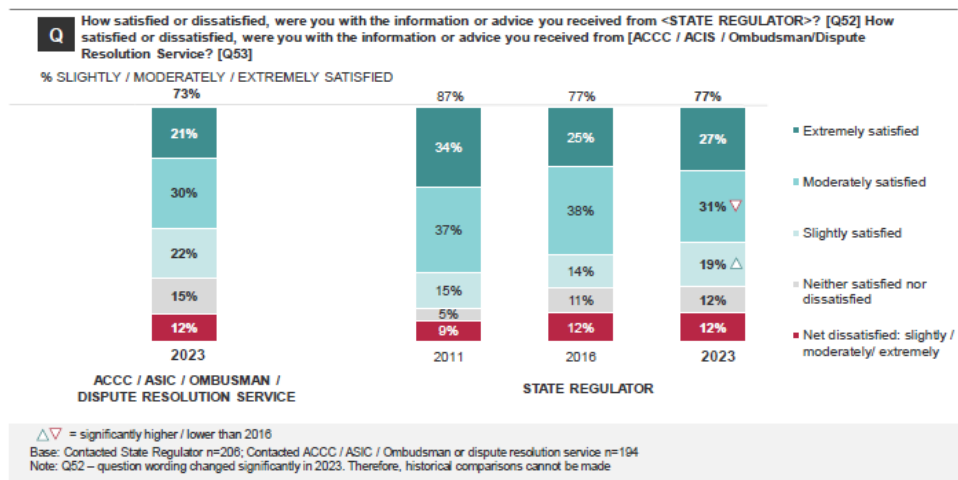
Figure 47. Sources of information and advice about consumer rights over time



Rather, as indicated in my previous Submission, even guidance notes put out on consumer guarantees (like what constitutes reasonable durability under the ACL

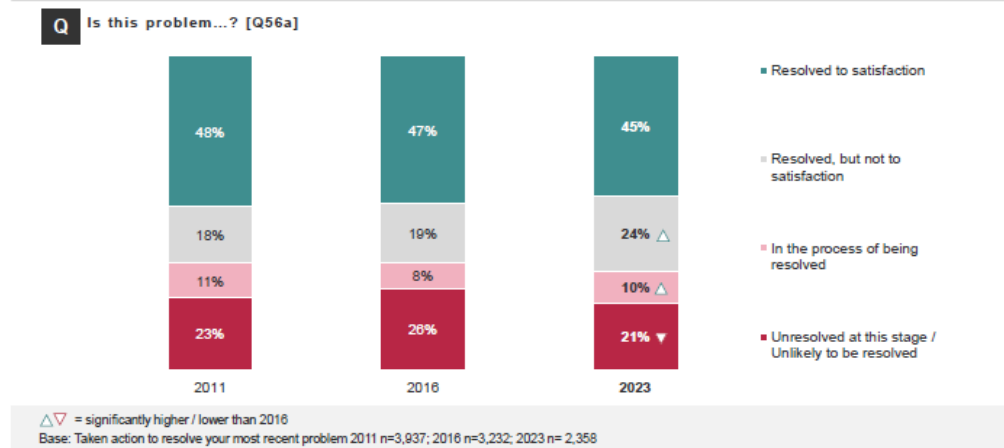
s54 guarantee of acceptable quality) remain too general for consumers or even legal advisors to use effectively in direct negotiations with suppliers around faulty products. My perception is bolstered by the declining satisfaction with the information received eg from State regulators:

Figure 49. Satisfaction with information sources



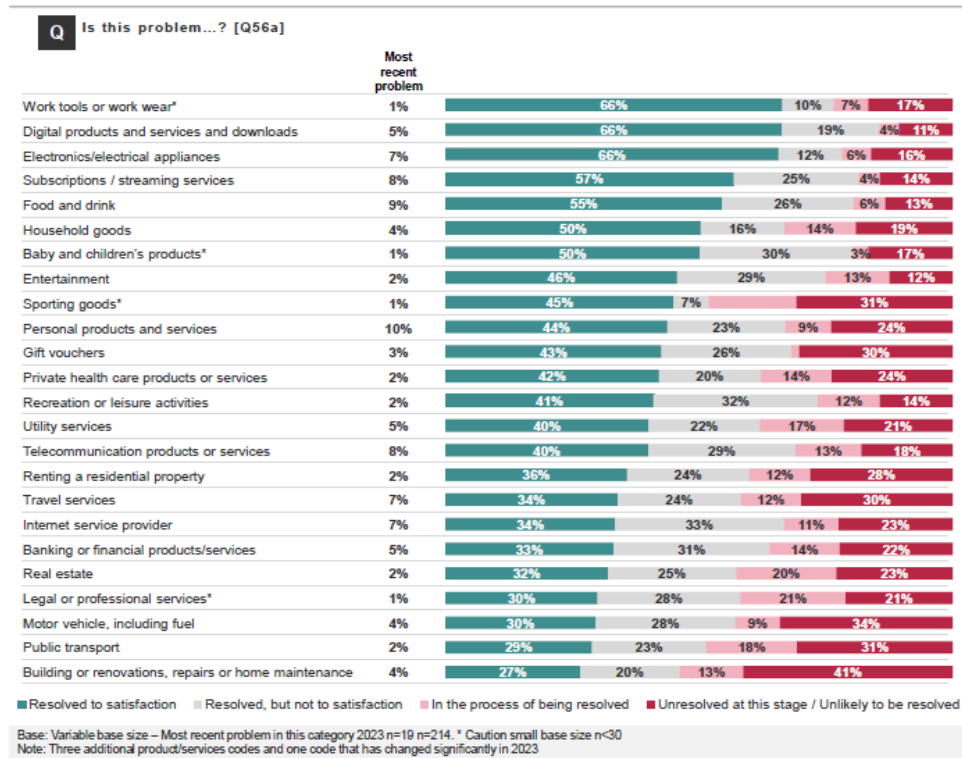
18. Unsurprisingly, from this perspective, more disputes are not being resolved satisfactorily:

Figure 50. Problem resolution over time



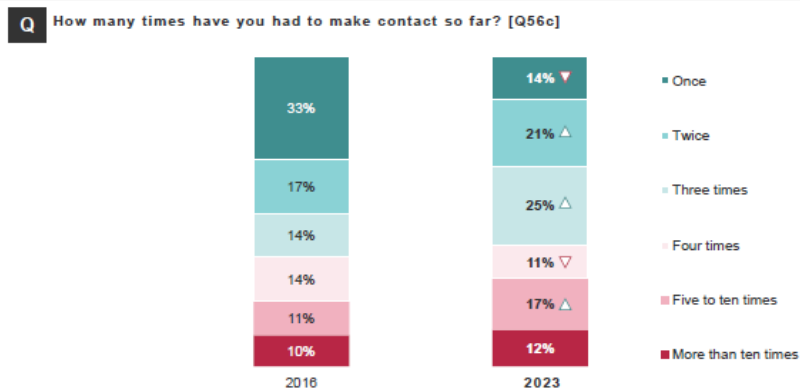
Again, one of the most problematic products is motor vehicles (whereas problems with foodstuffs and childrens' products are more likely to be resolved satisfactorily, I imagine for reputational and/or cost reasons):

Figure 51. Problem resolution by category



19. Consumers who were unable to resolve their disputes are also making more contacts with suppliers than in 2016:

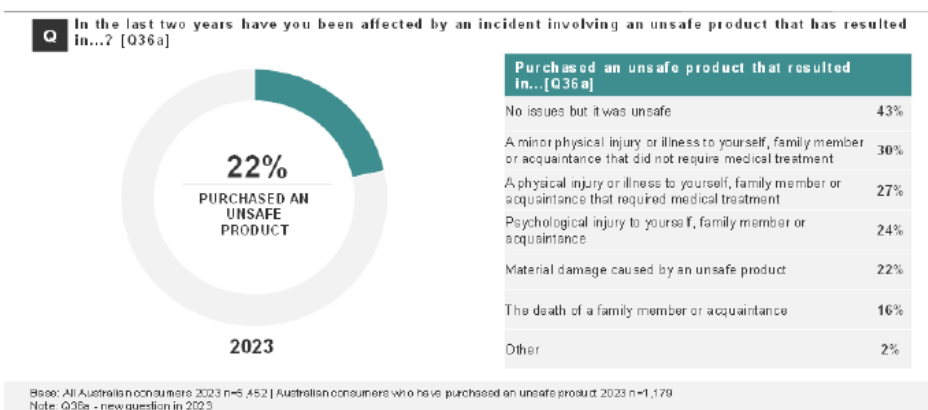
Figure 56. Number of contacts to try and resolve problem over time



20. In addition, there are many reports of unsafe products (although some are “near misses” or otherwise fortunately do not result in actual harm). I suspect this is related to the growth in e-commerce since 2016 and particularly since the pandemic (although Figure 59 questions unfortunately do not specifically ask about unsafe products purchased online). The problem is particularly acute among indigenous and culturally/linguistically diverse communities:

Twenty-two percent of Australian consumers say they have been affected by an incident involving an unsafe product over the last two years. Most often, no issues arose from the unsafe product. However, 30% of those who purchased an unsafe product said they, or someone they knew, experienced a minor physical injury, and a further 27% experienced a physical injury which required medical treatment. Psychological injury and damage to property was only slightly less common (24% and 22% respectively), and a further 16% experienced the death of a family member of acquaintance (16%).

Figure 58. Incidence of purchasing unsafe products



First Nations and culturally and linguistically diverse consumers are significantly more likely to have purchased an unsafe product in the two years prior to 2023 (40% and 30% respectively) compared to all

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21. In conclusion, such empirical data does suggest that consumers are experiencing more problems around consumer guarantee violations and getting sufficient redress on their own. Given regulators more powers to assist and thereby disempower poor behaviour from suppliers seems justifiable, but as mentioned at the outset there are various compromise solutions and regulators should be held accountable for how and when they use any such new powers.

22. I am happy to elaborate on any of the points above.

Yours sincerely

Luke R Nottage

#### APPENDIX I: Further examples of problems enforcing consumer guarantee rights

D.0 Pensioners Kay and Tony (suffering from chronic cancer from two years ago) each bought reclining chairs in November 2018 from a major chain of furniture retailers. His recliner (Viven / Napoli, purchased for \$999) soon developed a serious fault but was eventually replaced. Kay's recliner (IMG, purchased for \$1550) has developed serious faults since November 2023 (so after merely five years), for which they now claim: (a) dimpling on the surface of the leather (especially on the right arm), and then a week before Christmas 2023 (b) a split seam on the right arm (exposing filling) and a seam on the left arm also looking to ready to split. Is this a violation of the ACL consumer guarantees and what are the remedies available?

The retailer sent around an assessor who then asserted that defects evident in Kay's "prime leather" recliner chair are due to not sufficiently cleaning and caring for the chair. She contends this argument is not compelling because it was cared for in the usual way, Tony's chair (after the initial faults and replacement) has not had any such serious problems despite receiving the same level of care, and past similar furniture they have owned or known of others have not had problems either.

The assessor also pointed to a label which is hidden from view under the footrest, which states in very small print under "General Care Instructions" that users should clean "contact areas of perspiration and body oils regularly". But Kay has no abnormal propensity to perspire or emit body oils and is not on any medications that would generate this. Anyway it is a small vague instruction or warning label. She contends the retailer shouldn't have kept quiet until and at the point of sale about this issue, selling the furniture as "prime leather" that experience shows does not need extra-special care. Kay is even concerned now that the chair is not in fact real leather, having read recently about problems in the industry,<sup>12</sup> and is upset that her complaint lodged last year is not being taken seriously and they are being taking advantage of.

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<sup>12</sup> <https://www.choice.com.au/home-and-living/household/furniture/articles/leather-couches>





E.O 15-year-old Summer and her younger brother were watching TV when his new toy car, which had just been put on charge (for the third time), exploded and set fire to their home – causing \$8000 in damage. The Queensland retailer who had sold the toy, containing a lithium battery, alongside a tailored charging device that turns off when the battery is fully charged, keeps referring the family to the manufacturer. That New South Wales firm Model Engines told her it was not responsible for the damage, claiming it was her fault the battery exploded because she didn't follow the user guide. [That stated the charging should be done outside, and the user guide may not have been passed on by the retailer anyway with the product.]<sup>13</sup>

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<sup>13</sup> <https://www.abc.net.au/news/2024-04-24/lithium-ion-battery-laws-in-queensland-risk-fires/103753436> (and for general background see also eg <https://www.abc.net.au/news/2024-03-13/lithium-ion-fires-recycling-plants-trucks-vapes-exploding/103582110>)



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17 January 2022

By email:

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**Re: Submission to Australia's Treasury Consultation on 'Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law' (ACL)<sup>1</sup>**

1. I have researched, lectured and published on consumer law for over thirty years.<sup>2</sup> I agree with the proposed Part A Option 3: adding an ACL "prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms" (notably infringement notices).
2. This should be extended on an economy-wide basis, not just for the persistent problem area of new motor vehicles, as this generates on the maximum benefit cost ratio (4.7, at p47, on conservative assumptions<sup>3</sup>) and the problem with suppliers not providing ACL remedies is pervasive (except perhaps for very small-value goods, especially from large suppliers more mindful of reputational and organisational costs).
3. As evidence of that problem, in addition to the 78% increase in consumers contacting the ACCC with consumer guarantee problems in

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<sup>1</sup> <https://treasury.gov.au/consultation/c2021-224294>

<sup>2</sup> CV at <https://www.sydney.edu.au/law/about/our-people/academic-staff/luke-nottage.html>

<sup>3</sup> For example, the Consultation RIS assumes that there are only 2.7-6.6% chances of general consumer products having problems (p76), which is far less than evidenced than many product types in the consumer survey research undertaken by Choice as mentioned in paragraph 3 below and highlighted in my Appendix II powerpoint slides (although some of the "performance or reliability" issues may not necessarily involve ACL guarantee violations). Similarly, in light of Choice and anecdotal evidence, the "Deloitte assumption" of 60% of such product suppliers being likely "to provide remedies or refunds" is questionable (pp 77-79). In addition, the assumption that only half of consumers who do not obtain ACL remedies are entitled to them (p20, fn34) seems conservative, given that suppliers have many more financial and technical resources to resist even valid claims.

2019 compared to 2016 (noted at pp22-23 of the Consultation RIS), I append some of the scenarios based on real-life cases I became involved in the last few years. (As noted, only some resulted in a resolution, after formal complaints including in the case of Chris, filing a claim with NCAT.) I secondly append my Powerpoint joint presentation to the December 2021 meeting of the Australasian Consumer Law Roundtable,<sup>4</sup> including key results from Choice showing many reported defects across many goods sectors. Those survey results were presented to the Productivity Commission's inquiry last year into the ACL "Right to Repair", which also recommended introducing pecuniary penalties for not complying with ACL consumer guarantees.<sup>5</sup>

4. If that is politically difficult, despite the economic and other policy arguments for introducing this ACL reform on an economy-wide basis, at least the ACL should be amended to allow pecuniary penalties and/or infringement notices to be issued by Regulation. Initially the Regulation can target the areas which such surveys and other evidence indicate are most problematic (eg smartphones, new motor vehicles etc). Another possibility is for such a Regulation to apply to allow penalties etc only where the affected consumer is an individual, rather than a sole trader, partnership, corporation or trust – as access to justice is comparatively difficult for individuals, which suppliers in trade well know.
5. In any event, the ACL should add the possibility of issuing pecuniary penalties etc for defects which are not only "major failures". The Productivity Commission inquiry also found many examples of suppliers not providing repairs or replacements, which should be available for such defects. Consistently with their internal guidance on allocating resources, ACL regulators can be expected to target however suppliers that refuse to provide remedies even for major failures.
6. The maximum penalties etc should align with those proposed in exposure draft legislation for terms found to be unfair under the ACL.<sup>6</sup> Those are practically and conceptually similar to terms in contracts that attempt to contract out of mandatory consumer guarantees, even though such terms are also void under the ACL. Both mechanisms seek to ensure minimum

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<sup>4</sup> <https://japaneselaw.sydney.edu.au/2021/08/australasian-consumer-law-roundtable-1-december-usydney/>, linking to a PDF of our Powerpoints.

<sup>5</sup> <https://www.pc.gov.au/inquiries/completed/repair>

<sup>6</sup> <https://treasury.gov.au/consultation/c2021-201582>

- performance standards in consumer transactions and therefore trust in the marketplace, for the benefit of both consumers and suppliers.
7. As the Productivity Commission final report also recommended, new penalties for violating ACL consumer guarantee obligations should be supplemented by improvements in access to justice for consumers themselves seeking claims. For example, South Australia reportedly allows consumers to compel mediation. NSW introduced a few years ago a Consumer Guarantees Direction power allowing the OFT to order compensation to be paid to a consumer for up to \$3000, but there is no evidence of it ever having been used and it is not widely publicised in ACL related information for consumers.<sup>7</sup> The latter power at least could be added into the ACL regime for nation-wide implementation.
  8. Option 2 of more education / guidance, let alone Option 3 of doing nothing, is not compelling. Your estimated benefit cost ratio is lower. And there has already been guidance issued by regulators from the 2010 implementation of the ACL regime, including inquiries into the new motor vehicle market and indeed many court cases, plus from 2020 ACCC guidance relating to core consumer guarantees of reasonable durability and safety.<sup>8</sup> Even the latter guidance is phrased quite generally, and the Choice survey and other evidence shows that defects are still being reported and/or not easily claimed against, for many types of consumer goods.
  9. Indeed, as indicated in my two Appendices, it seems that suppliers are now *too* well educated regarding the core problem that has become evident with the ACL regime: it essentially requires consumers to “prove their case” of product or services defects in a tribunal or court. (Gradually since 2010, suppliers seem to have been mostly educated to not say that consumers only have manufacturers or other voluntary warranty rights, which misrepresentations of ACL mandatory consumer guarantee rights already can attract regulatory action and sanctions.) Yet proving their

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<sup>7</sup> See <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>. However, the power is not evident in the NSW OFT website information provided to consumers or those using its new online consumer complaints (register) system. Another reason why the power does not seem to have been used is that any Direction issued can anyway be challenged through NCAT: <https://www.ncat.nsw.gov.au/ncat/case-types/consumers-and-businesses/consumer-claims/consumer-guarantee-directions.html>)

<sup>8</sup> <https://consumer.gov.au/resources-and-guides>



case for defects is often prohibitive in terms of financial and indirect costs to consumers (especially those not in trade, thus not repeat players or able to deduct legal or expert witness costs from pre-tax income).

10. I am very happy to provide further information or advice on any of the above.

Yours sincerely,

Luke R Nottage

APPENDIX I: SCENARIOS based on recent actual cases

1. Liam, a high school student, buys a new iPhone 6 for \$489 from JB HiFi. One year and three months later, the screen stops working properly. He tries to get a remedy from the retailer. But the store manager says that while she acknowledges any rights he may be able to prove under the ACL, she has no discretion except to follow JB HiFi's Refunds and Warranties Policies at <https://support.jbhifi.com.au/hc/en-au/articles/360053005194-Refunds-Warranties-guide> which would mean Liam must bear the cost of JB HiFi assessing and then repairing the faulty screen.

Original purchase price	< 3 Months	< 6 Months	< 12 Months	< 2 Years	< 2.5 Years	< 3.5 Years	> 3.5 Years
<\$500	Green	Orange	Orange	Blue	Blue	Blue	Blue
>\$500	Green	Orange	Orange	Orange	Blue	Blue	Blue
>\$1000	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 A*	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 B*	Green	Green	Orange	Orange	Orange	Blue	Blue
>\$4000 B*	Green	Green	Orange	Orange	Orange	Orange	Blue

That policy states that for electrical products under \$500, only if the fault manifests itself within 4-12 months:

“JB HI-FI or the manufacturer will determine, at no cost to the customer, whether the product is faulty and the cause of the fault within a reasonable time frame. In the event of a major failure or minor defect and if the product is determined faulty through no fault of the customer, then the customer can request repair free of charge by an approved manufacturer's repairer. If the goods cannot be repaired within a reasonable time frame the customer can request that JB Hi-Fi replace the product. JB Hi-Fi will then replace the product with a new or used product of the same brand that has similar features. In some circumstances, the



provisions under the ACL may still provide for an automatic replacement or full refund of the original purchase price. See the blue section below for seeking a remedy under the ACL.”

The store manager asserts that Liam’s claim after a year of purchase falls within the “blue section” of their policy webpage chart viz:

“Whilst individual circumstances may vary and the law is uncertain, the policies set out above are intended to provide you with remedies that JB Hi-Fi believes in most circumstances to be consistent with your statutory rights under the ACL in the event of breach of a Consumer Guarantee relating to faulty products. However, these policies are in addition to, and do not limit your rights with respect to, the Consumer Guarantees or any other rights and remedies that you have under a law in relation to the goods sold by JB Hi-Fi. If you are not satisfied with a remedy under the JB Hi-Fi Minimum Voluntary Warranty Policy you can discuss your concerns with a JB Hi-Fi Store Manager who is authorised to provide an alternative remedy where appropriate. If the store manager believes that the JB Hi-Fi remedy is adequate but you are not still satisfied that your ACL rights are being appropriately observed then you can submit your concerns in writing to our ACL Warranty Claims Officer [contacting us](#) for further consideration by JB Hi-Fi.”

Advise Liam about his next possible steps, and generally about the JB Hifi refund policy which also would have applied their following “green section” if the fault and claim had arisen within 3 months of purchase:

“JB HI-FI or the manufacturer will determine, at no cost to the customer, whether the product is faulty and the cause of the fault within a reasonable time frame. In the event of a fault and if the product is determined faulty through no fault of the customer, then the customer can request an exchange or refund of the original purchase price. Alternatively, customers can request repair free of charge in accordance with the manufacturers warranty. If the product is a Big & Bulky product (i.e. white goods, large/fixed kitchen goods and certain TVs), then if possible, JB Hi-Fi will organise with the manufacturer to repair the product at your premises because this is generally the most convenient remedy. If you are not satisfied with this remedy, see the blue section below for seeking a remedy under the ACL.”

2. Chris, a pensioner, needs a new smartphone during the pandemic so buys a new \$500 one from Officeworks. It is not a major brand, as those had limited stock. He soon notices internet connectivity dropouts with his new smartphone. Initially he thinks it might be his telecom supplier but finds out that is not the problem. When he drops by a phone shop in the shopping mall, they manage to get internet connected for him by rebooting, but later it drops out again. Same with staff in the Officeworks shop where he had bought it. They then refuse to give him a replacement, let alone a refund, when requested 38 days after purchase. Officeworks instead insist that it be sent off for "assessment" and then potential repair or replacement (in effect from the manufacturer) to make sure nonetheless the fault wasn't due to damage from dropping / in water (despite no such harm being evident from the casing and my neighbour declaring that never happened). The store manager also says he has no discretion, and that refunds of phones are only if the goods are unusable. Chris cannot afford to be without a reliably functioning smartphone during the pandemic for "at least 1-2 weeks" while it is being "assessed", so goes to another store that day to buy a different phone, and seeks a refund from Officeworks.

After four weeks Officeworks says the phone has been assessed having no hardware or software defect, so refuses to refund (or indeed repair or replace). Advise Chris as to the law under the ACL,<sup>9</sup> as well as practical steps to take next,<sup>10</sup> in light also of this webpage information: <https://www.officeworks.com.au/information/policies/return-policy> [Eventually, after multiple visits to the Officeworks store, written complaints to their head office and NSW OFT (which states that as Officeworks can find no malfunction or cause, it is closing the complaint and his next option would be to go to a tribunal or court, Chris files a claim with NCAT – whereupon Officeworks provides him with a refund, so the hearing does not need to proceed.)

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<sup>9</sup> See eg [https://consumer.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability\\_0.pdf](https://consumer.gov.au/sites/consumer/files/inline-files/ACL-guidance-durability_0.pdf) via <https://consumer.gov.au/resources-and-guides>

<sup>10</sup> See eg <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register> and <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>



### **Consumer Guarantees**

Our goods and services come with guarantees that cannot be excluded under Australian Consumer Law. For major failures with the service, you are entitled to:

- cancel your service contract with us; and
- a refund for the unused portion or compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods.

If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done, you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund for any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

### **Change of Mind Returns – 30 Days**

If you have changed your mind about your purchase, Officeworks will be pleased to offer you a refund or exchange provided that:

- You return the item within 30 days of purchase
- You produce a satisfactory proof of purchase (being your original register receipt or online proof of purchase, such as a tax invoice)
- The item is in re-saleable condition, including its original packaging (if any), is unused and as sold.

- |   |
|---|
| <p>3. Three years and nine months ago Luke bought a \$800 washing machine, which completely stopped working - no power coming through. The manufacturer's warranty is two years. The manager of a Good Guys retail chain store where he bought it says that he has no discretion to offer any remedies, because under the chain's internal system developed in light of ACL consumer guarantees, a manager has only discretion up to three and a half years (after she inputs the product/type, price and purchase date) but after that can only invite the customer to contact Good Guys legal</p> |
|---|

department / customer service if wanting to pursue an ACL claim. [Eventually, after a written complaint is filed with Good Guys and then the NSW OFT, Luke essentially obtains a replacement product.]

4. Roy opens his 18-year-old fridge, a shelf on the door collapses, a beer bottle crashes to the ground and explodes, cutting his shin and calf deeply. He goes to hospital emergency for an urgent operation, has to buy then a boot to secure his leg initially and cancel holiday trips, substitute a gym membership for social soccer, and pay for physiotherapy over the next six months before making a full recovery. Roy unsuccessfully claims to the manufacturer and what he thinks was the retailer about the product failure, his injury and consequences.

APPENDIX II: Consumer Roundtable  
**Post-Pandemic Rights to Repair  
and Other Remedies Under the  
Australian Consumer Law**

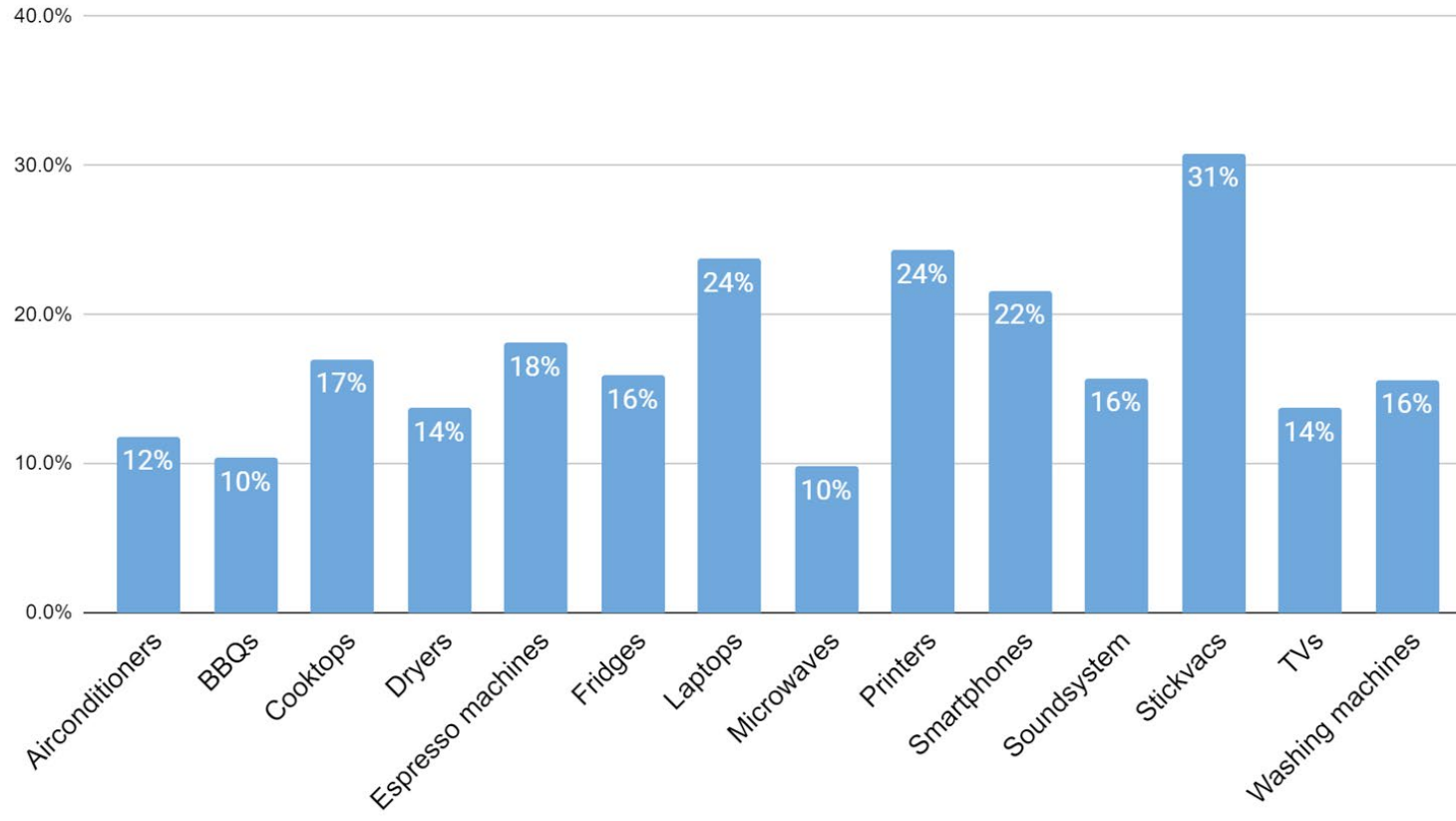
Luke Nottage (USydney), Jeannie Paterson  
(UMelbourne) & Erin Turner (CHOICE)

# Overview: How bad a problem? What solutions?

- Have suppliers become too well educated re the 2010 ACL rights, so they now tell consumers ‘make our day – prove your interpretation is correct through courts or tribunals, compared to our interpretation / policy’?!
- Two surveys: CHOICE
- Two case studies: Liam & Chris
- Two approaches from the Productivity Commission’s ‘Right to Repair’ Inquiry
  - Better mechanisms for accessing justice and redress: mandatory conciliation or orders
  - Further regulator guidance on minimum durability for different types of products (and possible labelling requirements re durability)
- Three further possible reforms:
  - UK/EU-style multi-tiered approach to remedies within certain timeframes
  - Require suppliers to specify in extended warranties how they offer more than ACL guarantees
  - Pecuniary penalties for violating at least some consumer guarantees or product types

# 1. What products are most likely to break?

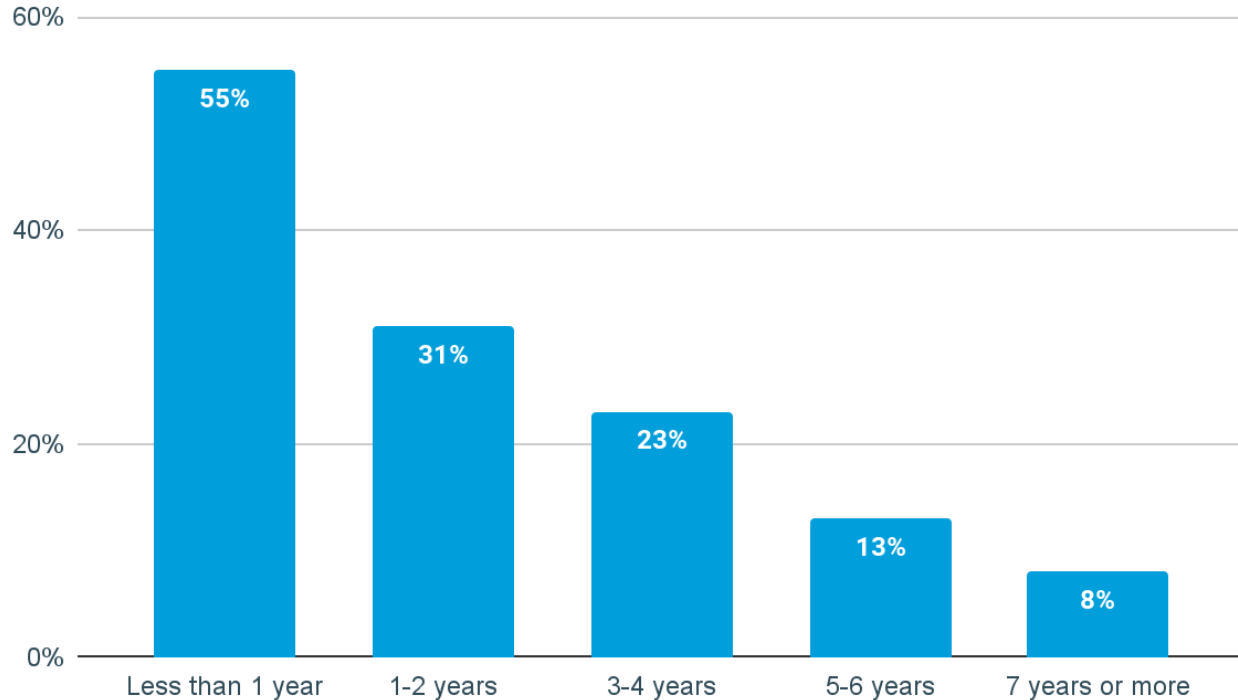
Consumers reports of performance or reliability problems in the last 12 months



**Source:**  
Choice  
reliability  
surveys  
(2019-2020),  
responses  
sourced from  
over 5,000  
CHOICE  
members.

# How common are product problems?

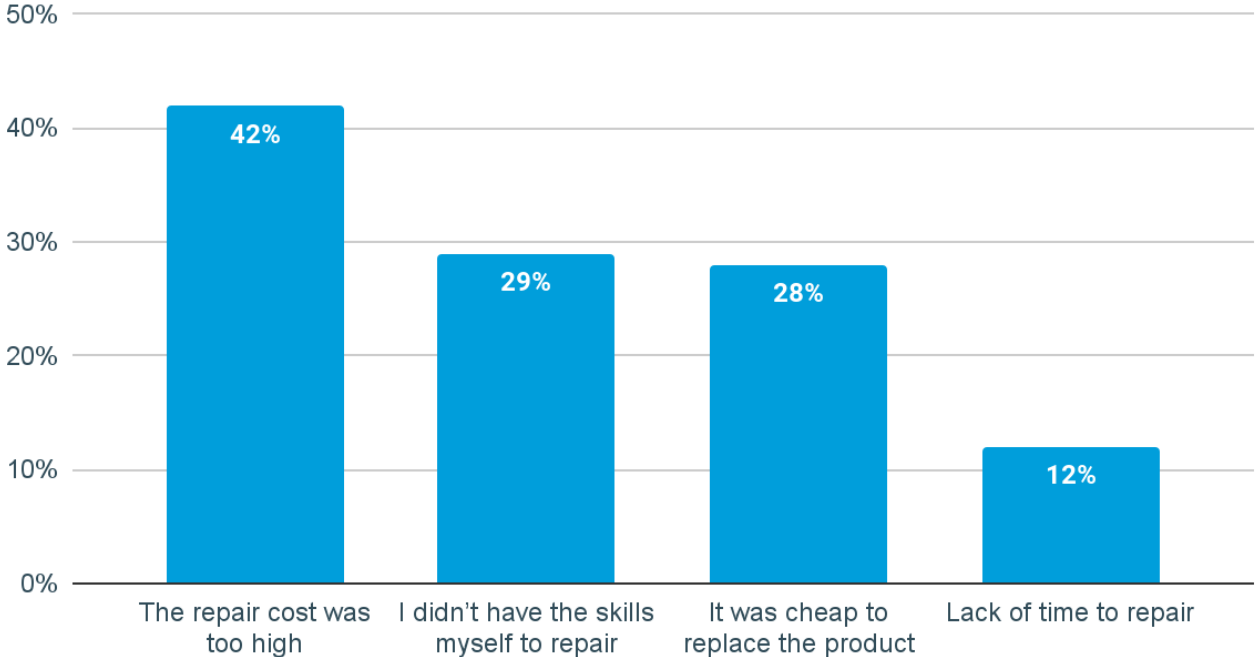
How long did you have your product before you experienced issues?



**Source:** Nationally representative survey of 1,047 people, conducted online between 9-23 June 2021 for CHOICE.

# Do people realise a free repair is available under the ACL?

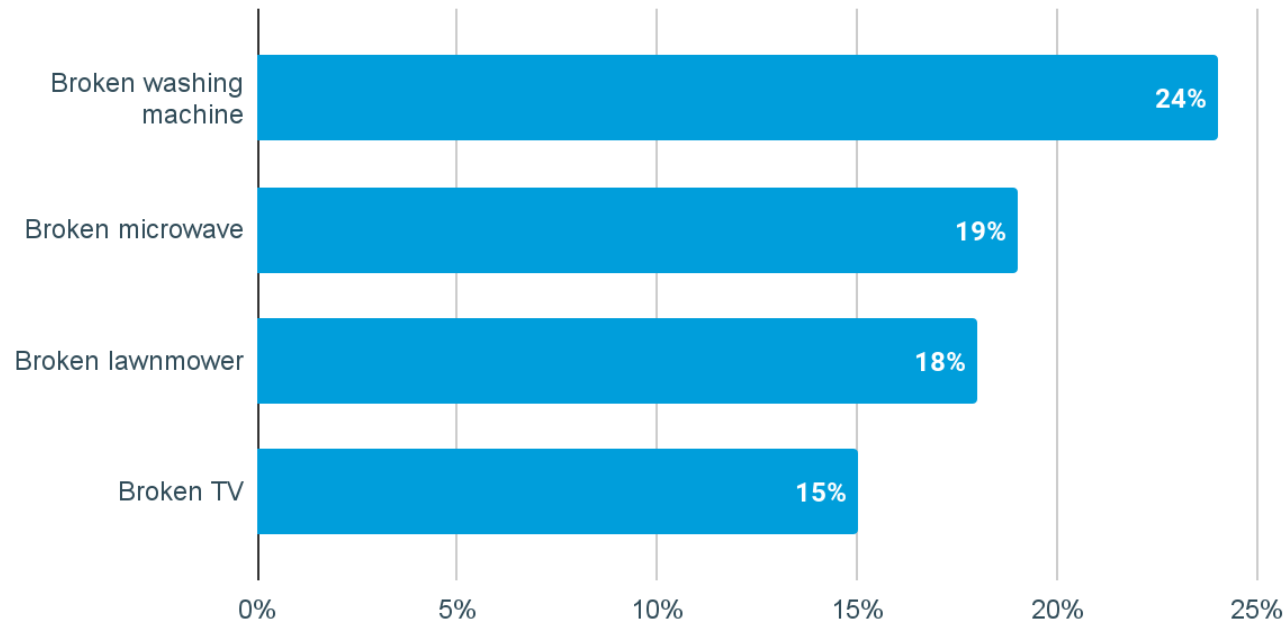
## Why didn't you get your broken product repaired?



**Source:** Nationally representative survey of 1,047 people, conducted online between 9-23 June 2021 for CHOICE.

# Even engaged consumers aren't seeking repairs

**How many CHOICE members with a broken product tried to get a remedy?**



Most people who had a problem with a product never tried to get a remedy.

**Why? 31% of CHOICE members said they didn't seek a remedy because the product was "past its warranty period"**

*Source: 2021 CHOICE reliability survey, completed by 6,571 CHOICE members and supporters (not representative of the Australian population).*



## 2. Two case studies: advise LIAM and CHRIS

(1) LIAM, through his dad, buys a \$489 iPhone 6. Its screen stops working after 15 months. Retailer JBHifi store manager says she has no discretion and its express warranty provides that it can be sent off for assessment and repair only at Liam's own cost – blue section here:

Original purchase price	< 3 Months	< 6 Months	< 12 Months	< 2 Years	< 2.5 Years	< 3.5 Years	> 3.5 Years
<\$500	Green	Orange	Orange	Blue	Blue	Blue	Blue
>\$500	Green	Orange	Orange	Orange	Blue	Blue	Blue
>\$1000	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 A*	Green	Green	Orange	Orange	Blue	Blue	Blue
>\$2000 B*	Green	Green	Orange	Orange	Orange	Blue	Blue
>\$4000 B*	Green	Green	Orange	Orange	Orange	Orange	Blue

<https://support.jbhifi.com.au/hc/en-au/articles/360053005194-Refunds-Warranties-guide>

(1) CHRIS, a pensioner, buys from Officeworks a \$500 smartphone during pandemic lockdowns (iPhone knock-off, as not much stock available).

Within the first few weeks, he notices it disconnects from the internet. He confirms first it is not a problem with his telecom supplier. A shopping mall phone repair stall, then Officeworks sales staff, get it connecting again after fiddling around, but it keeps disconnecting. After 38 days he asks Officeworks for a replacement but the office manager says he has no discretion under their policy,\* requiring such phones to be sent off for ‘assessment’ (and then possible repair) taking at least 1-2 weeks. He says this is to check for any evidence of dropping or water damage, even though Chris points out there is no evidence of that & declares before a witness in the store that that did not occur.

Chris cannot be without a functioning smartphone and has lost trust in Officeworks so he buys a similar phone elsewhere and wants to claim a refund. The manager says he can only give a refund if the phone is ‘unusable’. After 3 weeks for “assessment” Officeworks inform Chris they cannot find any hardware or software fault in the phone he returned to them.

\* <https://www.officeworks.com.au/information/policies/return-policy>








- For Liam, retailer as well as manufacturer/importer owe ACL s54 consumer guarantee of ‘acceptable quality’ including reasonable durability, but how long?
  - <https://consumer.gov.au/consumers-and-acl/articles/guidance-businesses-meanings-safe-and-durable-consumer-guarantees> (Sept 2019, after 2017 ACL Review report recommendation)
- For Chris, how much evidence does he need in the store (or later) to prove the smartphone is not connecting and therefore is defective under s54?
  - Doesn’t the supplier then have the burden of proving that the phone was ‘damaged by abnormal use’ (s54(6))? Does this give any legal or practical reason for Chris to have to wait for the supplier’s ‘assessment’ before claiming remedies?
  - Is this a ‘major failure’ allowing rejection and refund because (s260(1)):
    - (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; .... And/or
    - (c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose
  - If not a major failure, can Chris anyway ‘require the supplier to remedy the failure within a reasonable time’ (s259(2)(a)) and otherwise reject the goods?

- In practice, for both, how can they enforce such ACL rights?
  - Complain online to NSW OFT via <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/make-a-complaint>, which then shows up on new public register if the supplier/chain has more than 10 complaints lodged in a month: <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register>
  - Since 2019, NSW OFT can issue Consumer Guarantees Direction for goods purchased up to six months earlier for \$25-\$3000, but compensation seems never to have ordered? <https://www.fairtrading.nsw.gov.au/news-and-updates/news/new-powers-for-nsw-fair-trading>
  - NCAT tribunal sets a non-refundable application fee of \$52 (less 25% for pensioners), no lawyers allowed

# 3. PC 'Right to Repair' Inquiry: Draft Report (June 2021, Final Report submitted to Gov't)

Figure 1 Possible reforms to overcome barriers to repair

- ▶ Eg mandatory conciliation (SA) or consumer guarantees direction (NSW)
- ▶ (UK-style) “super-complaints” mechanism (not recommended in 2017 ACL Review!)

Enhance access to consumer rights	Enable access to repair supplies
<p>States and Territories use of alternative dispute resolution options to better resolve complaints</p> 	<p>Evaluate proposed motor vehicle mandatory information sharing scheme</p> 
<p>Consumer groups to be able to lodge complaints on consumer issues</p> 	<p><i>Seeking further information on possible reforms to:</i></p> <ul style="list-style-type: none"><li>Include software updates in consumer guarantees </li><li>Require manufacturers to provide access to repair supplies in particular product markets </li><li>Introduce 'fair use' or 'fair dealing' in the Copyright Act to allow use of copyright repair information (e.g. manuals and schematics) </li><li>Amend the Copyright Act to allow repairers to legally circumvent digital locks to access repair information (e.g. diagnostic data) </li></ul>

# [www.pc.gov.au/inquiries/completed/repair#report](http://www.pc.gov.au/inquiries/completed/repair#report)

- ▶ How will regulators provide guidance per product type?  
Why not also labelling scheme?
- ▶ PS 'misleading conduct' to not mention consumer guarantees allow own repairer?
- ▶ PS 'unfair term' for voluntary warranty to insist on using authorised repairer?

## Ensure warranties do not impede independent repair

Require warranties to inform consumers that consumer guarantees do not require use of authorised repair



*Seeking further information on prohibiting warranties from requiring authorised repair*



## Better information on product durability and reparability

Regulator guidance of minimum expected length of product durability



*Seeking further information on a product labelling scheme*



## Improve management of e-waste

Enable product stewardship schemes to count repaired and reused products



Use GPS trackers to audit e-waste recycling streams



## 4. Further possible reforms:

- Three further inspirations from UK/EU consumer law
  - Within 30 days of purchase: (dead-on-arrival) refund right (UK 2015)  
<https://www.businesscompanion.info/en/quick-guides/goods/the-sale-and-supply-of-goods#Theshorttermrighttoreject>
  - Within 6 months: defect presumed when supplied ('99 Directive, also copied in Singapore)  
<https://www.gov.uk/accepting-returns-and-giving-refund>
  - Within 2 years: minimum legal guarantee of durability, but harder to prove ('99 Directive, extended years in 6 EU states: <https://www.evz.de/en/shopping-internet/guarantees-and-warranties.html>)
- Recall one of the (few still unactioned) proposals from 2017 ACL Review:
  - Require suppliers to specify what their extended warranties (including sometimes longer periods than 'free' express warranties against defects) offer in addition to the ACL
  - PS Why not already 'misleading conduct' if they don't? Cf eg 'Applecare' fines in EU:  
<https://www.degruyter.com/document/doi/10.1515/ercl-2013-0017/html>
- Pecuniary penalties for breaches of at least 'acceptable quality' guarantee and/or up for certain types or value of goods? Cf Exposure Draft legislation now for unfair contracts:  
<https://www.claytonutz.com/knowledge/2021/august/massive-penalties-more-contracts-caught-by-exposure-draft-legislation-for-unfair-contract-terms-reform-open-for-comment>



THE UNIVERSITY OF  
**SYDNEY**

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22 October 2024

Treasury, Consumer Policy Unit, Competition and Consumer Branch  
e: [megan.trudgian@treasury.gov.au](mailto:megan.trudgian@treasury.gov.au)

**Re: Improving mandatory standards under the Australian Consumer Law –  
Decision Regulation Impact Statement:**

<https://treasury.gov.au/publication/p2024-582678>

I am pleased to make this further submission, although I find the window (25 October 2024 deadline two weeks after the consultation was announced) to be very tight. As with my Submission re the Consultation RIS in 2021, I broadly favour the proposal to make it easier for the Minister (advised by regulators) to adopt safety standards for specific consumer products from overseas bodies. However, I do have some concerns that this good intention leaves much discretion to the Minister and regulators, with little of the accountability that we expect for good governance in our democratic system. In Part A below I outline what I think are some key points and conclusions from the Decision RIS (with emphasis added). In Part B I raise accordingly some concerns.

**A. Background**

As the "Decision RIS" notes under Policy Context from p12, currently under the ACL the:





"Minister can make or declare a mandatory safety standard or a mandatory information standard. Mandatory standards set out requirements which must be complied with to supply products in Australia, including requirements relating to performance, composition, methods of manufacture or processing, design, construction, finish, packaging or labelling. Key provisions include powers to:

- **Make** a safety standard to prevent or reduce the risk of injury (s 104) or an information standard (s 134); and
- **Declare** all or part of a standard developed or approved by Standards Australia, or an association prescribed by regulation, as a safety standard (s 105) or an information standard (s 135).

Where a mandatory safety or information standard allows two or more alternatives for compliance, the regulator may request that a supplier nominate which alternative they intend to comply with (s 108).

The process for *making* a safety or information standard is resource intensive and typically takes at least 18-36 months. A regulation impact statement may be required and public consultation is undertaken on a proposal to make a mandatory standard which is followed by ministerial decision, and the creation and registration of a legislative instrument if approved.

The Commonwealth Minister may also *declare* all or part of a voluntary standard as a mandatory safety or information standard. While the ACCC still undertakes stakeholder consultation and any required regulatory impact analysis before recommending declaration, the process is more direct than making a standard. Importantly, declaring an existing standard can be done more quickly than making a standard, as the rigorous processes and expertise which forms part of the

voluntary standards development process can be recognised and does not need to be replicated.

The threshold test for declaring (s 105) a mandatory safety standard is also different, with the Commonwealth Minister not required to specifically consider matters that are 'reasonably necessary to prevent or reduce risk of injury to any person' when declaring a safety standard, which potentially allows a more responsive approach to broader safety issues. However, the utility of section 105 is greatly limited because there are no overseas standards-making organisations prescribed in the regulations. This restricts the utility of sections 105 and 135, and means only standards developed or approved by Standards Australia may currently be declared by the Commonwealth Minister."

Per p15 of the Decision RIS the Governments has considered

- (a) "prescribing a list of standards making associations in the regulations, to complete the existing intention of section 105 and permit the Commonwealth Minister to declare a standard developed or published by overseas associations in addition to Standards Australia, this included:
  - an 'opt-in' approach where specific standards from overseas standards associations are recognised under the ACL following a review process, or
  - an 'opt-out' approach that automatically incorporates relevant standards from equivalent international and overseas standards associations, without a review by the regulator, unless it is demonstrated to be unsafe for Australia.

- (b) using a principles-based approach for declaring overseas standards."

Per p25 of the Decision RIS:

"In 2016, the ACCC consulted on a proposed list of nine overseas standards making associations to be prescribed in the ACL regulations.<sup>[1]</sup> In the Consultation RIS, a further five standards making associations were identified as potentially suitable, for a total of 14 potentially suitable associations. During the ACCC's 2016 consultation, stakeholders expressed concern that establishing a list would allow overseas standards to be introduced without appropriate consideration of safety and the Australian context. Concern was also expressed that prescribing a list of standards making associations could be viewed as 'picking winners' which could have potential trade implications.

As a result, Option 2(a) will not be pursued for the purposes of this Decision RIS.

The preferred policy approach is to amend sections 105 and 135 of the ACL to allow the Commonwealth Minister to declare suitable standards from any Australian or overseas standards making association, rather than being limited to a pre-determined list of associations that would require regular updating. In taking this approach the suitability of overseas standards would be based on whether an overseas standard provides an appropriate level of safety in the Australian context. This policy approach enables the Commonwealth Minister, under sections 105 and 135 of the ACL to consider standards from any standards-making association without the need for a prescriptive list. In addition to this, declared standards may also be recognised in their entirety, thereby reducing regulatory burden for businesses.

Importantly, this would be achieved through existing review and consultative processes conducted by the ACCC. This policy approach does not seek to implement the 'opt-out' approach as presented in the Consultation RIS to automatically adopt overseas standards by default and without review. Nominating standards under section 108

In addition to these proposed amendments, submissions to the Consultation RIS also indicated that subsequent changes to section 108 of the ACL should be considered to provide clarity around suppliers nominating which standard they intend to comply with, where more than one option is available to them. Currently under section 108, the regulator may only require a 'supplier' to nominate which standard they intend to comply with when more than one option is available to them, but this obligation does not extend to 'manufacturers'. In addition to this, section 108 does not provide a mechanism for the regulator to require a supplier to provide information such as test reports to substantiate a claim of compliance with the nominated standard.

[1] ACCC, '[Consultation paper – International standards associations: Consumer Product Safety](#)', 9 May 2016."

## B. Concerns and Comments

I remain of the view that it long overdue for Standards Australia (which has a listed company making money from publishing its standards and undertaking certifications) not to have a monopoly of providing standards that the Minister can declare under s105. However, I am not convinced that adding by regulation a list

of trusted overseas standards associations eg ISO or EU American main associations risks any complaint against Australia based on the WTO's Technical Barriers to Trade Agreement (see [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm)). Article 2 gives considerable scope to national regulators to introduce safety measures provided they do not create unnecessary obstacles to trade. Even if an international standard exists or is imminent (eg from the ISO), states can decide not to use them if inappropriate in light of legitimate objectives such as protecting human health. Australia has not been subject to any complaints from WTO members, to my knowledge, for prioritising only Australian standards under s105. Nor has Singapore which since 2011 even mandates all consumer products should comply with any standard developed by several overseas standard setting bodies (thereby adding a partial General Safety Provision as in EU law requiring all products to be safe, which reform for the ACL Treasury also consulted about but seems is not proceeding with: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3530671](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530671)).

Accordingly, listing 14 or more trusted overseas organisations seems better than giving carte blanche to the Minister (who will be heavily influenced by advice from our regulators), as to which standards abroad to declare. This is especially true given that the Decision RIS proposes no legislative criteria specified to guide the exercise of discretion. There is not even, as mentioned above, a legislative requirement under s105 to be guided (as when making own ACL standards under 104) by what is “reasonably necessary to prevent or reduce risk of injury to any person”. At the least, the latter provision should be added to s105 as well.

It does seem appropriate that, unlike the Singaporean regulations from 2011, if the Australian Minister declares alternative foreign standards the supplier (and of course any manufacturer) should have to identify which one they believe they are complying with. Adding now a requirement for test reports may seem burdensome for business, but is broadly consistent with the recently revised EU General Product Safety Regulation requirements for suppliers etc to maintain risk assessment documentation (albeit in the context of a wider General Product Safety requirement for all types of consumer products). That Regulation could be consulted for similar wording ([https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/eu-product-safety-and-labelling/product-safety/general-product-safety-regulation_en)).

I also do not have major problems with the proposal to allow newer versions of overseas standards to be automatically in Australia, although per p35 the:

"Decision RIS acknowledges these concerns about time-to-time updates. However, under this policy option the ACCC would maintain administrative responsibility of all mandatory standards including responsibility to ensure time-to-time updates to referenced Australian and overseas standards are suitable for the Australian context. The ACCC would monitor the effect of updates to Australian and overseas standards, so that action could be taken by the Minister to



stop any unsuitable update being incorporated into a mandatory standard if required (such as amending or repealing that mandatory standard)."

However the implementation would need to be closely monitored as various stakeholders were worried that any newer version of the overseas standards referenced might not necessarily improve consumer safety outcomes in Australia. (This is especially so given the s105 declaration route does not explicitly require a focus on what is reasonably necessary to secure consumer safety.)

There is also a broader rule of law consideration described eg broadly here by my colleague Prof Andrew Edgar: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AIAdminLawF/2021/3.html>. Although the intention again may be laudable, the process proposed envisages maximum discretion to the Minister (and regulators) with minimal democratic accountability (eg via parliamentary committee reviewing formal regulations).

Please let me know if you need any further information.

Yours sincerely,

*Luke R Nottage*