

23 April 2018

Manager
Consumer Policy Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By email: australianconsumerlaw@treasury.gov.au

Dear Sir/Madam

Clarification, Simplification and Modernisation of the Consumer Guarantee Framework

The Insurance Council of Australia¹ (the Insurance Council) appreciates the opportunity to comment on Treasury's consultation on the recommendations of the Australian Consumer Law (ACL) Review in relation to the consumer guarantee framework. The Insurance Council represents the general insurance industry, and some of our members issue, underwrite or indemnify extended warranty products issued by third parties. Our submission focusses on Chapter 3 of the Consultation Regulation Impact Statement (RIS) on enhanced disclosure for extended warranties (the Consultation RIS).

The Insurance Council supports a more consistent approach to the way extended warranty products are regulated, and specifically, Option 2 as presented in the Consultation RIS. The rationale for robust consumer protection is the same for all extended warranties, regardless of their character at law. A more consistent regulatory regime will minimise any regulatory gaps, and we support enhanced disclosure measures and cooling-off rights to assist consumers make informed decisions about extended warranties.

Our submission outlines the types of extended warranties issued and underwritten by general insurers and contract warranty providers, the associated regulatory provisions that apply, and a brief assessment of each of the options put forward in the Consultation RIS.

1. Extended Warranties Issued and Underwritten by General Insurers

General insurers are currently active in the extended warranty market in two general ways; either by:

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2017 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$44.9 billion per annum and has total assets of \$118.6 billion. The industry employs approximately 60,000 people and on average pays out about \$132 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

- underwriting and issuing an extended warranty insurance product directly to a consumer; or
- indemnifying a warranty issuer (for example, a motor vehicle dealer or the retailer of consumer goods) for their obligations under an extended warranty product issued by them to their customers.

Extended warranty insurance

Extended warranty insurance, which covers the repair of mechanical breakdowns for motor vehicles, sometimes referred to as mechanical breakdown insurance, is an example of an extended warranty product underwritten and issued by an insurer. These products generally provide insurance cover for the cost of repairs should a mechanical breakdown occur following the conclusion of the manufacturer's warranty.

As these are general insurance products, they are subject to comprehensive regulation, including those contained in the *Corporations Act 2001* (the Corporations Act) and *Insurance Contracts Act 1984* (IC Act).

When the products are sold, consumers are given a policy wording setting out the terms and conditions of the policy. As standard practice, insurers also offer cooling off periods and provide information about consumer rights under the ACL.

Warranties issued by supplier

These warranties are issued and sold by the retailer or motor vehicle dealer to the consumer when they purchase the goods or vehicle covered by the warranty. The insurer indemnifies the retailer's liability for paying out claims under the warranty product, and the insurer or a warranty administrator will also typically manage the handling of claims. For these arrangements, the "re-insurance" contract is between the insurer and retailer, whilst the principal contract is between the warranty issuer (the retailer) and the consumer.

These products are neither insurance nor a financial product, when they are sold to another facility under the incidental product exemption in s763E of the Corporations Act. However, as noted in the Consultation RIS, the *Australian Securities and Investments Commission (ASIC) Act 2001* (ASIC Act) protections would apply.

2. Option 1: Status Quo

Option 1 outlined in the Consultation RIS is to maintain the status quo, that is, retain the existing protections under the ACL and ASIC Act. We note that in addition to these existing protections, some insurers which underwrite extended warranties sold by retailers are also subject to enforceable undertakings agreed with the Australian Competition and Consumer Commission (ACCC)². These undertakings require those insurers to:

- provide information to consumers about their rights under the ACL, a comparison of these rights against the extended warranty product, additional benefits offered by the warranty not available under the ACL, and the ACCC's contact information.
- develop and implement annual compliance training (regarding the false or misleading conduct provisions under the ACL) targeted at business partnership managers, and

² Undertakings from WFI Insurance Limited trading as Lumley Retail Warranty (signed 7 December 2015); Virginia Surety Company (signed 7 November 2016); and Domestic & General Services (signed 11 May 2017).

develop an online compliance training course for distribution to retailer store managers.

- have in place a compliance monitoring program to ensure compliance with the ACL.
- annual reporting to the ACCC on training and compliance monitoring.

While these enforceable undertakings minimise the regulatory gap for extended warranties which are not insurance products, the Insurance Council is aware that these enforceable undertakings do not cover all market participants. The Insurance Council's view is that amending the ACL (as proposed in Option 2) would provide for a more consistent regulation of extended warranties. Further regulation of extended warranties under the ACL would remove the need for the ACCC to conclude enforceable undertakings with every warranty issuer.

3. Option 2: Cooling off Right with Oral and Written Disclosure

Option 2 outlined in the Consultation RIS is to amend the ACL to:

- require written disclosure on the terms and conditions of the extended warranty, including: the rights and obligations of the warrantor and the consumer (including the cooling-off right), the duration and expiry date of the agreement (including whether or not the agreement expires when a claim is made), the total price payable under the agreement, and the date of the agreement.
- provide consumers with a 10 day cooling off period, which commences when the consumer receives the written disclosure.
- require traders to provide oral advice, where reasonably practicable, about a consumer's cancellation rights before entering into the contract. Oral disclosure would not be required in circumstances where it would not be reasonably practicable, such as when consumers purchase products online.

The Insurance Council submits that this option would best meet the policy objective of ensuring that consumers are better able to make informed decisions about whether to purchase an extended warranty. This option would also close the existing regulatory gap for warranties that are not insurance products. We do not support the sub-options of requiring only disclosure or providing only cooling off rights, as we see both measures as complementary in supporting informed decision-making.

As noted in the Consultation RIS, a definition of extended warranty would need to be developed to ensure it is clear which products are within scope of the proposed provisions under the ACL. In general terms, extended warranties are contractual rights of repair or maintenance for a specified period beyond the initial term of an express warranty.

4. Option 3: Disclosure and Opt-in Process

Option 3 outlined in the Consultation RIS would contain the disclosure requirements in Option 2, but instead of a cooling off period, consumers would be required to confirm their purchase within a limited period, such as ten business days, before they are required to pay for the extended warranty. This would essentially defer the sale of a warranty until the consumer opts-in.

We note that ASIC is considering developing a deferred sales model for some products sold through motor dealer distributors, which is likely to capture motor vehicle extended warranty

insurance products. While the Insurance Council is in-principle supportive of a deferred sales model for motor vehicle extended warranties, we submit that there is insufficient evidence to suggest that a similar model is warranted or would result in good consumer outcomes for all other warranties.

ASIC's proposal for motor vehicle extended warranties has been informed by consumer research, and is being developed for very specific products and sales context. It is unclear how a deferred sales model could be designed to apply appropriately to the range of extended warranties to which this option would apply.

A mandatory deferred sales period may also inadvertently have an impact on whether the incidental product exemption under the Corporations Act applies. As noted in the Consultation RIS, warranties which are available for purchase after the goods are supplied (rather than when the goods are supplied) are unlikely to be able to take advantage of the incidental product exemption.

Retailers currently operating under this exemption may consider that it would no longer be feasible for them to offer extended warranties if they are to be treated as financial products regulated accordingly, including the requirement to obtain an Australian Financial Services (AFS) Licence or to be an authorised representative of an AFS Licensee. By removing the ability of retailers to rely on the incidental product exemption, the warranties they issue would effectively cease to be regulated under the ACL, and instead will be regulated under the ASIC Act and Corporations Act. Such an outcome would be disproportionate to the regulatory risks being addressed, and the costs are likely to far exceed the benefits of reform.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



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