



New caravan retailing

**Ensuring industry compliance with the
Australian Consumer Law**

July 2022



Australian Competition and Consumer Commission
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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ADR	Australian Design Rules
ATM	Aggregate Trailer Mass
CIAA	Caravan Industry Association of Australia
CRIS	Consultation Regulatory Impact Statement
MVSA	<i>Motor Vehicle Standards Act 1989</i>
NDA	Non-Disclosure Agreement
RAV	Register of Approved Vehicles
RV	Recreational Vehicle
RVSA	<i>Road Vehicle Standards Act 2018</i>

Executive Summary

This report highlights areas of concern the Australian Competition and Consumer Commission (ACCC) has identified with the conduct of some suppliers and manufacturers in the new caravan retailing market. The report provides guidance to ensure businesses in this market comply with the Australian Consumer Law (ACL).¹

Caravans are one of the most expensive goods consumers can buy. When things go wrong the consumer harm can be high. For this reason, consumers need to have confidence that they will be able to obtain remedies if their caravans do not meet one or more of the statutory consumer guarantees.²

The ACCC is concerned with the rising number of complaints we have received about caravans over the past 5 years. In November 2021 we published consumer and supplier surveys to better understand the issues affecting the new caravan retailing market. We have also spoken directly with suppliers and received feedback through industry forums. This extensive engagement with consumers and suppliers has informed the findings in this report.

Dealing with delays in the supply and repair of caravans

A common theme consumers reported was delays in the delivery of their new caravan, or for parts to fix failures with their existing caravan. The ACCC recognises that COVID-19 supply chain disruptions and recent increased demand mean delays are going to be more prevalent in the caravan industry, at least in the medium term. To avoid misleading consumers, suppliers should:

- be upfront at the point of sale about the timeframe for delivery and any potential for that timeframe to change
- promptly inform their customers following receipt of any information about changes to that timeframe
- ensure that these explanations are accurate.

Suppliers must accurately advertise and describe their caravans and any associated warranties

The ACCC is concerned that many consumers alleged suppliers had made misrepresentations to them about their new caravans and their consumer guarantee rights. It is a breach of the ACL for a business to make statements to their customers that are incorrect or likely to create a false impression. The most commonly alleged misrepresentation was about manufacturers' warranties (and their interaction with consumer guarantees). Consumers also reported misrepresentations about, among other things:

- the caravan's performance capabilities
- tow-weight
- availability of repairs.

The consumer guarantee provisions in the ACL operate regardless of any right under a warranty provided by a manufacturer or supplier and any such warranty does not affect the rights of a consumer under the ACL. The ACCC is concerned about reports that many suppliers are denying consumers their statutory rights because the warranty has expired. Suppliers must not suggest to consumers that their consumer guarantees are limited to any warranty period or by any warranty terms and conditions. Such statements are likely to breach the ACL.

1 The ACCC has made empowering consumers and improving industry compliance with consumer guarantees, with a focus on high value goods including motor vehicles and caravans, a compliance and enforcement priority for 2022-23.

2 For general information on the operation of the consumer guarantees, see ACCC website at: <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>.

Consumer reports indicate consumer guarantee failures are widespread

A large proportion of consumer respondents to our survey (80%) reported they had experienced failures with their new caravans. If a business sells a consumer a caravan that fails to meet one or more of the consumer guarantees, the consumer is entitled to a remedy. Unfortunately, many consumers reported they were unable to obtain remedies, or the remedies did not fully address the failures.

Many suppliers, manufacturers and consumers reported that they were unclear as to when a failure is minor or major. This distinction determines the remedy a consumer is entitled to under the ACL, be it repair, replacement or refund of their caravan.

When considering what remedy is appropriate, suppliers should base their view on a thorough assessment of the caravan and any failures.

Caravan manufacturers must reimburse suppliers for the cost of providing remedies to consumers

Another significant issue we have identified is the difficulty some suppliers report they are having in obtaining reimbursement from manufacturers for the costs of providing consumers with remedies. This includes the manufacturer:

- referring a supplier to a component manufacturer
- only providing reimbursement for parts and not labour
- in some instances, refusing reimbursement outright.

We are concerned that the conduct of some manufacturers may make suppliers more reluctant to provide consumers with remedies, even though this is a supplier's legal obligation under the ACL regardless of whether the manufacturer indemnifies them.

Law reform required to strengthen the ACL, improve access to remedies, and address concerning conduct

The ACCC considers the ACL requires strengthening to address concerning conduct we have identified in new caravan retailing. Currently, the failure to provide a consumer with a remedy is not a civil penalty provision, and the same applies to a manufacturer's obligation to provide an indemnity to a supplier. The Treasury is consulting on options aimed at improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL.³ The ACCC strongly advocates for the introduction of prohibitions, supported by penalties and other enforcement mechanisms, against:

- suppliers not providing remedies for consumer guarantee failures
- manufacturers not indemnifying suppliers
- manufacturers retaliating against suppliers who request indemnification.

We consider that these reforms will assist in addressing the issues we have identified in this market, as well as similar issues that occur in other markets for consumer goods and services.

³ See Treasury consultation page at: <https://treasury.gov.au/consultation/c2021-224294>.

ACCC to take enforcement action in new caravan retailing market where appropriate

The ACCC will continue to closely assess complaints about new caravan retailing and take enforcement action where appropriate. We will be particularly focused on the types of conduct identified in this report. This includes instances where we consider:

- suppliers have misled consumers about their consumer guarantee rights
- manufacturers have misled suppliers about their right to indemnity.

Rights and obligations under the Australian Consumer Law

For consumers



Consumers have automatic consumer guarantees that apply to all eligible goods and services, including caravans. Any term in a contract which purports to limit or exclude consumers' rights under the consumer guarantees will be void. The consumer guarantees include a guarantee that goods must be of acceptable quality.



Where a failure to meet one or more consumer guarantees occurs, consumers are entitled to remedies. These include repair, replacement or refund. The type of remedy available, and whether the consumer is entitled to choose the remedy, depends on whether the failure or failures is minor or major.



The consumer guarantees apply regardless of any warranty offered by the supplier. In the ACCC's view, it is reasonable to expect a caravan will not exhibit a major defect for several years.



If the supplier refuses to provide the consumer with the appropriate remedy for failure to meet one or more of the consumer guarantees, the consumer can take the supplier to a court or tribunal to seek a remedy. They may also contact the ACCC or their state and territory office of fair trading.

For suppliers



Suppliers must not accept payment for caravans if they know that they are not able to supply the products within the timeframe quoted or within a reasonable timeframe.



The ACCC expects that suppliers will be proactive and accurate in communicating any delivery delays and reasons for delays to consumers. The same applies to any delays to repairs.



Suppliers must be truthful in any statements they make to consumers about the caravans they are selling. Suppliers should exercise caution when making representations about the performance of caravans, consumer guarantee rights and warranties.



Any opinion that the consumer is not entitled to a remedy must be based on a thorough assessment of the caravan.



Suppliers must not engage in conduct which is unconscionable. This includes conduct that is harsh, oppressive or beyond hard commercial bargaining. The obligation also applies to manufacturers in their engagement with suppliers.



Suppliers have a right to be indemnified by the manufacturer for the cost of providing consumers with remedies for failures with the consumer guarantees. For most failures, the indemnity includes the cost of the part(s) and other costs, such as labour. Manufacturers must not misrepresent the nature or extent of their obligation to indemnify a supplier.

SURVEY STATISTICS

Of the **2270** consumers who responded to the survey



67%

paid over **\$60,000**
for their new caravan



37%

stated they had to wait
longer than **6 months**
for delivery of their caravan



65%

stated this was
their first time
buying a caravan

BUYING



29%

stated a representation
made during the sales
process turned out to
be inaccurate

47%

misled about
warranties

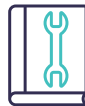
14%

misled about
tow weight

4%

misled about
off road capabilities

WHEN A FAULT OCCURS



80%

stated they had
experienced a fault
with their new
caravan

50%

classified their fault
as a major failure

48%

classified their fault
as a minor failure

48%

had to wait longer than
2 months for repairs



66%

were aware of
their consumer
guarantee rights

28%

said they mentioned
them to a retailer when
communicating about
their fault



13%

stated they had a
dispute with a
retailer over their
caravan's fault

63%

settled their
dispute via
private resolution

32%

settled their
dispute via some
other method

4%

settled their
dispute via
court or tribunal

1. Understanding consumer issues in the new caravan retailing sector

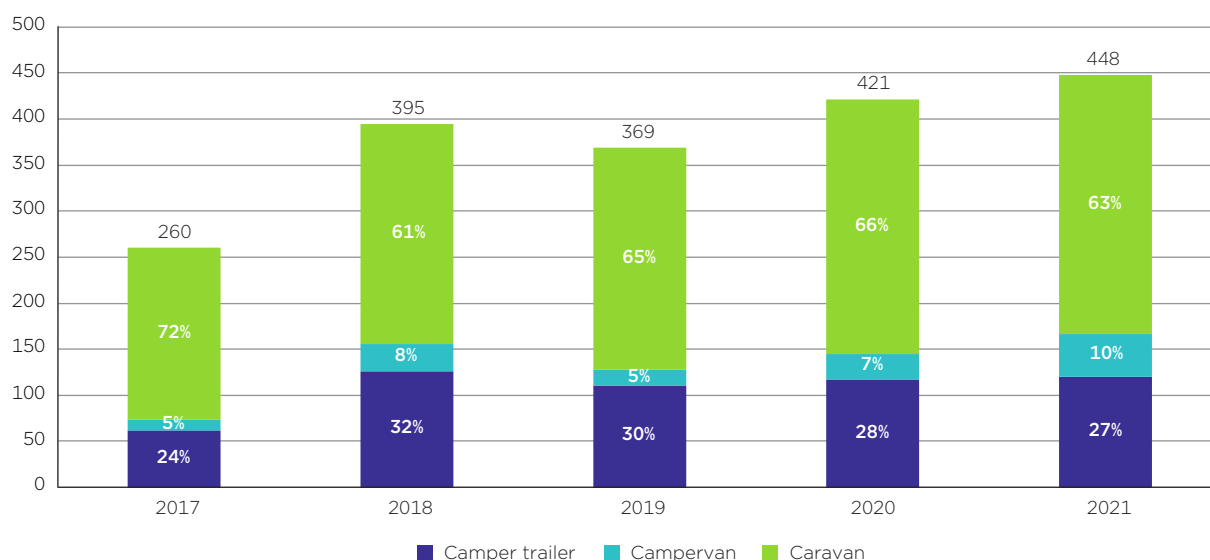
Caravans are one of the most expensive goods a consumer can buy. When things go wrong the consumer harm can be high. For this reason, consumers need to have confidence that they will be able to obtain remedies if their caravans do not meet one or more of the consumer guarantees.⁴

Since 2017, the ACCC has received an increasing number of consumer contacts about campervans, camper trailers and caravans (together referred to as recreational vehicles or RVs), as outlined in Figure 1 below.

In each of the past 5 years contacts about caravans have made up at least 60% of overall RV contacts received by the ACCC. This trend has informed our focus on new caravan retailing. However, we consider that our findings are applicable to manufacturers and suppliers of other RVs.⁵

In response to this trend, the ACCC has made industry compliance with consumer guarantees regarding high value items including caravans a compliance and enforcement priority for 2022-23, as it was in 2021-22.⁶

Figure 1: Contacts to the ACCC 2017-2021



1.1 ACCC surveys and industry engagement

In November 2021, the ACCC published 2 surveys to better understand both consumer and supplier experiences in the caravan industry. The surveys were open for 4 weeks and closed in December 2021.

The surveys were limited to new caravans purchased in the previous 24 months (the relevant period). The ACCC used this timeframe because we wanted to understand issues currently affecting consumers and suppliers.

4 For general information on the operation of the consumer guarantees see ACCC website at: <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>.

5 For the purposes of this report **suppliers** means dealers or the party from whom the consumer purchased the caravan. The ACCC understands that some manufacturers may sell caravans direct to the public and this means that they are both **suppliers** and **manufacturers** for the purposes of the ACL.

6 <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>.

The surveys were widely promoted by:

- the Caravan Industry Association of Australia (CIAA)
- CHOICE
- ACCC social media channels
- print and radio.

The ACCC received 2,699 responses from consumers in total, 2,270 of which related to new caravans purchased within the relevant period. We also received 67 responses from suppliers, including manufacturers who also sell directly to the public.

The ACCC released a second targeted survey in early 2022, seeking further details from consumer respondents about the brand and model of caravan they purchased. This additional information will assist the ACCC in identifying any manufacturers and suppliers who may be engaging in systemic non-compliance with the ACL.

The ACCC conducted additional interviews with individual suppliers (some of whom were also manufacturers) and met with industry representatives. We also presented initial findings about how suppliers and manufacturers could improve compliance with the ACL at caravan industry conferences and forums.

The ACCC recognises the limitations of the data collected include:

- consumers who had a negative experience were more likely to respond to the survey or contact the ACCC
- the number of consumer respondents and contacts to the ACCC Infocentre is low as an overall proportion of caravans registered in Australia.

While acknowledging these factors, the ACCC has 5 years of contact data, as well as the survey results, indicating that the issues identified in this report are not uncommon.

2. Caravan sector profile

Consumer demand for new caravans has been strong over recent years. As of 31 January 2021, there were 698,353 caravans registered in Australia, with registration increasing by 26% over the last 5 years.⁷

A key feature of the caravan industry is the presence of a large domestic manufacturing base, with an estimated 25,000 vehicles built in Australia per year.⁸ The CIAA estimates that 90% of registered RVs were built domestically.⁹ They also note that this is changing, estimating that in 2020–21 around 40% of RVs sold in Australia were imported from China.¹⁰

While a large portion of the market is comprised of the 3 major brands (Jayco, Avan and Apollo), there are also numerous smaller suppliers and manufacturers in the market. This was supported by the ACCC consumer survey, which identified over 150 different brands purchased during the relevant period.

The caravan industry has had to respond to a complex and rapidly changing market during the relevant period. According to the *CIAA State of the Industry Report*:¹¹

- bushfires in Australia and COVID-19 lockdowns in China saw a 25% average monthly decrease in caravan imports for the first half of 2020¹²
- domestic manufacturing struggled to match 2019 production levels as lockdowns in Victoria, where 90% of local manufacturing occurs, continued from April to September 2020
- government stimulus packages, international border closures and eased domestic travel restrictions in late 2020 created unprecedented consumer demand.

The effects of COVID-19 continue to impact the caravan industry, as they do the broader economy. This is particularly the case with caravans because many intermediate goods are made in China, which has been subject to ongoing lockdowns.

Sustained demand for caravans, both domestically and internationally, will further pressure supply chains that have already been heavily stressed. The elevated cost of freight continues to apply upward pressure to caravan manufacturing and repair costs.

7 <https://parki.cloud/wp-content/uploads/2022/02/2021-Caravan-Campervan-Data-Report.pdf>.

8 https://treasury.gov.au/sites/default/files/2020-09/115786_CARAVAN_INDUSTRY_ASSOCIATION_OF_AUSTRALIA_-_SUBMISSION_2.pdf.

9 <https://www.9news.com.au/national/caravan-sales-boom-as-aussies-holiday-locally-during-covid-pandemic/8f122576-2854-4a50-a18c-e87516f48405>.

10 <https://www.caravancampingsales.com.au/editorial/details/big-jump-in-chinese-imports-133044/>.

11 'Caravan and Camping State of Industry 2021', Caravan Industry Association of Australia, 2021.

12 'International Trade Report: Caravan Trailer Imports and Exports Monthly Insights', Caravan Industry Association of Australia, Nov 2021.

3. Suppliers and manufacturers must comply with their obligations under the Australian Consumer Law

All suppliers and manufacturers must comply with their obligations under the ACL. This includes compliance with:

- the consumer guarantees
- prohibitions on misleading and unconscionable conduct
- the unfair contract terms provisions.

3.1 The Australian Consumer Law

3.1.1 Consumer guarantees

Under the ACL, there are automatic statutory guarantees, known as the consumer guarantees, that apply to all eligible goods and services. They apply regardless of any other warranties businesses give to or sell to consumers.

The consumer guarantees provide that products must be of acceptable quality. This means goods should be:

- safe, lasting, with no faults
- look acceptable
- do all the things you would normally expect them to do.¹³

In addition, products must, among other things:

- match the salesperson's description¹⁴
- match any demonstration model or sample¹⁵
- be fit for the purpose the business told the consumer it would be fit for and any purpose that the consumer made known to the business before purchasing¹⁶
- meet any express warranty given or made by the manufacturer¹⁷
- have spare parts and repair facilities available for a reasonable time after purchase unless the consumer was told otherwise.¹⁸

If a business fails to deliver any of these consumer guarantees, the consumer has the right, depending on whether the failure is minor or major, to a repair, replacement or refund, and compensation for any damage and loss (discussed further in section 6). Any term in a contract that, among other things, excludes or restricts the consumer guarantees is void.¹⁹

13 ACL, s.54.

14 ACL, s.56.

15 ACL, s.57.

16 ACL, s.55.

17 ACL, s.59.

18 ACL, s. 58.

19 ACL, s. 64.

3.1.2 Circumstances where a supplier is not required to provide a remedy

The guarantee of acceptable quality does not mean that goods must be indestructible.²⁰ This would increase prices and reduce the range of goods available to consumers. Under the ACL, a supplier is not obligated to provide a remedy to the consumer if, for example, the consumer:

- damages their caravan due to abnormal use²¹
- does something which means that the caravan is no longer of acceptable quality²²
- loses, destroys or disposes of the caravan²³
- simply changes their mind.

3.1.3 False, misleading or deceptive conduct

The ACL provides that a business must not engage in misleading or deceptive conduct when selling products or services.²⁴ The ACL also prohibits a person from making false or misleading representations, including about the consumer guarantees and any remedies available.²⁵ ACL regulators, including the ACCC, can apply to a court and if the court agrees, businesses can face significant financial penalties.²⁶

ACCC v Mazda Australia Pty Ltd (2021)²⁷

The ACCC alleged, among other things, Mazda made false or misleading representations in its dealings with 9 consumers. These representations included that certain faults with Mazda new motor vehicles owned by consumers were not “major faults”. Therefore, these consumers were not entitled to a refund or replacement vehicle at no cost under the consumer guarantee provisions of the ACL.

In November 2021, the Federal Court found that Mazda misled consumers about their consumer guarantee rights. This included by representing to consumers that:

- they were only entitled to have their vehicles repaired, even though a consumer’s rights under the ACL also include a refund or replacement when there is a major fault
- they were not entitled to a refund or replacement vehicle at no cost when in fact consumers do not have to make any financial contribution to receive the remedies that they are entitled to under the ACL.

Relevantly, the Court found that some of Mazda’s representations that the consumers were not entitled to a refund were misleading because Mazda was expressing an opinion that it had no reasonable grounds for making. This was because Mazda did not assess whether the relevant faults were major failures.²⁸

20 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf.

21 ACL, s. 54(6).

22 ACL, s. 54(6).

23 ACL, s.262(1.)

24 ACL, s.18.

25 ACL, s.29(m).

26 See: <https://www.accc.gov.au/business/business-rights-protections/fines-penalties>.

27 https://austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/1493.html?context=1;query=mazda;mask_path=

28 On 14 April 2022, the ACCC filed an appeal against the Federal Court’s decision to dismiss the ACCC’s allegations that Mazda engaged in unconscionable conduct (<https://www.accc.gov.au/media-release/accc-appeals-dismissal-of-mazda-unconscionable-conduct-allegations>). Mazda has also appealed the Federal Court’s finding that it engaged in misleading and deceptive conduct and made false or misleading statements.

3.1.4 Unconscionable conduct

Under the ACL, businesses must not engage in unconscionable conduct when dealing with other businesses or their customers.²⁹ To be considered unconscionable under the ACL, conduct must be more than simply unfair. It must be against conscience as judged against the norms of society. Business behaviour may be unconscionable if it is particularly harsh or oppressive and is beyond hard commercial bargaining.

For example, Australian courts have found transactions or dealings to be 'unconscionable' when they are deliberate or involve serious misconduct.

This provision applies to:

- suppliers in their dealings with consumers
- manufacturers in their dealings with suppliers.

As with false or misleading representations, businesses can face significant financial penalties if a court finds their conduct has been unconscionable.³⁰

3.1.5 Unfair contract terms

The ACL protects consumers and small businesses from unfair terms in standard form contracts. The ACL provides examples of contract terms that may be unfair.³¹ This includes terms that permit, or have the effect of permitting:

- one party (but not another party) to unilaterally terminate the contract
- one party to vary the upfront price payable under the contract without the right of another party to terminate the contract.³²

Ultimately, only a court or tribunal, not the ACCC, can decide that a term is unfair. If a court or tribunal finds that a term is 'unfair', the term will be void. This means it is not binding on the parties. The rest of the contract will continue to bind the parties to the extent it can operate without the unfair term.³³

3.2 Road Vehicle Standards Act

The *Road Vehicle Standards Act 2018* (RVSA) sets out the Commonwealth legislative framework for the approval of vehicles to be provided to the Australian market. It replaced the *Motor Vehicle Standards Act 1989* (MVSA). The RVSA is due to come into effect for low aggregate trailer mass (ATM) trailers, including caravans, on 1 July 2023.³⁴

The RVSA represents a significant change from the current approval process under the MVSA, whereby manufacturers and importers self-certify compliance with Australian Design Rules (ADRs).³⁵ Under the RVSA, manufacturers and importers will be required to register online for approval and log caravans on a Register of Approved Vehicles (RAV) before they can provide them to the Australian market. The approval must include a declaration that the caravan complies with the relevant ADRs.

29 ACL, s. 21.

30 See: <https://www.accc.gov.au/business/business-rights-protections/fines-penalties>.

31 For all the examples of unfair contract terms see ACL, s. 25.

32 ACL, s. 25(b) and (f).

33 On 9 February 2022, Schedule 4 to the Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022, which, among other things, would introduce a civil penalty regime prohibiting the use and reliance on unfair contract terms in standard form contracts and expand the class of contracts covered by the unfair contract terms was introduced to Parliament. The Bill has since lapsed due to the 2022 Federal Election.

34 Under the RVSA, a low ATM is a trailer with an ATM of 4.5 tonnes or less.

35 For a list of ADRs that apply to caravans, see: <https://rvsaready.com.au/adrs-relevant-to-towables/>.

RSVA requirements for caravans, as with motor vehicles, will be both a Commonwealth responsibility in respect to registration on the RAV and a state and territory responsibility once the caravans are registered.

Requiring manufacturers and importers to demonstrate compliance with the relevant ADRs will subject caravans sold in Australia to a higher regulatory standard. This should improve the overall safety and quality of these vehicles.

3.3 State and territory reforms

In recent years, some states and territories have introduced changes to the consumer protection and tribunals frameworks in their jurisdictions to improve access to remedies for consumers. This includes measures such as:

- improving the coverage of statutory warranty provisions which apply to many vehicle sales under motor vehicle dealer regulations
- increasing the monetary limits for claims that can be handled by tribunals (which means more caravans would fall within the tribunals' jurisdictions).³⁶

³⁶ For example, see Queensland's "lemon laws" that took effect from 1 September 2019. In addition to increasing the levels for claims to be handled by the Queensland Civil and Administrative Tribunal from \$25,000 to \$100,000, the laws introduced a 30-day or 1,000 kilometre warranty for consumers buying a vehicle, including a caravan, more than 10 years old or with 160,000 kilometres or more on the odometer (<https://statements.qld.gov.au/statements/88012>).

4. Suppliers' obligations when dealing with delays in the supply and repair of caravans

A common theme reported by many consumers was delays in the delivery of their new caravan or for parts to fix failures with their existing caravan. The ACCC recognises that recent supply chain disruptions and increased demand mean delays are going to be more prevalent in the caravan industry, at least in the medium-term.

Suppliers should be upfront with consumers at the point of sale about delivery timeframes and any potential for them to change. Suppliers should then keep consumers informed of changes to timeframes and ensure that these explanations are accurate.

Suppliers and manufacturers should not use supply chain disruptions as an excuse to divert spare parts to new orders or avoid repairing caravans because the cost of doing so has increased.

4.1 Obligation not to accept payment if supplier cannot deliver within timeframe

Under the ACL, businesses must not accept payment for goods if the business knows or should have known that it would not be able to supply the products within the timeframe indicated by the business, or if no timeframe was provided, within a reasonable time.³⁷

If a business accepts payment for goods, it must supply the goods within the period specified or, if no period is specified, within a reasonable time.³⁸

However, this obligation does not apply to businesses who genuinely try to meet supply agreements but the failure was due to something beyond their control and the business exercised reasonable precautions and due diligence to avoid the failure.³⁹

Some suppliers reported to the ACCC that they sold caravans based on production schedules that allocated a specified number of caravans to them over a period. Suppliers reported that in some instances, manufacturers were unable to meet these schedules.

The ACCC considers that suppliers should:

- be upfront with consumers at the point of sale about timeframes and any potential for them to change
- promptly inform their customers following receipt of any information about changes to that timeframe
- ensure that these explanations are accurate.

To enable this, the ACCC also expects manufacturers to be accurate and timely in their communications with suppliers about any factors affecting production schedules.

³⁷ ACL, s. 36.

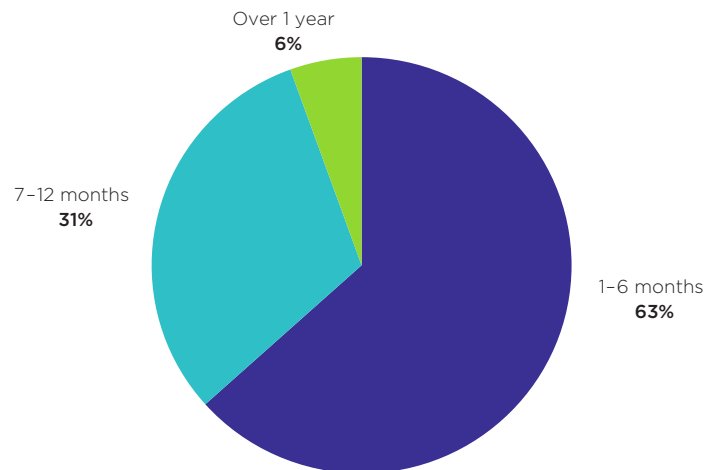
³⁸ ACL, s. 36(4).

³⁹ ACL, s. 36(5).

4.2 Survey findings

Over a third of consumer respondents (37%) stated that they had to wait longer than 6 months for the delivery of their caravan, as demonstrated by Figure 2 below. The survey focused on consumers who had purchased a caravan during the relevant period up to late 2021. It is possible that wait times may be even longer now given sustained global supply chain issues and increased demand.

Figure 2: Wait time for new caravan



Of the 27% (626) of consumers who stated that their order changed from point of sale to delivery, 30% (186) stated their delivery date was pushed back.

The consumer response below is illustrative of the frustration some respondents expressed with suppliers failing to provide timely notice of delivery delays. The ACCC is concerned that in this example the consumer claims to have suffered loss due to the supplier's alleged failure to communicate delays proactively.

► ***“Several delays to expected completion with no more than 2 weeks’ notice to inform of large delays - this cost us money in holiday bookings more than once.”***

Consumer respondent

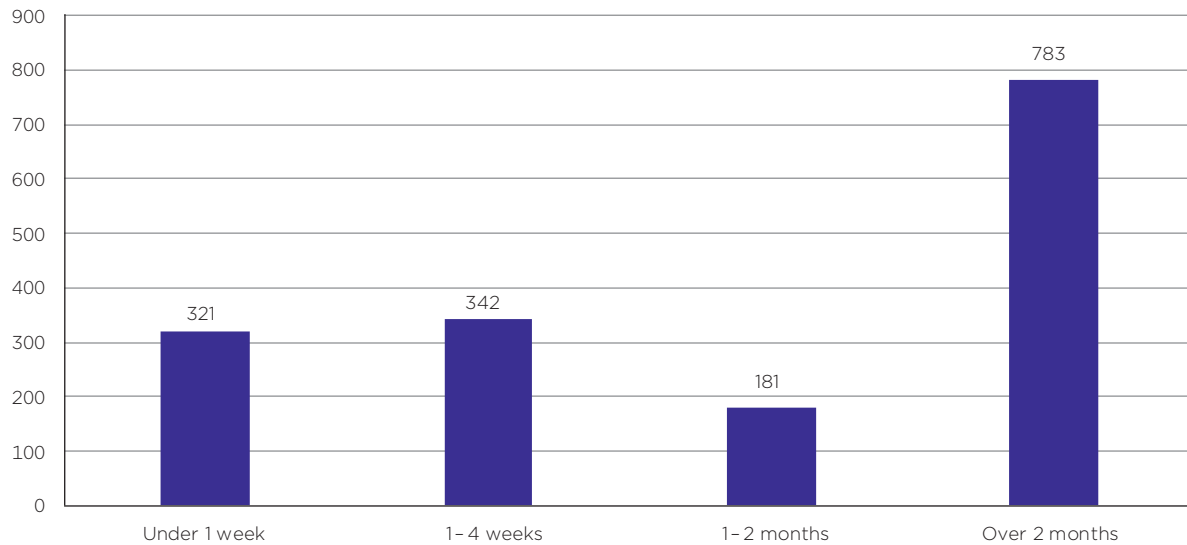
4.3 Repairs must be made in a reasonable timeframe

Consumers seeking repairs also frequently mentioned delays, stating they often had to:

- undertake the repairs themselves
- pay a third party to do them
- simply not use the caravan.

The survey found that nearly half (783) of all consumers (1627) who sought repairs, had to wait longer than 2 months for the repairs to occur. The ACCC is concerned that some consumers reported having to postpone or even cancel travel plans because they were waiting for repairs to be undertaken.

Figure 3: How long did it take to fix the fault



If a consumer is entitled to a repair and it is not done within a reasonable timeframe, under the ACL the consumer is entitled to:

- have the repair done by another party and recover the reasonable costs incurred by the consumer in doing so from the supplier⁴⁰
- reject the goods⁴¹ and elect to get a refund or have the goods replaced by the supplier.⁴²

What is reasonable will depend on the circumstances and the nature of the good, including its complexity and core purpose.

Separately, a consumer is entitled to recover damages against the supplier for any loss or damage suffered by the consumer due to the failure to comply with consumer guarantees. This only applies if it was reasonably foreseeable that the consumer would suffer such loss or damage because of the failure.⁴³

40 ACL, s. 259(2).

41 Subject to being within the rejection period in ACL, s.262(2).

42 ACL, s.259(2), s263(4).

43 ACL, s.259(4).

4.4 Representations about delays must be accurate

While delays caused by the COVID-19 pandemic were largely outside the control of manufacturers or suppliers, some consumers reported that COVID-19 was cited by manufacturers to justify prioritising new builds over remedying faults with existing caravans.

The example below demonstrates the difficulty some consumers experienced in enforcing their consumer guarantee rights.

► ***“[They] basically took our money and didn’t care after that. Numerous things weren’t repaired, and COVID-19 was used as an excuse to not be able to repair things and then warranty ran out on parts and components.”***

Consumer respondent

The ACCC would be concerned if suppliers:

- refused to comply with their obligations under the ACL, including if they use the expiry of a warranty as reason
- used COVID-19 or any other factor as an excuse for non-compliance or delays if this was not the case.

Suppliers and manufacturers should be proactive and accurately communicate any delays in supplying or repairing caravans, and the reasons for any delays. This will avoid the risk of making false and misleading representations, as well as managing consumers’ expectations. It will also enable consumers to plan their travel more effectively.

5. Suppliers must accurately advertise and describe their caravans and any associated warranties

The ACCC is concerned about the number of consumer respondents who alleged a supplier or manufacturer misled them. The ACL prohibits a business from making statements or representations that are incorrect or likely to create a false impression. Suppliers and manufacturers should exercise caution when making representations about their caravans.

We will continue to review consumer contacts for any misleading or deceptive conduct, including false or misleading representations made by businesses and take enforcement action where necessary.

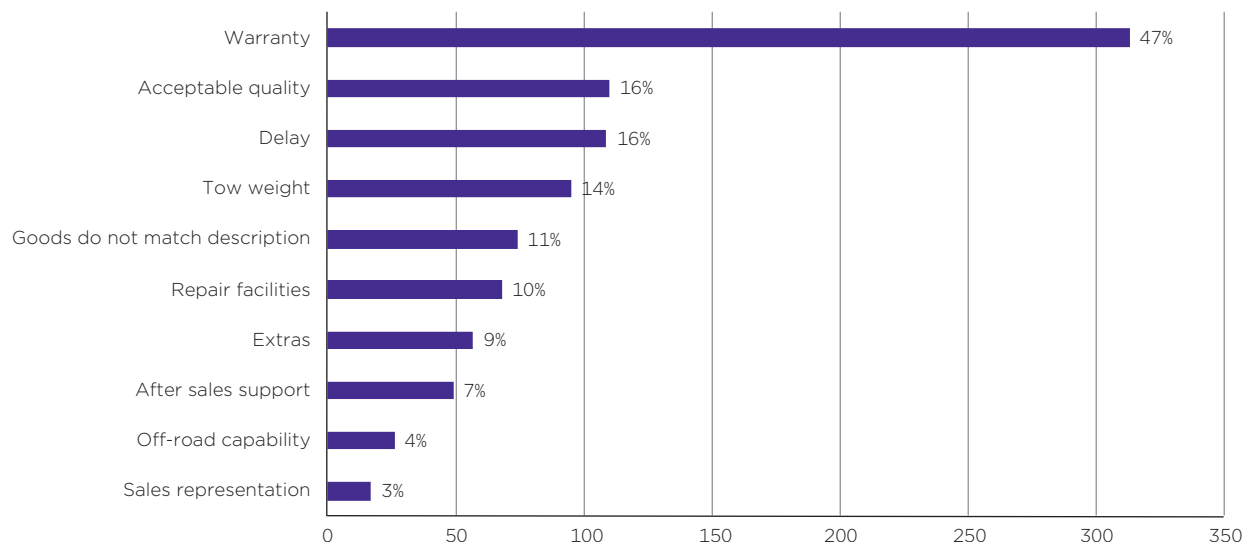
5.1 Survey findings

The manufacturing process for caravans is complex given they are made up of many separate components and have different specifications for individual consumers. The supplier and manufacturer usually possess significantly more information about their product than the consumer. Around 65% (1467) of consumer respondents reported that this was their first caravan purchase, meaning they are likely to be less knowledgeable than the 35% (793) of consumers who have previously owned caravans. This means that many consumers may be more susceptible to misrepresentations.

The ACCC is concerned that 29% (667) of consumers perceived that representations made during the sales process were inaccurate. This suggests that some suppliers may not be complying with their obligation not to mislead consumers.

We asked consumers to outline what aspects of their caravan purchase they perceived they were misled about. Consumers reported several areas, as outlined in Figure 4 below, with warranties being the most common category reported.

Figure 4: Most common areas subject to alleged misrepresentations



Note: Consumers often responded that they believed they were subject to more than one misrepresentation. The areas that were identified by 2% or less of consumers as an area of potential misrepresentation were not included in the above chart.

The ACCC is particularly concerned about alleged misrepresentations outlined below, given the potential harm to consumers.

5.1.1 Warranties

Of the 29% (667) of consumers who felt they were misled during the sales process, 47% (313) believed that they were misled about warranties. Many consumers noted that, despite their consumer guarantee rights under the ACL (as outlined in section 3.1 above), suppliers denied repairs on the basis that the warranty provided by the manufacturer or supplier had expired or that exclusions applied to this warranty.

The ACCC notes that the consumer guarantees apply *regardless of* any right under a warranty provided by a manufacturer or supplier. Any such warranty does not affect the rights of a consumer under the ACL.

The survey shows that some consumers find the issue of warranties confusing. Suppliers and manufacturers should know their obligations under the ACL and meet them. This raises the issue of how long after their caravan purchase consumers should be able to get a remedy under the consumer guarantees.

Under the ACL, goods that are of acceptable quality are fit for purpose, acceptable in appearance and finish, free from defects, safe and as a reasonable consumer would regard as acceptable having regard to among other things, the nature of the goods and its price.⁴⁴

Suppliers and manufacturers should be aware that caravans are expensive consumer goods, which consumers expect to use for many years. These factors will affect the length of the period for which a reasonable consumer would regard as acceptable.

For example, some manufacturers' warranties may be limited to 1 to 2 years. However, in the ACCC's view, it is reasonable to expect that a caravan that was of acceptable quality would not exhibit a major defect for several years of use. The ACCC considers that if a major defect arose during this period, the consumer is entitled to have the vehicle refunded or replaced even if the period was outside of the warranty period.

Ultimately, if the supplier and consumer cannot agree, courts and tribunals will decide whether consumers may be entitled to a particular remedy.

5.1.2 Separate Warranties

A subset of consumers alleged that caravan suppliers told them to approach individual component manufacturers, such as air conditioner or fridge manufacturers, to obtain remedies under those component manufacturers' warranties or the consumer guarantees. These consumers expressed frustration that this was the case, as reflected in the consumer response below.

► ***“The dealer did not want to manage the warranty repairs for anything despite saying they would handle any warranty issues for me during the sales pitch. When warranty issues were raised they simply referred me to the manufacturer of each individual part.”***

Consumer respondent

Requiring the consumer to organise a repair, replacement or refund with the relevant component manufacturer is inconsistent with the requirements of the ACL. Under the ACL, the supplier is responsible for providing these remedies to the consumer.⁴⁵ Stating otherwise could be considered misleading.

44 ACL, s. 54(2) and (3).

45 ACL, ss.259, 260.

5.1.3 Availability of repair facilities

Of the consumers that felt they were misled during the sales process, 10% (68) reported that suppliers had made inaccurate representations about the availability of repair facilities. Specifically, consumers allege they were told repairs would be available Australia-wide, but that this turned out to be untrue. When faults occurred during their travels, these consumers found that repair facilities were unavailable.

The consumer response below is an example where a supplier allegedly made representations about the availability of nation-wide repair facilities that were inaccurate. If this is the case, representations such as these would breach the ACL.

► ***“We were told that should we require any repairs there were services available Australia-wide and to just phone the dealer for information on where to take the van - incorrect, we tried this..and the dealer just fobbed us off.”***

Consumer respondent

The size of many caravan manufacturers means they do not have the same dealership network as car manufacturers. Many suppliers rely on third parties to undertake repairs. As this can be expensive, some suppliers have stated a preference that, if the repair is not urgent and the caravan remains operable, the consumer should defer repair until the caravan is returned to the supplier. However, disagreement often arises between suppliers and consumers about what is urgent.

Suppliers need to explain to consumers how warranties work in practice, avoiding terms like “nation-wide” or “Australia-wide” if they cannot deliver on this.

Related to the issue of nation-wide warranties was the issue of additional costs incurred by consumers to have their caravan repaired or replaced. The ACL provides that a consumer can recover damages against the supplier in certain circumstances.⁴⁶ Suppliers should be aware of this and should not state otherwise.

5.1.4 Availability of spare parts

For many caravan owners, it is critical to have access to repair facilities and the spare parts needed for those repairs. This may play a significant role in a consumer’s decision to buy one brand of caravan over another. Moreover, the availability of spare parts adds to the caravan’s durability and resale value.

The ACL provides that manufacturers of goods must take action to ensure that facilities for repair of the goods and spare parts are available for a reasonable period after supply.⁴⁷

5.1.5 Tow-weight

Of the consumers that alleged they were misled during the sales process, 14% (95) responded that they were misled about their caravan’s weight. For example, some stated that their caravan was too heavy after water tanks were filled, or bikes were added. Others stated that the weight on the compliance plate understated the caravan’s actual weight or what was agreed to in the contract.

In some cases, consumers bought new vehicles with more power to resolve this problem, significantly adding to the expense of owning their caravan. In addition to any financial costs, misrepresentations about tow weight can lead to serious safety issues, including accidents involving the consumer, passengers or others on the road that may lead to serious injury or even death.

⁴⁶ ACL, s. 259(4). A consumer can recover damages against a supplier for any loss or damage suffered by the consumer because of the failure to comply with a guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damages because of the failure.

⁴⁷ ACL, s.58(1). We note this guarantee does not apply to goods acquired at auction. ACL, s.58(2) provides this is the cause unless the supplier took reasonable action to ensure the consumer was given written notice that facilities for repair and parts for the goods would not be available after a specified period.

To address this, we consider that suppliers should:

- advertise the weight of the caravan clearly, stating explicitly what is and is not included in the weight calculations
- inform consumers about how any modifications may affect the caravan's weight to avoid issues arising after delivery.

5.1.6 Performance capabilities

Of the consumers that felt they were misled during the sales process, 11% (74) stated the caravans they purchased did not match their description. Some consumers reported that design plans or appliance upgrades which they had previously agreed to were ignored, or that items were simply left off the caravan.

An additional 4% (26) of respondents stated that off-road capabilities were specifically misrepresented. For consumers planning to go off-road with their caravan, such misrepresentations could encourage them to buy a caravan that may be unfit for its intended purpose, as reflected in the consumer response below.

▶ ***“The caravan was sold as an off-road vehicle. There was no way the suspension, tyres or rims could go off-road. It barely towed straight on a main road.”***

Consumer respondent

Many caravans are advertised for off-road use. Unlike passenger vehicles where a standard definition exists in the ADRs, there is no standard definition of the term in the caravan industry.⁴⁸ This may lead to confusion or mismatched consumer expectations about where a caravan can travel and what is normal versus abnormal use.

In the absence of an accepted definition, the ACCC considers manufacturers and suppliers should exercise caution when using terms like “off-road” and should clearly explain to consumers what surfaces a caravan should not travel on.

When making representations about a caravan’s capabilities, suppliers should also be aware of the consumer guarantees. This includes:

- goods must match the description
- fitness for any disclosed purpose.

48 Clause 4.3.3 of the *Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005* defines an off-road passenger vehicle as a passenger vehicle having up to 9 seating positions, including that of the driver and being designed with special features for off-road operation. These special features include 4 wheel drive and clearance from the ground. For more information, see: <https://www.legislation.gov.au/Details/F2012C00326>.

6. The supplier's obligation to repair, replace or refund a caravan when it has a failure

Many suppliers, manufacturers and consumers reported that they were unclear as to when a failure is minor or major. This distinction affects the remedy a consumer is entitled to under the ACL, be it repair, replacement or refund of their caravan.

Ultimately, determining whether a failure is minor or major will always be based on an assessment of the specific circumstances of each case against the criteria in the ACL. When considering the type of remedy, suppliers should base their view on a thorough assessment of the caravan.

6.1 Repair, replace, refund

Under the ACL, if a failure of goods to comply with the consumer guarantees can be remedied and is not a major failure, then businesses can choose to repair the good, replace the good or provide a refund.⁴⁹ Generally speaking, minor failures are those that do not stop the consumer from using the good in question and are easily repaired.

The ACL specifies that a failure to comply with a consumer guarantee is a major failure if:⁵⁰

- the failure is serious enough that the consumer would not have made the purchase having known what they know now
- the good is significantly different from the sample or description
- the good is substantially unfit for its common purpose and cannot easily be fixed within a reasonable time to make it fit for that purpose
- the good is unfit for a specific purpose that was made known to the supplier or salesperson and cannot easily be fixed within a reasonable time to make it fit for that purpose
- if the good is unsafe
- if the good has multiple failures that, when taken as a whole, would have stopped the consumer from buying it if they had known about them.⁵¹

A consumer has the right to ask for their choice of a replacement or refund when a major failure with a good is identified.⁵²

6.2 Survey findings

6.2.1 Consumer Responses

Of the 80% (1814) of consumers who reported they had encountered a failure with their new caravan, 48% (878) classified the failure as minor. Of those who provided their reasoning, the overwhelming majority stated that:

- the failures were easily fixed or repaired, often under warranty (235 consumers)
- the caravan was still usable, or they found a work around (194 consumers).

49 ACL, ss. 259 and 261.

50 ACL, s. 260.

51 ACL, s.260(2). This was part of an amendment to the CCA that came into effect in 2021 (Treasury Laws Amendment (2020 Measures No. 6) Act 2020).

52 ACL, ss. 259(3) and 263(4).

Consumers were given the opportunity to describe the failures they experienced. Respondents who encountered minor failures focused on the inconvenience of having their new caravan repaired or expressed disappointment in the quality.

Fifty percent (910) of consumers asserted the failure they experienced was major.⁵³ The most common reasons for this view included:

- water damage (238 consumers)
- safety risks (222 consumers)
- the inability to use the caravan as intended due to wrong or missing components (203 consumers).

This suggests that consumers' understanding of the meaning of major failures is largely consistent with the ACL. There was also some consumer awareness that multiple minor failures may constitute a major failure (discussed further at section 6.3), as demonstrated in the below consumer response.

► ***“In isolation the faults were minor. The cumulative effect of the faults indicates a huge lack of quality control and an ambivalence towards the consumer.”***

Consumer respondent

6.2.2 Supplier Responses

When asked in the survey why a consumer complaint was not resolved within 30 days, suppliers often cited difficulties with categorising the failure and finding the appropriate remedy.⁵⁴ While the survey showed many consumers considered water damage or safety risks as a major failure, suppliers found other problems were more contentious and harder to classify.

This confusion may be the source of disagreement among consumers, suppliers and manufacturers, particularly as the cost for the supplier of replacement or refund is likely to be significantly greater than repair.

In relation to disputes with consumers, the supplier survey found that of the 67 respondents:

- 22% (15) of suppliers stated there was a disagreement about whether the failure was major or minor
- 15% (10) of suppliers stated there was a disagreement about whether minor failures amounted to a major failure
- 27% (18) of suppliers responded that there was a disagreement about the remedy offered (i.e. consumer sought refund and supplier offered repairs).

Some suppliers suggested in interviews that consumers' expectations may not match the reality of owning a caravan. The below supplier response is indicative of the view communicated to the ACCC.

► ***“You can sell the same camper to 2 different people, and they can have 2 different experiences. How can we manage that? In the end, they bought the wrong thing. [We] figured out it's not for them.”***

Supplier respondent

⁵³ Less than 2% of respondents did not classify their faults.

⁵⁴ It should be noted that suppliers had the option to select multiple answers.

6.3 Multiple minor failures constituting a major failure

There is limited case law relating to when multiple failures which each may be minor failures in isolation constitute a major failure. However, the recent *Jayco* decision (described below) indicates that faults such as water leaks, which compromise the ability of caravans to provide shelter, could individually amount to major failures.⁵⁵

ACCC v Jayco Corporation Pty Ltd (2020)⁵⁶

The ACCC alleged among other things that Jayco engaged in misleading and deceptive conduct and false or misleading representations to 4 consumers relating to claimed defects in their RVs.

The Federal Court considered that a reasonable consumer who purchases a RV (or caravan) would have some degree of tolerance for certain types of failures due to the RVs complex nature and relevant use. The Court accepted that RVs are, among other things, subject to stresses and flexes, exposed to weather and designed to be lived in. Given these characteristics, it is likely some components of the RV may need to be adjusted, repaired or replaced after an initial period of use.

Despite assuming that consumers would have some tolerance for imperfections in the RVs, the Court found that 3 out of the 4 consumers had experienced a major failure to comply with a statutory guarantee and were entitled to a refund or replacement for the following reasons:

- In the first instance, the cumulative number of faults, even if by themselves minor, and their disparate nature indicated an unacceptable build quality and exceeded a reasonable consumer's tolerance for faults.
- In the second instance, the extent of the faults, and the numerous failed repair attempts – in this case 10 tries over 15 months – amounted to a major fault with the caravan. One of the faults could have caused significant amounts of water coming into the caravan, which would have rendered the caravan uninhabitable.
- The third instance, an ongoing water leak, which took several attempts to fix, was deemed a major failure given it impeded the core purpose of the caravan to provide adequate shelter and amenities.

Ultimately, determining whether a failure is minor or major will require assessment on a case-by-case basis. When considering the remedy, suppliers should base any view on a thorough assessment of the caravan and any failures, including how they impact the use of the caravan.

55 The Treasury Amendment (Treasury Laws Amendment (2020 Measures No. 6) Act 2020) has since clarified that a major failure includes 2 or more failures to comply with a consumer guarantee.

56 <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2020/1672.html?stem=0&synonyms=0&query=jayco>.

7. Consumer reports indicate that non-compliance with consumer guarantees is widespread

Many consumer respondents reported difficulties obtaining remedies from suppliers for consumer guarantee failures. Some consumers needed to escalate their issues through dispute resolution processes to access their rights.

Our findings in the new caravan retailing market reinforce the ACCC's views on the need for reform to the ACL to introduce a prohibition against a failure to provide a remedy where a business is legally required to do so.

7.1 Survey findings

The consumer survey found that around 80% (1814) of respondents reported failures with their caravan.

The survey found that 66% (1207) of respondents were aware of their consumer guarantee rights. Of these consumers, only 28% (341) reported mentioning their consumer guarantee rights to the supplier when communicating about the failure.

The ACCC is concerned that many consumers respondents reported that suppliers ignored them when they mentioned the consumer guarantees, as reflected in the consumer response below.

► *"I told the manufacturer that under the consumer law I had certain rights that they were ignoring. They said, 'so what'."*

Consumer respondent

Suppliers and manufacturers have asserted to the ACCC that failures will likely arise, particularly in the first 1000 kilometres, due to the complex nature of caravans. If this is the case, the ACCC considers it is essential that these businesses have established processes to provide remedies for any consumer guarantee failures.

Businesses also need to explain to consumers at the point of sale and supply that failures will likely occur, particularly in the first 1000 kilometres. This will help manage consumer expectations and ensure suppliers do not breach the ACL.

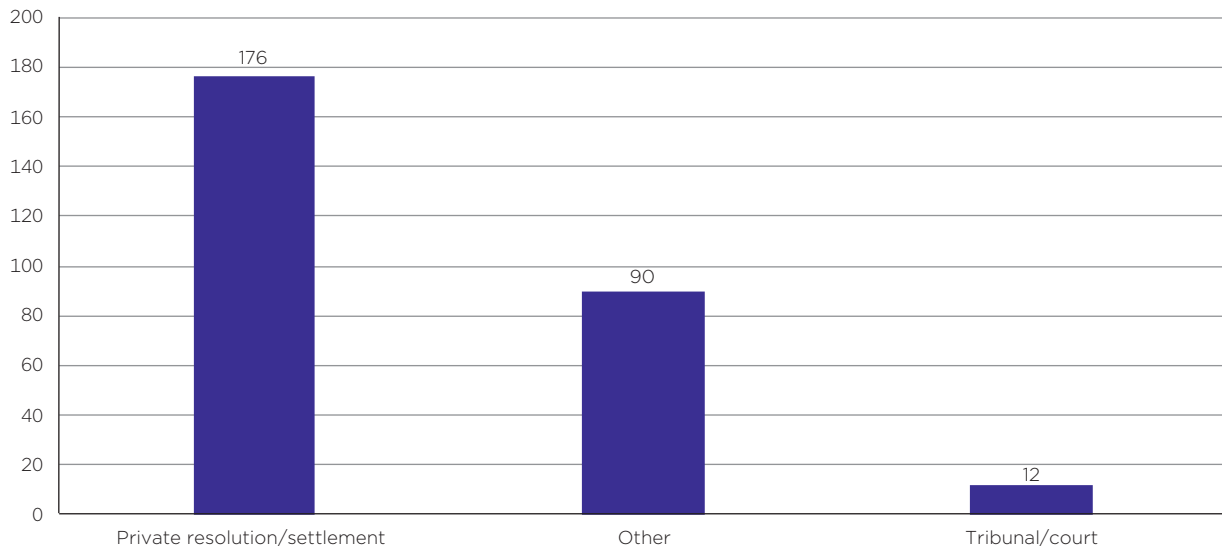
7.2 Dispute resolution

If a supplier refuses to repair a minor failure, or disagrees with the consumer that the failure is major and the consumer is entitled to a refund or replacement, the consumer can access dispute resolution.⁵⁷ For example, a consumer may take their dispute to their state or territory fair trading office to seek help to negotiate a resolution. They may also have the right to take the matter to the local small claims court or tribunal. Generally, the onus is on the consumer to demonstrate that there was a failure with the consumer guarantees and the failure was major.

⁵⁷ ACL, s.271 provides that the consumer may also seek a remedy from the manufacturer for failure with certain consumer guarantees (acceptable quality, goods must match description, repairs and spare parts and guarantees as to warranties). ACL, s.272 provides this is limited to damages only (i.e., any reduction in the value of the goods and any loss that was reasonably foreseeable as a result of the failure).

Of the 13% (294) of consumers who reported settling a dispute during the relevant period, 60% (176) of respondents reached a private settlement with the supplier or manufacturer, as outlined in Figure 5 below. The consumer survey indicated that only 4% (12) of respondents resolved their dispute via a court or tribunal.⁵⁸

Figure 5: How was your dispute resolved



7.2.1 Private settlement

Many consumers reported that they did not receive a full refund as part of a private settlement for what they considered was a major failure to comply with the consumer guarantees. Some of these consumers were prepared to accept a settlement at less than what they were entitled to under the ACL in the interests of resolving the matter.

► ***“We paid for half of the costs involved in fixing it. Otherwise, we would have months of haggling and [still have] an unacceptable caravan.”***

Consumer respondent

The ACCC reminds suppliers that, if a major failure is identified, a consumer is entitled to a full refund or replacement. The ACL does not allow suppliers to adjust for factors such as depreciation or use by the consumer.⁵⁹

The supplier may also require the consumer to sign a non-disclosure agreement (NDA). In the caravan industry, NDAs usually state that a consumer will not disclose details of a settlement that has been reached to solve a problem with their caravan. NDAs may also be used by suppliers and manufacturers to prevent consumers from publishing negative comments on social media platforms about them.

The ACCC has previously raised concern about the use of NDAs.⁶⁰ The ACCC considers that NDAs may:

- substantially reduce information in the market for new buyers about defects that are common to a particular make or model of caravan
- suppress incentives for manufacturers to compete on vehicle quality and the postsales customer services they offer.

⁵⁸ 16 consumers did not report how their disputes were resolved.

⁵⁹ *Vautin v BY Winndown, Inc. (formerly Bertram Yachts) (No 4)* [2018] FCA 426. This principle was affirmed in *Jayco and Mazda*.

⁶⁰ See ACCC New car retailing industry report: https://www.accc.gov.au/system/files/New%20car%20retailing%20industry%20final%20report_0.pdf.

The survey did not indicate widespread use of NDAs. However, for the consumer respondents who did raise the issue, the information provided raises concerns that some NDAs may breach prohibitions against misleading and deceptive conduct and unconscionable conduct in the ACL. This includes where:

- a dealer or manufacturer denies a consumer remedies for non-compliance under the consumer guarantees unless they sign an NDA
- an NDA restricts or limits a consumer's access to remedies for any subsequent noncompliance with the consumer guarantees.

Any term in a contract which purports to limit or exclude consumers' rights under the consumer guarantees will be void.

Consumers who consider that any NDA which they are asked to sign breaches their consumer guarantee rights or any other section of the ACL should report the matter to the ACCC or their state and territory office of fair trading.

7.2.2 Tribunal consideration

The consumer survey indicates that taking a supplier or manufacturer to a tribunal was uncommon. Some of the reasons for this included:

- expense (including legal representation and expert reports in some jurisdictions)⁶¹
- emotional cost
- wanting the dispute to end.

Many supplier respondents stated that being taken to tribunal was a difficult experience for them. For some, the experience was so stressful that, rather than risking tribunal proceedings, they provided consumers with remedies in circumstances where they considered the failure was caused by the consumer's abnormal use. This sometimes led to difficulties when seeking an indemnity from the manufacturer (see section 8).

The onus is also on the consumer to demonstrate to the civil standard (balance of probabilities) that there is non-compliance with the consumer guarantees. This can be a daunting challenge for consumers, as this requires taking on a business who has more product knowledge and information.

7.2.3 Other ways of dispute resolution

Some of the other outcomes respondents reported included:

- selling the caravan
- repairing the fault at their own expense
- they were still awaiting further resolution.

⁶¹ For instance, the Queensland Civil and Administrative Tribunal requires that all parties involved in a matter before the tribunal are expected to represent themselves (<https://www.qcat.qld.gov.au/going-to-the-tribunal/appearance-and-representation/representation-at-qcat>).

7.3 Law reform required to support consumer guarantees and improve access to remedies

In December 2021, the Treasury published a Consultation Regulatory Impact Statement (CRIS) on improving consumer guarantees and supplier indemnification provisions under the ACL.⁶²

The CRIS sought submissions on some options to achieve this, including the option of introducing a prohibition against a failure to provide a remedy where a business is legally required to do so. The ACCC supports such a prohibition, and considers it should be accompanied by penalties that would deter businesses from failing to comply with their obligations to provide remedies.

For the caravan industry, the ACCC considers these changes would incentivise:

- manufacturers to ensure the caravans they build are compliant with the consumer guarantees
- suppliers to provide remedies to consumers where there is non-compliance with the consumer guarantees.

The improved ability for the ACCC and state and territory ACL regulators to intervene would also create more case law that would help provide more certainty about issues such as what is considered a major failure.

62 https://treasury.gov.au/sites/default/files/2021-12/c2021-224294-cgsicris_2.pdf.

8. Caravan manufacturers must reimburse suppliers for the cost of providing remedies to consumers

Manufacturers have an obligation to indemnify suppliers for the cost of providing consumers with remedies for failures with the consumer guarantees. The ACCC is concerned that many suppliers reported that manufacturers refused to do this.

The ACCC considers that for the consumer guarantees to work effectively, manufacturers must comply with their obligation to provide an indemnity where applicable.

8.1 Requirement to indemnify

The ACL makes suppliers responsible for providing remedies to consumers for any consumer guarantee failures.⁶³ Suppliers will, therefore, often be liable to provide consumers with remedies in circumstances in which the cause of the failure lies with a manufacturer.⁶⁴ Where the consumer is dissatisfied with the remedy provided, their recourse is to take the supplier to court or tribunal, as their purchase contract lies with the supplier.

Many suppliers considered that this provision is unfair. However, the reason for this is made clear in the Explanatory Memorandum:

“The primary contact point for consumers when they buy the goods is the supplier. Consumers usually have less direct contact with the manufacturer of goods. Accordingly, the primary source of remedies for consumers when goods fail to meet the standard required by guarantees is the person who supplied the goods.”⁶⁵

To address this, the ACL requires the manufacturer to reimburse the supplier for the cost of providing remedies.⁶⁶ Again, the Explanatory Memorandum provides:

“Some manufacturers seek to apply undue pressure on suppliers to limit remedies provided to consumers in respect of faulty goods. When this occurs, some suppliers respond by, in turn, attempting to limit the redress that they provide to consumers in respect of faulty goods. The indemnity in favour of suppliers is intended to provide them with a strong legal basis for requiring manufacturers to comply with their obligations in respect of goods that they manufacture.”⁶⁷

If the manufacturer does not provide an indemnity, the ACL gives suppliers the right to seek reimbursement through legal action.⁶⁸

63 ACL, s.259.

64 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf.

65 Ibid.

66 ACL, s.274.

67 Ibid.

68 ACL, s. 274(3). ACL s. 274(4) also provides the action must be commenced within 3 years from:

- the day on which the supplier made payment to the consumer or
- the day on which a consumer commenced proceedings against the supplier.

8.2 Survey findings

8.2.1 Refusal to indemnify

Many of the supplier respondents raised concerns about indemnification. Of the 67 supplier respondents:

- 40% (27) reported that a manufacturer had refused to indemnify them for remedies under the guarantees during the relevant period
- 37% (25) reported that they disagreed with a manufacturer about whether the defect was the manufacturer's responsibility.

Difficulties obtaining reimbursement from manufacturers may make some suppliers more reluctant to provide consumers with remedies for failures.

We heard from some suppliers who stated that they continued to comply with their obligations in full knowledge that the manufacturer would not provide an indemnity. Suppliers stated they were motivated to do this because:

- the obligation to provide a remedy remains on the supplier regardless of whether an indemnity is provided, and it is the supplier against whom the consumer initiates legal proceedings
- many suppliers, operating in a local community, were concerned it would cause their business serious reputational damage if they did not provide remedies.

The example below demonstrates the practical difficulties suppliers face when seeking an indemnity from a manufacturer. The financial detriment to many suppliers is significant, particularly when it is sustained over a prolonged period.

► *“This is a grey area with current legislation where there is no protection for the dealer on behalf of the customer to seek reimbursement or costs without going down a legal route (at significant cost). As dealers, we have little option other than to do the right thing by the customer and wear the cost as it often isn't worth pursuing legally and not worth the damage to the relationship with the manufacturer. These small cases, accumulate into a larger overall amount over time.”*

Supplier respondent

8.2.2 Reluctance to provide indemnity for total cost of repairs

Suppliers raised concerns about some manufacturers providing indemnity for parts only, leaving them to absorb the cost of labour. They reported that parts are often a small proportion of the overall cost of repair, while labour is the largest cost.

► *“In one instance, I had a caravan with sheets of plywood that had defects in it. It's not an easy thing to fix. The parts are cheap, but the labour is expensive. You essentially have to rebuild the caravan at your own expense.”*

Supplier respondent

The ACL states that a manufacturer of goods must indemnify the supplier who supplies the goods to a consumer if the supplier **incurs costs** because of a failure to comply with certain guarantees.⁶⁹ The ACL's use of “costs” means all costs. This includes parts and any incidental or ancillary costs such as labour.

⁶⁹ ACL, s.274(2)(a) provides that the relevant guarantees are s.54 (acceptable quality), s.55 (fitness for any disclosed purpose) and s.56 (supply of goods by description).

8.2.3 Indemnity for separate components

A caravan, much like a car, is made from thousands of separate components, which are often manufactured by many separate businesses. Unlike cars, however, many components are not usually engineered specifically for the caravan. For this reason, caravan manufacturers may not keep inventories of spare parts and direct suppliers to the particular component manufacturer.

The response below outlines some of the practical difficulties suppliers face when they are directed to deal with a component manufacturer rather than the caravan manufacturer.

▶ *“When it’s an awning or different components, we go directly to the [component manufacturer] who the manufacturer has purchased it from. Sometimes that can be pretty easy [because] the [component manufacturer] knows who we are. But depending on where the manufacturer bought it from, the [component manufacturer] sometimes asks us for a receipt. But we can’t provide that because we bought a caravan, not just a component. We buy the whole unit whereas the manufacturer buys the specific part.”*

Supplier respondent

The ACL does not qualify the indemnity it provides the supplier.⁷⁰ This means that, even when the supplier has a right to claim against a manufacturer, it is the supplier’s choice which of the 2 parties – the manufacturer or the component manufacturer – is liable.

We have spoken to some suppliers who have arrangements in place that make it easier to approach certain component manufacturers. While this might work for them, most suppliers with whom we discussed the issue have stated a preference to deal with the caravan manufacturer. This is because:

- as discussed above, the indemnity includes parts and labour, and this means that the cost of repair is more than merely the cost of replacing the affected part
- the manufacturer has a relationship with the component manufacturer and is in a better position to obtain components
- following on from the above, the manufacturer is the party that buys the parts from the component manufacturer and has the relevant documents.

8.2.4 Disagreements about liability

A supplier is not obliged to provide a remedy to a consumer for any failure that resulted from the consumer causing the good to become of not acceptable quality or which was caused by the consumer’s abnormal use.⁷¹ However, the ACCC is concerned that some manufacturers may be applying this exemption too broadly, noting the Explanatory Memorandum states:

“The exemption from the guarantee of acceptable quality that applies when goods are damaged by abnormal use is intended to provide suppliers with an excuse for avoiding their guarantee obligations **only in exceptional circumstances** [ACCC emphasis added].”⁷²

Suppliers reported that some manufacturers require evidence that the failure was not caused by the consumer. Many suppliers reported spending significant amounts of time documenting what they considered were minor failures, asserting that the cost of documenting these failures exceeded the cost of repair. This is reflected in the supplier response below.

70 ACL, s. 274.

71 ACL, s. 54(6).

72 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-4892-b9e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdf.

► ***“The issue is the manufacturer is mostly never involved in the complaint, as the customer is dealing with the retailer. Most of the time the manufacturer doubts the complaint exists or disagrees that they are at fault. I see that when an issue is documented through small claims. The manufacturer should be jointly notified of the issue being taken to a higher level. It’s very frustrating for the dealer, forcing us to engage more staff and fund most repairs internally.”***

Supplier respondent

As noted above, some consumers also expressed frustration because the manufacturer’s requirement that suppliers document each failure was the cause of delays. Some suppliers have suggested that the situation could be improved if manufacturers put in place policies and procedures that streamline indemnity for repairs below a certain monetary threshold. This may reduce the administrative burden for suppliers and reduce the delays consumers experience in obtaining remedies. It may also assist both suppliers and consumers if manufacturers maintain inventories of commonly used spare parts.

8.2.5 Dispute resolution

The ACL gives the supplier the right to take a manufacturer to court for failure to provide an indemnity.⁷³ The ACCC has heard from some suppliers that failure to indemnify is a practice that has become more common, as suppliers are reluctant to pursue their rights. Many supplier respondents we interviewed, spoke of the considerable financial expense and emotional impact of taking a manufacturer to court in addition to the fear of retribution.

Retribution may include the manufacturer withholding stock or allocating stock to a rival supplier. In many instances, suppliers are dependent on one manufacturer for stock and losing supply can be devastating to their business. The supplier response below illustrates the power imbalance that may arise between suppliers and manufacturers.

► ***“Mostly the caravan manufacturers don’t want to recognise faults in manufacturing. Even to the point where their brand will be taken away from the retailer and given to another dealer.”***

Supplier respondent

We have also received reports that many suppliers have either out-of-date contracts or no contracts at all with the manufacturer. If this is the case, this would further worsen the power imbalance between suppliers and manufacturers.

Manufacturers should be aware that taking advantage of this power imbalance may amount to unconscionable conduct. The ACCC also considers that manufacturers and suppliers should work together to ensure that contractual agreements are in place or up-to-date.

73 ACL, s 274(3) provides the supplier may, with respect to the manufacturer’s liability to indemnify the supplier, commence an action against the manufacturer in a court of competent jurisdiction for such legal or equitable relief as the supplier could have obtained if that liability had arisen under a contract of indemnity made between them. Section 274(4) provides the supplier may commence the action at any time within 3 years after the earliest of the following days:

- the day, or the first day, as the case may be, on which the supplier made a payment with respect to, or otherwise discharged in whole or in part, the liability of the supplier to the consumer or
- the day on which a proceeding was commenced by the consumer against the supplier with respect to that liability or, if more than one such proceeding was commenced, the day on which the first such proceeding was commenced.

8.2.6 Potential enforcement action

The ACCC is concerned about reports that manufacturers are not complying with their obligation to provide indemnification or are only providing partial indemnification.

The ACL does not include any penalty for non-compliance with the obligation to indemnify suppliers. However, manufacturers are still subject to the prohibitions against:

- misleading and deceptive conduct (this includes any representations about a manufacturer's obligation to indemnify)
- unconscionable conduct.

We encourage any suppliers who consider a manufacturer has misled them about the obligation to indemnify them to contact the ACCC. The ACCC will investigate reports with a view to taking enforcement action where necessary.

8.3 Law reform required to support supplier access to indemnity

The information from our surveys and interviews indicates widespread failures to comply with the consumer guarantees and unwillingness by some manufacturers to indemnify suppliers when these failures occur. This suggests that the ACL is not operating as intended.

Many respondents to the supplier survey perceived the current legislative framework as unfair.

▶ ***“The law is aimed at the retailer and fails to hold the manufacturers responsible for the poor workmanship and poor quality control through these caravan factories; start at the source of the problem.”***

Supplier respondent

▶ ***“Manufacturers [have] no accountability. The dealers are always fixing faulty issues without compensation. We have no way of defending ourselves at tribunal..the law is directed at us. There is no one to help the dealers against the manufacturers.”***

Supplier respondent

The ACCC or state or territory ACL regulators can intervene in supplier indemnification disputes via what is known as a “representative action.” This involves the ACCC commencing action on behalf of one or more suppliers who are entitled to be indemnified by a manufacturer under the ACL.⁷⁴ However, there are significant limitations on the effectiveness of such actions.⁷⁵ As a result, the ACCC has used this provision sparingly for actions under the ACL. Additionally, suppliers are likely to fear retribution from manufacturers even through representative actions.

As noted above, the Treasury has released a CRIS on options to improve the effectiveness of the consumer guarantees and supplier indemnification provisions.⁷⁶ This included consideration of civil prohibitions with pecuniary penalties for:

- manufacturers' failure to indemnify suppliers
- retribution by manufacturers against suppliers who seek indemnification.

74 ACL, s.277(1).

75 See pages 23 to 24 of the CRIS on Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law, available at https://treasury.gov.au/sites/default/files/2021-12/c2021-224294-cgsicris_2.pdf.

76 https://treasury.gov.au/sites/default/files/2021-12/c2021-224294-cgsicris_2.pdf.

The ACCC considers that the current indemnification framework lacks any real incentive for businesses to comply with the law, and has provided a submission to The Treasury's CRIS process advocating for the ACL to be amended to introduce these prohibitions. Without an indemnification prohibition, the supplier will:

- disproportionately bear the costs of providing remedies to consumers in circumstances where many of these costs should be borne by the manufacturer
- potentially avoid providing consumers with the remedies they are legally entitled to.

The findings of the supplier survey and our direct engagement with suppliers further support the ACCC's views in this regard.

Making manufacturers' obligation to indemnify suppliers a civil penalty provision with an adequate pecuniary penalty will provide a strong incentive for caravan manufactures to comply. This, in turn, may mean that suppliers are more willing to provide consumers with remedies.

The inclusion of a no retribution provision should also overcome some of the concerns raised by caravan suppliers, which currently impede them from seeking indemnification.



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