



Small
Business
Commissioner

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Director
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To whom it may concern,

Thank you for the opportunity to provide feedback on new penalties for businesses regarding consumer guarantees and supplier indemnification under Consumer Law. The NSW Small Business Commission (the Commission) is an independent statutory office of the NSW Government, providing advice, advocacy, and affordable dispute resolution services to small businesses across NSW.

Small businesses have rights and obligations under the ACL's consumer guarantees and supplier indemnification provisions as suppliers, manufacturers, and consumers. In 2021, the Commission provided a submission expressing concern in relation to introducing a civil prohibition for failing to meet a consumer guarantee, accompanied by penalties and enforcement mechanisms. The Commission noted concerns about distortionary impacts, increased uncertainty and duplication of protections already within the ACL.

As noted in our submission, the 2009 Commonwealth Consumer Affairs Advisory Council report on statutory implied conditions and warranted also explored prohibitions and penalties, concluding that it would not be appropriate for consumer agencies to impose penalties for failures to honour consumer guarantees. The issues contemplated as part of this report have not been resolved and careful consideration is required to better understand impacts and potential unintended consequences associated with a penalty regime.

The consultation paper notes some concerns and evidence relating to consumers' ability to enforce their consumer guarantee rights. Negative experiences associated with the consumer guarantee framework should be seen within the broader context of the vast magnitude of purchases and supply arrangements which occur within the economy, most of which are successful exchanges of goods and services.

Most retailers have product return options which exceed what is required by the ACL, with market factors encouraging suppliers to offer more favourable terms. Instances of consumer detriment appear to be linked to higher-value purchases where there are financial consequences for suppliers accepting consumer guarantee claims unquestioned, or without defending their legitimate interests. It is imperative that suppliers honour consumer guarantee rights, there is a need to consider purported challenges from the perspective of suppliers, particularly in circumstances where it is questionable whether a consumer guarantee claim is valid.

The Commission would also welcome any additional transparency and sensitivity analysis on the cost-benefit assessment used to demonstrate net benefits. Based on the information provided, it is open to conclude the analysis may over-estimate the benefits and under-estimate costs, including due to:

Assumptions used for the likelihood of an issue with a good or service being untested against actual failure rates of common goods and services.

An unclear basis for assuming that a penalty regime would increase the proportion of consumers who address a problem and access a remedy to their satisfaction from 71 per cent to 81 per cent.

Inadequate estimates for compliance costs, including only 30 minutes of additional training, on a once-off basis (the additional training and compliance burden is likely to be more significant given the additional assurance required for staff to reject a claim than what it presently is under the self-enforcing model).

The omission of estimates for other costs, including unintended consequences such as suppliers withdrawing products from the market or other second-round impacts.

The absence of figures and calculations to determine how the estimates are derived including sensitivity analysis.

The Commission would welcome any updated and more detailed analysis that can be provided as part of the final decision RIS.

Uncertainty about rights and obligations

The Commission maintains there can be significant ambiguity associated with key concepts which determine the nature of remedy entitlements under the consumer guarantee framework. For example, assessing whether a product is 'lasting' or of 'acceptable quality' can be difficult. These matters are likely exacerbated in circumstances where retail staff are expected to consider a complex range of factors within a retail setting, including where they do not possess the legal acumen to make decisions about whether to accept or deny a consumer guarantee claim. It is implausible that the 30 minutes of additional training outlined in the cost-benefit assessment, would be sufficient to support retail staff in making judgements about what in some instances could be complex matters of law. A possible result is that small business suppliers would feel compelled to meet consumer demands for a remedy, even where they are unreasonable and beyond the scope of the consumer guarantee regime.

Relatedly, the Commission strongly opposes, as a matter of fairness, the prospect that small businesses could be subject to a penalty merely for the act of disputing whether they are liable for a remedy. A penalty regime would presumably depend on a determination being made that a supplier has failed to comply with a consumer guarantee. It would be grossly unfair if suppliers were penalised for failing to provide a remedy, before such a determination had been made, in circumstances where they had legitimate grounds to dispute whether they were liable for the remedy.

Proper consideration of small business perspectives

The Commission is concerned the framing of the consultation paper is prejudicial to the interests of small businesses. For example, the consultation paper notes there was "...*little support for the current regime*" because only six out of 46 submissions voiced support for current arrangements. The consultation paper further noted that 99.6 per cent of members of the consumer advocacy organisation CHOICE, indicated that businesses should be penalised for failing to provide a refund, repair or replacement where required by the ACL.

Separate analysis conducted by the Commission suggests a much more mixed view of the merits of penalties among small business stakeholders. Only 28 per cent of survey respondents to a Commission survey reported they agreed penalties would be fair and practical. Of the remaining respondents, 35 per cent expressed they disagreed that penalties would be fair and practical, with the remaining 37 per cent either neutral or unsure. Respondents to the survey indicated concern over the potential financial strain on small businesses, fearing penalties may stifle growth or survival. Some noted a perception that consumer laws were already complex, and added penalties would increase burden, favouring alternative

approaches. Others requested a focus on larger corporations, as small businesses are often less equipped to manage complex matters of compliance.

Assessing support for the status quo solely by the number of submissions overlooks the principle that interests should be weighed, not simply counted, especially when small businesses and other suppliers are disproportionately affected.

The Commission therefore encourages caution when inferring the extent of support for change by relying on feedback that is not representative of the perspectives of impacted stakeholders. The small business population is vastly exceeded by the number of consumers, and it is unsurprising there would appear to be significant support for policy changes perceived to be in consumers' interest. In the absence of more detailed analysis and consultation, the Commission does not agree with the assessment of only limited support for the status quo and the question of whether to proceed with this proposal should be more thoroughly examined.

A related concern is the extent to which small business perspectives were proactively sought to determine the practicality of policy changes. The Commission recently conducted a [Review of small business experiences with regulatory policymaking](#). The review examined the experiences of small businesses as key stakeholders when new legislation, regulations, rules and other requirements are being developed. A key finding of the review is that small businesses find it difficult to engage in consultation processes for a range of reasons. Only 1 in 10 respondents to our survey indicated they had engaged in a government consultation or review and only 16 per cent indicated they agreed that regulation had been designed with input from their industry. For these reasons, additional efforts may be required to engage small businesses, including to understand any specific needs they have that aren't shared by larger suppliers.

Proactive consultation with small business suppliers should inform both consideration of the preferred option, as well as the design of any potential penalty regime should this approach be pursued.

Supplier indemnification

Seeking indemnification from manufacturers can be challenging for small businesses. As noted in the consultation paper, some businesses may avoid seeking indemnification due to uncertainty about rights and obligations, confusion about what constitutes a 'major' or 'minor' failure, the dual and overlapping rights and obligations under manufacturers warranties and third party 'product care' agreements, the lack of access to legal advice, and fear of retaliation from the manufacturer.

The need for clearer indemnification rights for suppliers under the ACL is apparent from both parties, particularly if suppliers become liable to penalties. Manufacturers often dispute the existence of supplier indemnification rights and businesses often are not aware of their existence. Additionally, there may be further ambiguities in circumstances where suppliers accept product returns on the basis of delivering customer service that go beyond what is required by the ACL. This can create operational challenges for businesses in distinguishing between different categories of returns (including those where consumer guarantees apply and those where they do not).

Penalties: a balanced approach

The consultation paper does not clearly set out how a penalty regime would operate, though the consultation RIS indicated a prohibition against 'not providing a remedy' would enable courts to impose civil pecuniary penalties and for the ACCC to issue civil penalty notices.

The Commission notes that penalties apply for breaches of section 29 which prohibits false or misleading representations about goods or services. In the context of consumer guarantees, a breach of section 29 might occur if a supplier falsely claims that a product is not covered by a consumer guarantee when it actually is, or that a consumer is not entitled to a repair, replacement, or refund when such remedies are required by the ACL.

It is essential for any potential penalty regime to distinguish between systemic and egregious failures to comply with the consumer guarantees framework, and the legitimate right of suppliers who wish to dispute claims they do not believe they are liable for. Section 29 represents an appropriate balance as it prohibits conduct which actively discourages consumers from seeking remedies or asserting their rights. This conduct is more likely to be present in circumstances where there are systemic and egregious breaches, but may be absent where there are differences of opinion held in good faith.

There is an opportunity to consider the operation of section 29, and whether there are any associated changes that could be made to improve its use as a disincentive for suppliers knowingly doing the wrong thing. For example, the consumer guarantees framework could be amended to provide a right for consumers to obtain advice from the supplier as to why their consumer guarantee claim has been rejected. This would facilitate options for consumers to more easily assert their rights while also providing additional scope for regulatory intervention in circumstances where legitimate claims are rejected on dubious grounds (in a manner that constitutes a false or misleading representation about the consumer's rights).

Automotive

As stated in the Commission's 2021 submission, my office is unaware of any specific evidence suggesting widespread consumer difficulties experienced by purchasers of new motor vehicles. Motor vehicles are particularly complex goods and many of the Commission's concerns with respect to a penalty regime are amplified for this type of good, including whether a failure has occurred and whether it is major or minor.

If evidence of broad and systemic challenges is giving rise to significant consumer detriment, then it may be more appropriate to develop industry-specific approaches that could better address these specific concerns.

Thank you for the opportunity to make a submission. If you require further information, please contact my Executive Officer Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission

Date: 14 November 2024