



**Small Business
Commissioner**
SOUTH AUSTRALIA

Director
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Dear Mr Robinson

SA Small Business Commissioner response: Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law

Thank you for the opportunity to respond to the Consultation Regulation Impact Statement: Improving consumer guarantees and supplier indemnification provisions under the Australian Consumer Law. I have considered the CRIS through a lens of the possible impacts of the proposed amendments on South Australian small businesses and offer the following observations.

Part A - Receiving remedies:

Option 3 - A prohibition against not providing remedies, supported by penalties and other enforcement mechanisms:

The replacement and refund remedies available to consumers for major failures of goods and services can represent significant costs for suppliers and could threaten the viability of some small businesses, particularly those that have low liquidity but supply high-value goods and services. These costs apply whether the business in question is routinely flouting the ACL, or whether it was only refusing a remedy in a specific set of circumstances, e.g. where the business believed that the fault lay with the manufacturer or with a consumer who had misused an item. The potential threat to the viability of a small business would significantly increase should the threshold under the ACL increased from \$40,000 to \$100,000.

In cases where a small business supplier is not the manufacturer of the goods, the risk to viability could be partially mitigated by strengthening the ACL provisions relating to supplier indemnification, provided such indemnification

was prompt. If this option is to be adopted, the legislation should additionally provide that, in cases where a supplier disputes an infringement notice on the ground that the fault for the failure lies with a manufacturer or importer, no



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enforcement action will be taken until the supplier has had a reasonable opportunity to obtain indemnification from the manufacturer or importer.

Part B - Supplier indemnification:

Option 3 - A prohibition against not indemnifying suppliers, supported by penalties and other enforcement mechanisms:

The CRIS states that under this option, manufacturers would remain able to dispute supplier claims for indemnification on their merits if it is considered that there had not been manufacturer fault. However, such disputes would need to be considered by a court or tribunal. A scheme that requires a small business manufacturer to take legal action to settle a genuine indemnification dispute could threaten the viability of small manufacturers and seems unnecessarily burdensome. It would be preferable for the ACL to allow a manufacturer an opportunity to dispute a supplier claim within a fixed period after the issuing of an infringement notice.

As an observation, if this option were to be adopted, there would seem to be a risk that small business manufacturers would not dispute supplier claims even in instances where they legitimately suspect that the fault lies elsewhere, simply because they do not have the confidence or resources to engage in litigation to prove their case. Anecdotally, a similar phenomenon exists among some drivers who receive traffic expiation notices; they would rather pay a fine than face the cost, inconvenience and anxiety associated with contesting the allegations.

Please feel free to contact my Office should you wish to discuss any aspects of this submission in more detail.

Yours sincerely



Nerissa Kilvert
A/Small Business Commissioner

11 February 2022