



Australian Government

10 February 2022



Australian
**Small Business and
Family Enterprise**
Ombudsman

Director
Consumer Policy and Currency unit
Market Conduct Division
Treasury
via email: consumerlaw@treasury.gov.au

Dear Sir/Madam

Consumer guarantees and supplier indemnification provisions under Australian Consumer Law

We offer the following comments on the Consultation Paper (the Paper).

Part A: Receiving remedies

Our Office does not support Option 3 under Part A of the Paper (Option 3). Option 3 will create uncertainty and undue compliance costs for small business suppliers around minor and major faults, and these issues have not been addressed in the Paper. Clear guidance on the difference between a minor and major fault would also need to be available.

Were Option 3 pursued, consideration must be given to how the Australian Competition and Consumer Commission (ACCC) would protect small business suppliers from vexatious claims. While it is important that consumers, including small businesses, can seek remedies when the *Australian Consumer Law* (ACL) has been contravened, the Paper suggests that the onus of proof would only be placed on the ACCC after a supplier chooses not to pay an infringement notice. Small business should not carry the onus of proof against a regulator.

Instead, the onus of proof should be initially placed on the ACCC to prove that the supplier has contravened the law. Our Office is aware of the toll vexatious claims and a lack of clear guidance, particularly in the industrial relations system, can have on small businesses and their owners and believe any new legislation should consider this in tandem with consumers' right to receive remedy.

Part B: Supplier indemnification

Consideration should be given to this Office's recommendation that a Federal Small Business Claims List (the List) be formed as part of the Federal Circuit Court of Australia to provide affordable, determinative, dispute resolution services to small businesses.¹ The List could serve as an enforcement mechanism for small business suppliers to seek the enforcement of their right to indemnification against a manufacturer. Further, the List could also provide a jurisdiction for small businesses, as consumers, to pursue consumer guarantee remedies under the ACL.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Ms Alexandra Hordern on 02 5114 6101 or at alexandra.hordern@asbfeo.gov.au.

Yours sincerely

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman

¹ Australian Small Business and Family Enterprise Ombudsman. 2020. *Access to Justice Report*. Page 7.