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Consultation Regulation Impact Statement December 2021

Thank you for the opportunity to provide feedback on the *Consultation Regulation Impact Statement December 2021* (Consultation RIS) examining potential amendments to the Australian Consumer Law (ACL) and associated legislation.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission's role includes:

- encouraging government agencies and larger businesses to enter productive working relationships with small businesses
- facilitating and encouraging the fair treatment of small businesses
- promoting a fair operating environment in which small businesses can flourish.

The Commission notes the purpose of the Consultation RIS is to inform assessment of options to ensure businesses comply with consumer guarantees provided by the ACL and consumers can access the remedies to which they are entitled. This includes consideration of a proposed civil prohibition for failure to provide a consumer guarantees remedy. Specific consideration is given to options that apply economy-wide as well as options applying to the supply of motor vehicles. The Consultation RIS also considers supplier indemnification in the event a consumer guarantee failure falls within the responsibility of a manufacturer or importer.

Civil prohibition for a failure to provide a consumer guarantee

Option 3, as considered in Part A of the Consultation RIS, proposes a civil prohibition on a failure to provide a consumer guarantee, accompanied with penalties and other enforcement mechanisms.

The Commission does not support an economy-wide prohibition, with penalties, for a failure to provide a consumer guarantee on the basis that it may be distortionary, increase uncertainty and duplicate better targeted protections already contained within the ACL.

The case for a stronger enforcement toolkit appears to be based on a perception that there are widespread difficulties in consumers self-enforcing their consumer guarantee rights. The Commission's view is that most suppliers act in good faith and reports of challenges enforcing consumer guarantee rights should be seen in the context of the volume of successful consumer guarantee claims, including where suppliers go beyond their legal

obligations. In circumstances where conduct is intentional and malicious, other protections within the ACL, including against false or misleading representations and unconscionable conduct, can be relied upon to issue civil pecuniary penalties in certain circumstances related to a consumer guarantee.

Some aspects of the consumer guarantee framework are inherently uncertain and may ultimately require the interpretation of a court of law in the event of a dispute. For example, whether a failure is a major or minor failure depends on the circumstances and a supplier and consumer may hold a different view as to the appropriate remedy (or whether a failure has occurred). This may be particularly problematic for some higher-value goods or services where it is reasonable for a small business supplier to have their position considered by a court without fear of attracting a penalty for not having acted pre-emptively.

In its 2009 report *Reforming statutory implied conditions and warranties*, the Commonwealth Consumer Affairs Advisory Council recommended against applying civil penalties in respect of failures to honour consumer guarantees

“While it would be desirable to find some mechanism to empower consumer agencies to take action, particularly in circumstances of egregious or systemic breach of implied terms or statutory rights, in practice, this mechanism would be difficult to construct. A failure ‘to remedy a failure to comply with a guarantee’ is a cumbersome obligation to ask retailers to comply with, and it may not be a provision of sufficiently certain application to contemplate attaching penalties or other enforcement measures to its contravention.”

Source: Commonwealth Consumer Affairs Advisory Council, p.66

<https://treasury.gov.au/sites/default/files/2019-03/Consumer-Rights-Report.pdf>

The challenge of uncertainty can be particularly difficult for small businesses that may not be equipped to assess what a reasonable consumer would regard as acceptable in relation to whether a product is ‘lasting’ and of ‘acceptable quality’ and therefore what would normally be expected for the type of product and cost.

A prohibition with penalties would distort the current balance with some suppliers feeling compelled to provide a remedy in circumstances where there is uncertainty as to a consumer’s entitlement to redress. While it is appropriate for a consumer to be able to challenge and have their claim reviewed, the initial position of the supplier to decline honouring a consumer guarantee should not itself attract a penalty if the supplier was acting in good faith but made an error of judgement.

This may be a particular challenge in some retail settings where less experienced staff are making decisions and applying judgment on behalf of a business. For example, if a small business were to reject a claim by a consumer in relation to a defect that occurred in a laptop two years after the date of purchase, and a court were to decide that a reasonable consumer would have expected a laptop of that type and for that price to be free from defects for at least three years, it may be considered unfair to subject this business to a penalty in addition to any remedies.

Specific approaches or options for the supply of motor vehicles



As noted above, the Commission does not support an economy-wide prohibition, with penalties, for a failure to provide a consumer guarantee. The Consultation RIS also proposes an option to provide a narrower protection for purchasers of new motor vehicles.

The Commission is unaware of any specific evidence suggesting widespread consumer difficulties experienced by purchasers of new motor vehicles. While the 2016 Australian Consumer Survey is cited in the Consultation RIS, the Commission notes that purchases of motor vehicles do not appear to attract a particularly notable degree of consumer concern. On most measures the extent of consumer concern relating to the purchase of motor vehicles is either in line with or more favourable than other purchase categories.

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. For this reason the Commission considers that strong and compelling evidence would be needed to demonstrate the suitability of penalties as a justified policy response.

Education campaigns

The Commission supports additional education and guidance, as set out in Option 2, to educate and support suppliers in meeting their obligations under the ACL.

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

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission
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