

ARA SUBMISSION

CONSUMER GUARANTEES AND SUPPLIER INDEMNIFICATION UNDER CONSUMER LAW

NOVEMBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to respond to Treasury's consultation on the design of proposed civil prohibitions and penalties for breaches of the consumer guarantees and supplier indemnification provisions under the Australian Consumer Law (ACL).

The ARA is the oldest, largest and most diverse national retail body, representing a \$430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

The ARA acknowledges Treasury's efforts to ensure consumers and businesses have access to remedies under the ACL. However, we have significant concerns regarding the clarity, proportionality, and potential impact of the proposed prohibitions and penalties.

Concerns with Legislative Ambiguity and Proportionality

The ACL's consumer guarantees framework relies on subjective principles, including "acceptable quality," "reasonably durable," and "major failure." These terms are inherently ambiguous, leaving businesses uncertain about their compliance obligations.

Retailers dealing with high-volume, higher-cost products, such as consumer electronics, experience significant challenges due to frequent misunderstandings by manufacturers who often conflate consumer guarantees with express warranties. These misunderstandings can result in substantial operational costs for retailers, who may bear the financial burden of refunds or replacements when manufacturers fail to reimburse for remedies. In particular, multinational manufacturers are often reluctant to acknowledge consumer guarantees beyond express warranties, leaving retailers to resolve disputes and complaints at significant cost.

The proposed penalties would unfairly expose businesses to risks of enforcement under a regime where obligations are poorly defined. For example, determining whether a failure is "major" often depends on subjective consumer perceptions, leading to inconsistent outcomes. The ARA believes that clear guidance, rather than penalties, should be prioritised to foster compliance and reduce disputes.

Recommendations for Greater Clarity

1. **Clarify Key Definitions:**
 - a. Treasury should provide detailed guidance on terms like "major failure," "reasonable consumer," and "reasonably durable."

- b. Definitions should also account for reasonable expectations around product quality and lifespan based on the product's price and market positioning, as many consumers may not recognize that low-cost items naturally have shorter lifespans.
 - c. This would mitigate uncertainty and prevent unnecessary and costly enforcement actions.
2. **Judicial Precedents and Enforcement Balance:**
- a. Relying on judicial decisions to clarify obligations creates unnecessary risks for businesses. Proactive clarification of obligations is needed to ensure compliance without relying on punitive measures.
 - b. Clearer guidance on permissible timelines for remedy assessment and processes could also reduce misunderstandings, as retailers often need to await manufacturers' assessments to determine faults in higher-cost goods, which can be time-consuming.
3. **Tailored Penalties:**
- a. If penalties are implemented, they should reflect the level of uncertainty in the ACL. Infringement notices, rather than court-imposed pecuniary penalties, provide an appropriate enforcement tool while balancing fairness.
 - b. Where penalties are warranted, they should apply only to cases involving high-value goods with clear evidence of consumer detriment, minimizing enforcement actions for lower-cost items.

Issues with Supplier Indemnification

Manufacturers' refusal to indemnify suppliers remains a significant issue, forcing suppliers to absorb the costs of remedies owed to consumers. The ARA supports measures that ensure manufacturers meet their indemnification obligations without imposing undue burdens or risks on suppliers.

Our members have observed that some manufacturers are particularly resistant to indemnification claims, especially where warranty coverage has expired, even if a consumer guarantees remedy should apply. In these cases, retailers face the dilemma of refunding consumers to avoid reputational risk or non-compliance while not receiving reimbursement from the manufacturer. Such non-reimbursed costs directly impact our members' operational expenses.

Retaliatory Practices

The ARA is concerned about reports of retaliatory behaviour by manufacturers against suppliers seeking indemnification. Such actions, including contract terminations or unfavourable terms, undermine supplier confidence and compliance with the ACL.

Retailers also face potential harm to business relationships with key manufacturers who supply popular brands that drive sales. This risk may deter retailers from pursuing indemnification claims or reporting issues to regulators, thereby perpetuating gaps in compliance. Clear definitions of retaliatory practices, supported by proportional enforcement mechanisms, are necessary to protect suppliers without jeopardizing essential commercial relationships.

We recommend clear definitions and examples of retaliatory practices, supported by proportional enforcement mechanisms, to ensure suppliers are protected without straining manufacturer-supplier relationships.

Proposed Enforcement and Penalty Structure

The ARA supports proportionate enforcement mechanisms that prioritise compliance and education over punitive measures:

- **Infringement Notices:** Provide an efficient and low-cost compliance tool, suitable for minor breaches.
- **Civil Penalties:** Should only be applied where significant harm is evident and where obligations are clearly defined.
- **Education and Guidance:** Regulators should focus on providing businesses with accessible, practical guidance on compliance.
- **Complaint Resolution Pathways:** Retailers should have opportunities to resolve complaints with consumers through existing Fair-Trading offices prior to any regulatory penalties. This would allow a more balanced approach and provide consumers with information on their entitlements, helping to prevent escalations based on misunderstandings of consumer rights.

Conclusion

The ARA appreciates the intent behind the proposed reforms but emphasizes the need for clarity, fairness, and proportionality. The ARA looks forward to continuing to work with Treasury to develop a framework that supports consumers while ensuring businesses can operate with confidence.

Thank you again for the opportunity to provide a submission on these matters. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.