

Consumer Guarantees and Supplier Indemnification under Consumer Law

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Georgia Holmes

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Master Electricians Australia (MEA) is the peak industry association representing electrical contractors recognised by industry, government and the community as a leading business partner, knowledge source and advocate. You can visit our website at www.masterelectricians.com.au

Of relevance to this consultation is a current matter MEA is actively involved in, relating to faulty pair-coil products used in air-conditioning installation. Installers have raised an alarm over micro-pitting that causes gas leakage. Unfortunately, to date suppliers have suggested it is an installer issue rather than a product issue. We have now surveyed members and identified a sufficient number of faulty products identified by a range of members to indicate this is indeed a faulty product issue.

With the combination of our members and other trade professionals being denied warranty access to cover the cost of damaged goods, leaving installers to shoulder the financial burden, the involvement of the Department of Climate Change, Energy, the Environment and Water (DCCEEW) in launching a national survey and ARCTicks' efforts to establish a working group with suppliers, demonstrates that this issue is clearly significant and must be addressed. Dismissal of responsibility across the supply chain, likely originating with manufacturers, has persisted for at least two years. It is unjust for our members and other installers to bear these costs while actively seeking resolution.

MEA therefore supports amending the ACL to improve remedies and protection against power imbalances in the supply chain. Additionally, MEA urges that any amendments take into account the limited resources of small and medium enterprises (SMEs) and we advocate for support to help suppliers and manufacturers understand and fulfill their obligations.

Prohibitions and Penalties for Failure to Provide a Consumer Guarantee Remedy

High-Value vs Low-Value Goods and Services

Should the ACL prohibit suppliers from failing to provide a consumer guarantees remedy in relation to all goods and services, or only in relation to goods and services above a specified value? Why or why not? What should the value be?

It is difficult to identify where a line should be drawn. While small businesses should arguably be offered reprieve from remedies for very low value goods or services, those same small businesses may require a remedy from others in the supply chain. Accordingly, it is considered that all goods and services meeting ACL criteria for a supplier remedy due to failure characteristics should be covered under the ACL.

Naturally, regulators need to assess priorities and cannot pursue all complaints, and it is likely that many consumers would not pursue a remedy for low-cost goods or services.

Is there a need to have penalties, or have stronger penalties, in relation to higher value goods and services?

The penalty system needs to be designed to ensure suppliers and manufacturers take their responsibilities seriously regardless of the value. If one consumer encounters a faulty good or service, it is likely that others will too, resulting in a considerable windfall for manufacturers and suppliers. A weak framework offering less protection for low-value goods may also lead to reduced accountability among suppliers and manufacturers to comply with ACL compensation requirements, especially if they believe that lower-value goods and services are less likely to attract regulatory scrutiny.

Consumer Behaviour

Should the ACCC be given the authority to issue an infringement notice for an alleged failure to provide a consumer guarantees remedy?

MEA believes granting the ACCC this authority would provide an additional means to address non-compliant businesses, encouraging manufacturers and suppliers to meet their ACL obligations while also improving the consumer's position in the current power imbalance. However, there is also a balance in limiting the cost of goods and services.

To avoid regulatory overreach and unintended consequences, MEA suggests that ACCC infringement notices be used only when all other avenues have failed to achieve positive outcomes, as seen in cases like the faulty pair coil issue.

Other

Are there any unintended consequences, risks or challenges that need to be considered when introducing civil prohibitions for suppliers or manufacturers failing to provide a consumer guarantees remedy when required by the ACL?

As regulations become more complex and expand, small businesses can struggle to keep up with changes and to implement processes for compliance. MEA advocates for government support to provide SMEs with the administrative and legal resources necessary to effectively address ACL complaints. Pecuniary measures under the ACL should be reserved for situations where manufacturers and suppliers are clearly and intentionally evading their obligations, rather than instances where SMEs may have unintentionally failed to fully comply.

It is also important to monitor increased costs of compliance to avoid financial burden on both consumers and the supply chain.

Prohibition Against Manufacturers Not Indemnifying and Retaliating Against Suppliers Who Request Indemnification

Barriers to Obtaining Supplier Indemnification

When should a manufacturer's failure to provide supplier indemnification be a contravention of the law? Should it apply to all failures or only in cases of major failures? Why or why not?

Manufacturers should be accountable for indemnifying suppliers in all instances of failure to meet their obligations. This approach guarantees a uniform level of consumer protection and holds manufacturers responsible for the quality and safety of their products, preventing any potential loopholes. When a manufacturer fails to indemnify suppliers, it affects the entire supply chain, ultimately shifting the costs of addressing faulty goods and services onto consumers.

This scenario is likely reflected in the ongoing challenges the electrical industry is facing with faulty pair coils identified in the introduction. It is unacceptable that the situation has escalated to the stage it is at, demonstrating significant gaps in the current ACL which needs to be addressed. Despite government involvement in 2022-2023, attention on the matter seems to have waned, even as faulty pair-coils continue to be available in the market.

Would the introduction of a penalty change a supplier's incentive to seek an indemnification from the manufacturer, or the manufacturer's response to a request for indemnification?

MEA believes that the risk of penalties would likely encourage manufacturers to respond more effectively to requests for indemnification. Moreover, we anticipate this will not only enhance compliance with ACL obligations but also motivate manufacturers to improve their operational procedures to avoid the additional administrative burden. As a result, this could lead to higher quality goods and services.

However, what may be considered a significant and burdensome cost for some manufacturers could be negligible for larger manufacturers. As previously emphasised, it is essential to protect SMEs to ensure they are not disproportionately impacted. MEA recommends further consideration be given to a tiered punitive structure.

Retaliation Against Supplier

What are examples of retaliatory practices by manufacturers against suppliers seeking to enforce their indemnification rights? Which practices should be prohibited?

MEA members (electrical contractors) have reported instances of some suppliers closing their accounts after seeking compensation for the faulty pair coil. While this is a supplier-to-business relationship, there is a fair presumption this is retaliatory to the pair coil request. Given the number of suppliers reported to be refusing to assist in compensating consumers with the wide-spread faulty pair coil issue, there is a presumption this issue lies with the manufacturer refusing to provide indemnification to the supplier. These are reasonable presumptions and would be justified to be included as factors into decision making when applying civil prohibitions.

Should presumptive tests apply if a civil prohibition was introduced to address manufacturer retaliation? If so, what presumptions should be considered?

Applying presumptive tests in the context of civil prohibitions can enhance accountability and protect consumer rights. By establishing clear presumptions related to non-compliance and retaliation, we can foster a more equitable environment for all parties involved. However, careful consideration must be given to implementation to ensure fairness and transparency in the process.

Conclusion

The current framework surrounding consumer protection under the ACL requires enhancement to address widespread issues related to product failures and supplier indemnification. MEA advocates for a comprehensive approach that ensures all goods and services meeting ACL criteria based on product/service characteristics are covered, thereby protecting small businesses and other consumers from the detrimental effects of non-compliance by manufacturers and suppliers. The potential for manufacturers to exploit loopholes must be mitigated by implementing a robust penalty system that holds all parties accountable, regardless of the value of the goods or services involved.

Additionally, it is crucial to protect SMEs from undue burden while ensuring they have the necessary resources and knowledge to comply with their obligations.

As seen in the ongoing pair-coil supply issues within the electrical industry, immediate action is needed to rectify the gaps in the current ACL framework. By addressing these concerns comprehensively, we can foster a more equitable marketplace that prioritises consumer rights and encourages compliance among manufacturers and suppliers.