

Review of the Australian Consumer Law

Submission

Thank you for the opportunity to make a submission to the review of the Australian Consumer Law (ACL).

The Australian Small Business and Family Enterprise Ombudsman commenced operation on 11 March 2016. As an advocate for small businesses and family enterprises, the Ombudsman's Office takes an interest in reviews of key policies and laws which impact on small business, such as the ACL.

Our advocacy work is complemented by direct assistance provided to small businesses that approach our office regarding dispute resolution. In our work directly assisting small businesses, we often come across issues which could broadly be categorised as relating to fair trading. In this respect there are similarities between our offices and the state small business commissioners. Where an ACL regulator is unable to resolve or take enforcement action in relation to a business-to-business dispute, they may refer the matter to the Ombudsman's Office or a state small business commissioner's office for assistance with alternative dispute resolution.

Our comments in this submission are based on the following three principles:

1. Small businesses should be given the benefit of protections under the ACL.
2. Education should be the cornerstone of regulatory and enforcement activities directed at small business.
3. Where disputes arise under the ACL, Alternative Dispute Resolution (ADR) is the only practical option for most small businesses. Cost effective access to justice through ADR is an essential component of an effect consumer law.

General comments on consumer and fair trading policy in Australia

The ACL has been a successful reform which has improved the operation and clarity of consumer protection and fair trading laws in Australia. The reforms introduced in 2010 were a significant step forward, and have improved the operating environment for both consumers and businesses by consolidating and harmonising key fair trading laws across Australia.

The Issues Paper asks whether there are innovative approaches that could help support the objectives of the national consumer policy framework, *'for example, innovative ways to engage with stakeholders on ACL issues'*. We consider that it is important that all ACL regulators look at the changing ways in which information is consumed in performing the role of educating and informing the public about consumer protection and fair trading laws – for example, the use of social media and other non-traditional formats for information delivery and education campaigns.

Outreach to small businesses needs to recognise that they are both regulated businesses – owing obligations to consumers and other businesses – and also beneficiaries of many of the consumer protections in the ACL. It is also important that communication is styled to meet the specific needs of small business. For example, we note the ACCC's March webinar on the extension of unfair contract terms protection to small business as an example, which was held outside of core business hours. We commend the ACCC on taking a pro-active approach and recommend that all ACL regulators continue to recognise the importance of reaching out to small business, including through industry associations.

Our Office works collaboratively with ACL regulators (and all regulators) in this respect. Improving interactions between Government and small business and promoting best practice is a key priority for our Office.

The legal framework

Scope and clarity of the Australian Consumer Law

As a matter of principle, there are sound reasons for extending protections in the ACL to business to business dealings.

- 61 per cent of all businesses in Australia had no employees. A further 28 per cent have 1 – 4 employees (the size of many individual consumers' households).¹
- Even excluding businesses not registered for GST, 26 per cent of businesses have a *turnover* of less than \$50,000. A further 34 per cent have a turnover of between \$50,000 and \$200,000.² To put this in perspective, the average full time employee in Australia has a before tax *wage* of over \$75,000.³

This data alone shows that the majority of businesses in Australia resemble individual consumers in terms of their resources and sophistication when transacting. In addition, many small businesses are from a non-English speaking background, and have education levels which resemble those of the general population, unlike the boards and legal departments of larger businesses with specialist in-house expertise.

Although the ACL is known as a set of 'consumer' protection laws, it is already the case that the objective and application of the ACL is much broader than the protection of individual consumers. However, working out whether a business is protected (or is owed protection) can be a difficult and technical exercise – one beyond the capacity of many small businesses.

While there is a role for education around the different protections to assist small business to navigate the law, we consider there would be benefit in attempting to harmonise the different criteria used to test whether an individual or business is eligible to claim the benefit of various protections in the ACL. Rather than considering each particular protection in the ACL in isolation, there is value in considering whether the ACL as a whole should be more consistent in this respect.

So while we support more moderate improvements to the scope of protection for small business (such as raising the threshold of \$40,000 for coverage by the consumer guarantees), we consider that there would be value in setting a more ambitious goal of attempting to harmonise the scope of protections in the ACL generally. For example, the legislation establishing the ASBFEO defines small business as a business with fewer than 100 employees, or, a business with annual revenue of under \$5,000,000.

General protections of the Australian Consumer Law

Unconscionable conduct

Unconscionable conduct is generally considered to be too difficult to prove to help small businesses who are subjected to unfair or unreasonable conduct of another business. This view persists notwithstanding amendments to the provisions over the years in an attempt to improve the usability of the provision and increase the scope of protection it provides.

¹ ABS Counts of Australian Business 8165.0, Feb 2016.

² ABS Counts of Australian Business 8165.0, Feb 2016.

³ The most recent ABS statistics show that average, before tax, weekly earnings for an adult employed full time are \$1,499.30 – or \$77,963 when extrapolated to a year. ABS 6302.0 - Average Weekly Earnings, Australia, Nov 2015.

The perceived shortcomings of the law relating to unconscionable conduct may be dealt with in part through the introduction of unfair contract terms regulation for small business, however we note that protection is different in nature. We have provided comments below on the introduction of a general prohibition on unfair commercial practices and note that, if such a protection extended to business to business conduct, this may remedy some of the perceived difficulties with the law relating to unconscionable conduct.

The difficulties with bringing cases relating to unconscionable conduct in the court system also highlight the importance for small business of ADR as a means of access to justice if they feel another business has acted unconscionably in their business dealings. Although ADR doesn't directly resolve the uncertainty associated with unconscionable conduct, it can ameliorate the impact of that uncertainty by providing a low cost forum in which allegations of unconscionable conduct can be discussed and resolved.

Unfair contract terms

We strongly support the reforms to unfair contract laws which will see small businesses with less than 20 employees able to utilise unfair contract terms provisions from November this year for contracts entered into up to a value of \$300,000 or \$1 million for contracts longer than a year.

While we strongly support these reforms, we consider there is still scope for revisiting the eligibility thresholds on the basis that they introduce yet another distinct set of criteria to gain the benefit of the provisions, and are arguably unnecessary in much the same way as the original thresholds relating to unconscionable conduct turned out to be – that is, the scope of the protection is sufficiently narrow that an inappropriate intrusion into commercial dealings is unlikely.

We also consider there would be some merit in expanding the reach of unfair contracts protections to contracts which are unfair as a whole, even though their individual terms may not be considered “unfair”. We have come across examples of contracts in our work which we think would satisfy a broader test.

Example of a type of unfair contract presented to small business

We have been made aware of contracts which require small businesses to commit to capital expenditure and investment which could not feasibly be recouped over the term of the contract. While it may not strictly make good business sense to sign such a contract, such contracts are commonly presented to and signed by small businesses on a ‘take it or leave it’ basis. For various reasons, including trust that the contract will be renewed beyond its original term, or an understandable reluctance to walk away from existing investment, such unfair contracts are agreed to by small business. It would be hard in such cases to point to a specific unfair term, but arguably the contract as a whole could be considered unfair.

The Australian Consumer Law’s specific protections

Unsolicited consumer agreements

The Issues Paper raises the question of whether protections in the ACL which relate to unsolicited consumer agreements should also apply to business consumers. In our view, they should. This is consistent with our views (stated above) about the liberalisation of protections in the ACL generally for business, however it is also something which we have direct experience of in our assistance work.

Example from our assistance work

We were approached by a small business owner who came from a non-English speaking background. He was approached by an advertising company to advertise his business for free and

agreed, but later on was charged for the same advertisement by a related company who placed the same advertisement on their own website and requested a payment for it.

The small business owner told us that he paid the invoice because he just did not have the time to check what he was paying for at the time, their system had been down for a while, and he was worried that if he did not pay, he would be incurring penalties.

While this particular example may already raise concerns under the ACL, it demonstrates the vulnerability of small businesses to unsolicited goods and services and is not an isolated example.

Protecting consumers from unsafe products

One issue that has been raised with our Office is the difficulty of navigating Australian standards regulations. For example, one small business contacted us after experiencing difficulty understanding requirements relating to labelling of children's clothing. This small business had made genuine and diligent efforts to understand the rules but remained confused and was told she should engage a lawyer for advice. This was despite her products being low risk clothing items, and her having already expended money on buying copies of relevant Australian standards. It should not be difficult for small businesses to comply with the law. Regulators and policy makers with responsibility for standards regulation need to work together to improve the system, with flow on productivity benefits for small business.

Another issue that has been raised with us is unfair competition from imported goods which do not comply with Australian safety standards.

Example

We were approached by a small business owner who supplies industrial kitchen equipment to other businesses. This equipment must meet stringent Australian standards (for example, electrical safety standards). However, many of his potential customers have been able to buy cheaper equipment which does not meet these standards by importing it from overseas suppliers, either directly or through agents in Australia.

Such imported goods are not always "consumer goods" in the sense of the ACL's product safety regime. However, such goods unfairly compete with products which must meet stringent Australian safety standards. Suppliers of such products are also required to offer spare parts and warranties which suppliers of imported equipment do not have to meet. In this way product safety regulation can operate to create an uneven playing field for Australian small businesses.

We urge the current review committee to consider whether there is scope for these issues to be dealt with by way of reforms to the Australian Consumer Law and the related regulatory structure.

Other issues

Unfair commercial practices

In our view there is merit in considering a general prohibition on unfair commercial practices, however such a protection would need to be carefully considered and designed to ensure that it did not create undue uncertainty for business. However, particularly in combination with the development of the law relating to unfair contract terms, a prohibition on unfair commercial practices which extended to business practices directed at other businesses is likely to address the perceived shortcomings with the law relating to unconscionable conduct. We provide the following examples of unfair practices for which there is presently no clear remedy, which might be captured by such a provision.

Charging for services provided free by the Government

A business owner came to us with a complaint about other businesses who charge a fee to assist with registering an Australian Business Number, or a business name. The small business owner considered these business models to be deceptive as they are charging up to \$100 for a service without clearly disclosing that the same service is provided free by the Government.

Price discrimination

We are aware of small businesses being subjected to price discrimination. That is, charging small businesses a higher price for wholesale goods notwithstanding equivalent conditions of supply (eg volume). While we appreciate that issues such as price discrimination have traditionally been dealt with by way of the competition law, a general prohibition on unfair commercial practices could be one answer to how to deal with such unfair trading practices.

We do recognise, however, that small businesses will not always be the target of an unfair commercial practice, but may indeed be an alleged perpetrator. Accordingly, we would submit that any prohibition on unfair commercial practices should be accompanied by appropriately designed limits, and a nuanced approach to enforcement with education as the key regulatory strategy, to give clear indications to business of when they may fall foul of the law. This will be important so that such provisions do not have an inappropriate “chilling” effect on innovative small businesses.

Interaction between the ACL and the ASIC Act

We note that responsibility for consumer protection in financial services lies with the Australian Securities and Investments Commission (ASIC) and not the ACCC, and although largely the same protections apply the protections are contained in different legislation.

We are often approached by small businesses with concerns about their treatment by financial services providers. We consider that there should be a continuing effort by ASIC to take a proactive role with respect to ensuring fair trading in business to business transactions in the financial services sector. In light of this, our preliminary view is that the explicit consumer guarantees found in the ACL should apply to financial and insurance products, noting that the consumer guarantees regime is one significant way in which the ACL differs from the consumer protection provisions of the ASIC Act. This would potentially be of assistance to small businesses in their interactions with banks and insurance companies. This would appear to be warranted in the case of small business partly because other consumer credit protection laws are limited in their application to business to business transactions.

Administering and enforcing the Australian Consumer Law

Proportionate risk-based enforcement

We support a risk-based approach to enforcement of the ACL. Most small businesses want to comply with the law and an approach to enforcement which recognises this and aims to educate and regulate flexibly is especially important for small business.

Effectiveness of remedy and offence provisions

Setting and updating maximum financial penalties

We note the discussion in the Issues Paper regarding the penalties available for breaches of the ACL, and whether these may be insufficient – particularly where large and profitable businesses engage in conduct which breaches the ACL. The example of Coles Supermarkets which is highlighted in the Issues Paper is particularly relevant to small business as it involved Coles' unconscionable treatment of small businesses.

It is very important that there are effective deterrents for large businesses acting unlawfully to the detriment of small business and consumers. We support increasing the maximum penalties available in a way that does not inappropriately expose small business to large penalties. While the penalties set out in the ACL are maximum penalties, at the upper end they are clearly inappropriate in the context of many small businesses. We accept that there is an important role for the regulator and the courts to play in ensuring that penalties are proportionate and appropriately set, however it would be sensible to tie penalties to turnover, and consider setting them according to penalty units rather than absolute limits so they remain appropriate and do not need to be periodically revisited.

Access to remedies and scope for private action

For small businesses there are clear difficulties in enforcing the ACL through private action. Cost effective access to alternative dispute resolution is a more time and cost effective option for most business to business disputes.

We note that the recent Harper Review of Competition Law and Policy recommended that the ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement, and endorsed previous recommendations of the Productivity Commission's Access to Justice report that 'small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services'.

In this respect we note that there is a significant role for our office. We work closely with the ACCC in ensuring that small businesses are connected with the appropriate help, including through regular meetings of the Federal Regulatory Agencies Group chaired by our Office. Effort is being made to ensure greater collaboration and cooperation among Federal regulators and among small business commissioners and agencies at the state and territory level.

Emerging consumer policy issues

Online shopping

We note that the Issues Paper discusses the issue of transparency of safety information for products sold online. We also consider this to be an issue from a small business perspective. Due to the inability to physically inspect products when shopping online, the trend to shopping online may lessen the ability of consumers to understand where a product is manufactured and whether it is manufactured according to Australian standards or tastes. That is, online shopping can make it harder for consumers to identify features of a product which may be important to them, and this can have flow on effects to small businesses that are competing on product features which cannot be identified.

For example, food and grocery products being sold via an online website may not be disclosed as parallel imports, and may in fact be quite a different product than a customer was expecting. This creates difficulties

for small businesses that are selling products through established channels which are adapted to the tastes of the Australian market – for example where there are different recipes for food products with the same branding.

We urge the review to consider how the ACL can best respond to the challenges presented by online shopping for both consumers and businesses.

The sharing economy

The Issues Paper also raises the issue of the ‘sharing economy’. The emergence of innovative services such as those offered by Uber and others are an important feature of a competitive market and can present significant advantages for consumers.

However, the disruptive effect of these services, and the lag in regulation, can also harm incumbent businesses. It is important that the ACL effectively covers these services to ensure that there is equivalence in terms of the responsibilities that incumbent operators and emerging competitors owe to consumers.

Concluding remarks

The great majority of businesses in Australia are small businesses. Accordingly, the consumer law must “work” for small business if it is to achieve the overall objective of fair trading and consumer protection, and promote confidence in markets to the benefit of the economy. Our approach in this area is governed by the following principles:

- In many cases small businesses closely resemble individual consumers and, accordingly, should be given the benefit of protections under the ACL.
- When it comes to small business, the foundation of enforcement policy should be guidance and education. No diligent small business operator should fall foul of the law because they were unaware of it, or what it required of them.
- Where disputes arise under the ACL, Alternative Dispute Resolution (ADR) is the only practical option for most small businesses. Cost effective access to justice through ADR is an essential component of an effective consumer law.

In summary, we make the following specific recommendations:

1. Address the difficulty of enforcing the law relating to unconscionable conduct, such as through a prohibition on unfair commercial practices.
2. Expand the protection afforded by the unfair contract terms regime to include *contracts* which are unfair as opposed to only *terms* which are unfair.
3. Expand the unsolicited consumer agreement protections to business consumers.
4. Assist small business to comply with standards and safety regulation and ensure consistent application of safety standards regardless of where a product is manufactured or how it is imported.
5. Apply consumer guarantees to small business financial and insurance products.

We look forward to the publication of the Interim Report and further engagement on the important small business issues outlined in this submission.