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Australian Consumer Law Review
By electronic lodgement: www.consumerlaw.gov.au

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Dear Sir/ Madam

Review of Australian Consumer Law (ACL)

Thank you for the opportunity to comment on the operation of the ACL.

The *Small Business Commissioner Act 2003 (Vic)* (the Act) provides a range of responsibilities and functions for the Commissioner. The primary function of the Commissioner is to provide a quick, low cost dispute resolution service for disputes between a business and: another business; a government body; or a not-for-profit entity. There is no definition of 'small business' in any of the five State Acts¹ where the Commissioner has a dispute resolution function.

My Office often receives applications from businesses for assistance with commercial disputes which include claims of misleading and deceptive conduct, misrepresentations, unconscionable conduct, unfair market practices and/or 'unfair' contract terms. Some disputes also relate to consumer guarantees under the ACL.

My Office achieves high resolution rates and high customer satisfaction feedback ratings. In 2015-16, one in four disputes were resolved prior to formal mediation, and 82 per cent of matters progressing to formal mediation were settled. Customer satisfaction was 94 per cent, regardless of whether applicant or respondent.

The following comments are based on our experience engaging with small and medium businesses involved in a commercial dispute, primarily with another business.

1. Extension of statutory cooling off period protections to small business.

The extension of unfair contract term protections to small businesses from November 2016 is very welcome, and will assist my Office in more effectively resolving disputes relating to contract terms. However, a related aspect of many such disputes is oral assurances often given by the salesperson (for unsolicited sales) of the ability for the business customer to cancel the contract, which are not reflected in the contract terms. While such oral assurances may be misleading, and there is an expectation that a business will read a contract before signing it, once the contract is signed it is very difficult for the customer to prove the allegation. We also occasionally find small businesses asserting their rights to a cooling off period, not aware of the distinction between consumer and business rights.

Extending consumer statutory cooling off periods for unsolicited sales to small businesses would provide a significant benefit to small businesses and provide a solution to many commercial disputes. From our experience, small businesses are no more nor less sophisticated than consumers on this issue.

¹ Small Business Commissioner Act 2003; Retail Leases Act 2003; Owner Drivers and Forestry Contractors Act 2005; Farm Debt Mediation Act 2011; Transport (Compliance and Miscellaneous) Act 1983

2. 'Unfair' Commercial Practices

The Issues Paper raises the question of whether the ACL should have a general prohibition against 'unfair commercial practices' for consumers. Consistent with the above comment, I would argue that any such consideration should extend to small businesses as well, as the potential business practices satisfying any such criteria would be as applicable to small businesses as consumers.

The primary objective of the Act is 'to enhance a competitive and fair operating environment for small business in Victoria'. Key functions of the Commissioner are 'to facilitate and encourage the fair treatment of small businesses in their commercial dealings' with other businesses, public entities and not-for-profit entities, and 'to receive and investigate complaints by small businesses regarding unfair market practices or commercial dealings'.

The Act does not define 'fair' operating environment or treatment, 'unfair market practices', nor 'commercial dealings'. This provides a broad scope for this Office to intervene in issues and disputes, although jurisdictional argument may arise in determining whether conduct was 'unfair' or not. Amendments to the Act in 2014 extended the scope of complaints handled by this Office from 'unfair market practices' to 'unfair market practices or commercial dealings' to address this particular issue.

Examples of 'unfair commercial practices' which may not be misleading or deceptive or involve misrepresentation which have been observed by this Office in regard to business-to-business disputes could include:

- Services with low entry but high exit costs, leading to excessive ongoing costs. For example, online services where a provider sets up a small businesses' website and relationships with search engines, accounting software, etc., and the ability of the client to withdraw from the business relationship is compromised by the control of key passwords, access rights, etc. by the supplier. This Office has dealt with disputes where a supplier has closed down the client's website but not provided full access rights and details due to commercial disagreement, leading to significant business loss to the client, and high costs to re-establish an online presence. Another example is the cost of URL registration where third party retailers are involved. The initial registration of the desired URL may be at a reasonable cost, but subsequent fees are dramatically increased to leverage the fact that the established business does not want to lose that URL.
- Legal demand for payment or threats to credit ratings when matters are in dispute. Where there is a genuine commercial dispute between businesses, a supplier's pursuit of legal action or threatening credit rating impact will in most cases cause the customer to acquiesce, albeit under duress, to avoid the substantial impact to its business which may otherwise transpire.

Whether or not the examples provided above may constitute 'unconscionable conduct' will depend on the facts in each case. However, in all such examples, the cost and other consequences of not conforming to the requirements of the supplier are likely to be substantial for the business customer, leading to acquiescence, despite the supplier's conduct arguably being 'unfair'.

Any proposed inclusion in the ACL of a general prohibition of 'unfair commercial practices' to consumers (and possibly small businesses) needs to be cognisant of other jurisdictions, including this Office's role and functions under the Act.

3. The relationship between Small Business Commissioners (SBC) and ACL State regulators

The ACCC does not provide a dispute resolution service and regularly refers small businesses to the relevant SBC. The State ACL regulators do provide dispute resolution services. While their primary focus is consumer-to-business disputes, some also deal with business-to-business disputes where a business (as the consumer) has statutory guarantee protections under the ACL. SBCs also deal with such business-to-business disputes as a subset of all business-to-business disputes received. In some States it is understood that any business-to-business dispute is referred by the ACL State regulator to the SBC; in others, different protocols may apply where statutory guarantees issues arise.

This uncertainty about the respective dispute resolution role of the SBC and the State ACL regulator in regard to a business's statutory guarantee protections as a purchaser will also occur, post 12 November 2016, when unfair contract term protections are extended to small businesses.

Clear protocols between SBCs, the Australian Small Business and Family Enterprise Ombudsman and the State ACL regulators should be established to ensure clear and agreed arrangements for handling disputes related to business statutory guarantees and unfair contract terms (from 12 November 2016).

I can be contacted on 03 9651 7636 if any further information is required.

Yours sincerely



Geoff Browne
Victorian Small Business Commissioner