



Small Business Development Corporation

**Submission to the
Australian Consumer Law Review: Interim Report**

December 2016

About the Small Business Development Corporation

The Western Australian Small Business Development Corporation ('the SBDC') appreciates the opportunity to provide a second submission to the Australian Consumer Law Review ('the Review'). The SBDC congratulates the Consumer Affairs Australia and New Zealand ('CAANZ') on producing such a comprehensive Interim Report that contemplates a range of important consumer law issues.

More information on the SBDC and its role in educating and advocating on behalf of the WA small business sector is available from the SBDC's first submission to this review.¹

The SBDC's submission to this Review

The Interim Report was substantial and covered a range of issues in the ACL from a range of perspectives. As the small business advocates, the SBDC's submission only covers those issues in the Interim Report that impact upon small business consumers.

The SBDC's first submission to this Review focused on the role of small businesses as consumers in the marketplace. The purpose of that submission was to put forward evidence of the importance of the small business sector in Australia and their need for further protections as small business consumers. The SBDC's first submission advocated for increasing the scope of the consumer guarantee provisions to small business consumers by raising the \$40,000 monetary threshold and removing the exemptions in the definition of 'consumer'.

Through this second submission, the SBDC aims to provide further evidence to support the proposal to increase the scope of the consumer guarantee provisions to capture more small business consumers. This submission will also look at unfair contract terms, indemnification between manufacturers and suppliers, and online purchasing.

Please note that the SBDC's submission is following the headings used in the Interim Report, but will only address those aspects that are pertinent to the small business sector. As such, the numbering used in this submission will not be sequential.

¹ Small Business Development Corporation, 2016, *Submission to the Australian Consumer Law Review: Issues Paper*, Available from: <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/issues-paper/> [30 November 2016]

Coverage of the ACL provisions

1.2.4 Who is protected under the ACL?

The \$40,000 threshold for the definition of 'consumer'

Review Questions

Q4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

Q5. What goods or services would be captured that are not already?

The ACL definition of 'consumer' contains a monetary threshold of \$40,000, amongst other specifications.

The SBDC maintains its position that the \$40,000 threshold defining a 'consumer' for the purpose of the ACL should be increased to \$100,000 and then linked to the Consumer Price Index. The SBDC notes that a number of other submissions also supported an increase in the threshold to \$100,000.

Whilst the \$40,000 threshold in the definition of consumer decreases the coverage of a number of ACL provisions to small business, the SBDC's discussion will focus specifically on how this threshold reduces coverage of the consumer guarantee provisions to small business. There are many goods and services that are not captured by the consumer guarantee provision because of this threshold. As shown in the case studies below, these are goods or services commonly purchased by small businesses and are vital to their operation.

Through its Alternative Dispute Resolution (ADR) service, the SBDC has assisted small businesses when dealing with disputes regarding the following products, which are presently excluded from the consumer guarantee protection:

- Air-conditioning units for industrial buildings (\$40,000);
- Agricultural equipment used by small businesses (\$75,000);
- Autoclave equipment used by small businesses (\$41,800); and
- Water tanks (\$70,000).

The detriment experienced by small business consumers when they are supplied with a faulty product can be significant, as shown in the following case studies:

Case Study – Water Tanks

A small business owner paid \$70,000 for a water tank to be installed on his truck by the supplier. After installation, the water tank began to crack. The small business owner believed that the manufacturer had used inferior plastic to construct the tank. The small business owner lost four jobs as a result of the faulty water tank, causing financial loss. The manufacturer of the water tank declared bankruptcy and the supplier refused to provide a refund. The supplier refused to participate in mediation to resolve the dispute, forcing the small business owner to take the matter to Court.

Case Study – Netting

The SBDC was approached by a small business owner who grows fruit on a commercial scale. The small business owner purchased \$70,500 in netting to protect the fruit trees from birds and pests. The supplier also installed the netting on behalf of the small business owner. A dispute arose between the small business and the supplier when the netting began to fall about 3 years after installation. The small business owner claimed the netting was poor quality hence it was falling apart, whereas the supplier claimed a lack of maintenance and the weather as the cause. The supplier of the netting offered to replace the netting if his costs were met by the small business owner; however the small business owner believed that the netting was faulty and requested a refund. The small business owner contacted the SBDC for assistance in mediating the dispute with the supplier. The SBDC's ADR team contacted the supplier; however they refused to participate in mediation. The small business owner has suffered a significant amount of stress and financial loss as a result of the dispute over the netting.

The SBDC understands that CAANZ requires evidence proving a need for reform to the threshold before presenting options to the Federal Government. Whilst the SBDC can provide some evidence based on its clients' experiences, it believes that CAANZ and the Federal Government must be mindful of the fact that a lot of the issues experienced with this threshold would go unreported by many affected small businesses.

The SBDC believes that the small businesses that contact it for assistance with faulty goods or services that are not covered by the consumer guarantee provisions represent the 'tip of the iceberg'. In this regard, the SBDC implores CAANZ and the Federal Government to take action on this aspect of the ACL regardless of the lack of substantial evidence of detriment.

1.25 Exemptions under the ACL

Review Questions

Q6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?

The ACL's definition of 'consumer' further reduces its coverage of small business consumers due to the exemptions in section 3.

As noted in the Interim Report, the SBDC's first submission to this Review proposed the removal of the exemptions from the definition of consumer. The SBDC maintains the need to expand ACL protections to small business consumers and believes that raising the threshold and removing the current exemptions will achieve that outcome.

To quote the Interim Report²:

CAANZ notes that given the general, economy-wide application of the ACL, each 'carve out' or exemption has the potential to undermine the benefits of a nationally consistent approach to consumer protection.

The SBDC believes that the current exemptions do undermine the benefits of the ACL for the small business sector.

The SBDC understands that CAANZ can only put forward reforms that are practical and supported by needs-based evidence. In the SBDC's opinion, as highlighted in the first submission, the main exemptions that cause issues for small business consumers are:

- Vehicle or trailer not used principally in the transport of goods on public roads (over \$40,000);
- Goods acquired for the purpose of re-supply;
- Goods acquired for the purpose of using them up or transforming them, in trade or commerce - in the course of a process of production or manufacture; and
- Goods acquired for the purpose of using them up or transforming them, in trade or commerce - in the course of repairing or treating other goods or fixtures on land.

The SBDC strongly believes CAANZ should present the removal of these exemptions as a necessary reform to the Federal Government and believes that failure to address the issues raised in this Review would be a lost opportunity.

²Consumer Affairs Australia and New Zealand, 2016, *Australian Consumer Law Review Interim Report*, Page 28

Similar to the point made in the previous section, the SBDC believes that the detriment reported by small business regarding these exemptions represents the tip of the iceberg:

Vehicles or trailers not used principally in the transport of goods on public roads (over \$40,000)

As per the definition of 'consumer' in the ACL, the consumer guarantee provision does not apply to vehicles or trailers if they are not used principally to transport goods on public roads and are valued at over \$40,000.³

As highlighted in its first submission, the SBDC receives numerous complaints about faults with vehicles and machinery that are not used to transport goods on a public road. The value of these vehicles often exceeds \$40,000 and therefore the small business owner is exempt from the consumer guarantee provisions.

The SBDC has advocated for the increase of the threshold to at least \$100,000 so as to capture more small business transactions. Such an amendment would increase the coverage of the consumer guarantee provision to more transactions involving the types of vehicles or machinery typically acquired by small business consumers. However, the SBDC does not believe that relying on the increased monetary threshold to resolve the problems with this exemption will be sufficient, as many of these type of machinery and vehicles will be valued over \$40,000. In that regard, the SBDC proposes amendment to section 3(1)(c) of the ACL to extend its coverage beyond those vehicles and trailers used in the transport of goods on public roads.

In the SBDC's opinion, taking a two-pronged approach to this reform (e.g. amend s3(1)(c) and increase the \$40,000 threshold) will ensure coverage of vehicles and machinery commonly used in small businesses. The SBDC recognises that this would open the provision up to expensive and complex machinery and therefore may not be a popular option with all stakeholders. However, the SBDC believes that this could be overcome with specific parameters in the legislation or regulations based on the type and cost of vehicles and machinery.

Some examples of vehicles and machinery purchased for use in a small business that have been brought to the SBDC's attention include:

- Fork lift (\$51,000);
- Boom spray machines (complaints ranging from \$125,000 to \$400,000); and
- Harvesters (\$270,000).

The following case studies provide more details on the issues small business consumers have with these type of vehicles:

³ *Competition and Consumer Act 2010* (Cth), Schedule 2, s3(1)(i) and 3(1)(c)

Case Study – Harvester

A small business owner purchased a harvester for \$270,000. The small business owner claims that the harvester was not fit for purpose after the motor shut down. The small business owner had the harvester repaired for approximately \$3500 and sought a refund from the supplier. With the assistance of a lawyer, the farmer tried to pursue the supplier under the consumer guarantee provision of the ACL. However the supplier refused to refund the small business owner for his costs in repairing the vehicle. As the vehicle was valued at over \$40,000, it was not covered by the consumer guarantee provision.

Case Study – Caterpillar 924

A small business owner purchased a Caterpillar 924, however problems with the gearbox arose costing \$27,000 and then \$18,000 to repair. The small business owner paid for these repairs and sought a refund from the manufacturer, who denied all responsibility. The small business owner sought assistance from the SBDC's ADR service. Unfortunately, the manufacturer declined to participate in mediation.

Goods acquired for the purpose of re-supply

Another exemption within the definition of 'consumer' is goods acquired for the purpose of re-supply. This exemption excludes all small business retailers from relying on the consumer guarantee provisions when seeking redress for faulty goods purchased for on-selling from suppliers or manufacturers.

As discussed in the SBDC's first submission, some manufacturers deny their obligations when it comes to rectifying faulty goods provided to suppliers or retailers. Removing the re-supply exemption will improve the ability of retailers and suppliers to quickly resolve issues with faulty goods purchased from manufacturers. This will strengthen the chain of responsibility between the supplier and manufacturer, as it's not always practical for suppliers and retailers to rely on their contractual rights in these situations. Amending the ACL will provide a quicker remedy for the retailer, which in turn will allow them to trade with more confidence.

As it currently stands, sometimes retailers have to use unorthodox methods to get a remedy, as highlighted by the following quote from an SBDC client:

“Goods supplied online from a supplier were not fit for use. Clothing was all too small. My requests for refund or replacement was pretty much ignored so I went to my bank and got them to reverse the transaction. The supplier queried why, demanded I return the goods but I never heard from them again.” [Small Business Retailer]

The example above is an exception to the rule that many retailers will not get an adequate remedy from a manufacturer who supplies faulty goods, as the following cases highlight.

Case Study – Faulty Fabric

The SBDC was approached by a small business retailer who purchases fabric from a manufacturer and then on-sells this to its customers. On one occasion, the manufacturer sent faulty fabric and the retailer sold this onto its clients. Upon being made aware of the fault, the small business retailer sought the assistance of the manufacturer in rectifying the situation. The manufacturer refused to give the small business consumer a remedy and denied that the goods were even sent. The SBDC explained to the small business retailer that the ACL does not apply to this situation due to the re-sale exemption and that they would need to pursue the matter through other remedies.

Case Study – Faulty refrigerator control board

A small business owner purchased a refrigerator control board from a supplier. He installed this product for his client in January, however in February the client complained that the water dispenser was not working. The small business owner inspected the unit and determined that the control board was defective. He went to the supplier for a refund, however was told that there was no warranty because the part was not installed by an authorised service centre. The small business owner attempted to contact the supplier on a number of occasions for a remedy, with no success. The small business owner requested assistance from the SBDC's ADR team. The SBDC offered to facilitate mediation between the two parties, however the supplier refused to participate in the process.

Another example received by the SBDC touches on two points of exclusion from the consumer guarantee provision. The small business in this case (outlined below) would be excluded from the consumer guarantee provisions due to the re-sale exemption, as well as the auction exemption. Whilst the SBDC's submission will not focus on the auction exemption, it believes that this case highlights a situation where a small business owner can fall through many gaps and be left with limited options for redress:

Case Study – Vehicle Bought at Auction for Re-Sale

A small business motor vehicle dealer purchased a \$28,000 truck at an auction, with the purpose of re-selling that truck to his customers. The small business owner was able to inspect the truck prior to the auction. However, as the inspection was only cursory, the small business owner was unable to view the underneath of the truck and could not see its severely rusted and cracked chassis. This rendered the vehicle un-roadworthy. The auctioneer refused to refund the motor vehicle dealer as the purchase was done on an "as-is basis". The small business owner is now left with a \$28,000 vehicle that he cannot re-sell and is only suitable for salvage.

In the SBDC's opinion, the retailer/ supplier's position can be further strengthened by giving them an easier legislative option to recovering the cost of the faulty good. Removing this exemption will help them recover the cost of the good. Furthermore, clarification of the indemnity provision (s274 of the ACL) will assist in recovery of ancillary costs (e.g. labour to rectify the fault). The indemnification provision will be discussed further later on page 18 of this submission.

The SBDC notes that South Australian Small Business Commissioner also supported the removal of this exemption in their submission to this Review.⁴

Goods acquired for the purpose of using them up or transforming them, in trade or commerce

The ACL definition of consumer excludes goods acquired for the purpose of using them up or transforming them, in trade of commerce:

- In the course of a process of production or manufacture; or
- In the course of repairing or treating other goods or fixtures on land.

These exemptions adversely impact on small businesses as they cannot rely on consumer guarantee remedies for faulty goods purchased to complete work for their customers. This exemption particularly impacts those businesses that purchase these goods as a single component in a final product. The case studies presented below focus on small businesses in the trade or construction industry, however these issues would apply equally to any business involved in the manufacture of products (e.g. manufacturing industry, food businesses) or repair or treatment of goods on land (e.g. tradespersons).

Case Study – Paint

A painter purchased acrylic paint to use on his clients' homes. The paint was promoted as being able to properly cover existing paint of any colour with only two coats. The painter discovered that it actually took five coats of paint before the desired effect was achieved. It cost the painter \$3,586 to rectify the work, the cost of which he tried to claim from the paint manufacturer. The manufacturer denied any responsibility, refused his claim and cancelled the painter's accreditation with that brand. There have been a number of complaints about this particular paint from other painters on consumer review forums.

⁴ Small Business Commissioner South Australia, Submission to the Australian Consumer Law Review Interim Paper, available from https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Small_Business_Commissioner_SA.pdf, 14 November 2016

Case Study – Window Kits

A small business consumer orders pre-fabricated window kits to fit into clients' homes. Eleven of the kits ordered in one month were faulty and required modification by the small business before they could be used. This caused delay to jobs and in most cases the purchase of new glass to fit into the faulty windows. The manufacturer's sales representative confirmed that the issue was in the production of the kits and that the small business would get a credit on their account. The small business owner made many attempts to follow up on his credits from the manufacturer but received no response. The small business owner has contacted the SBDC's ADR team in an attempt to seek resolution to the issue.

As shown in the case studies above, this exemption negatively impacts upon small business consumers and as such the SBDC believes that it needs to be removed.

Consumer Guarantees

The following section of this submission addresses the Interim Report's discussion on the legal framework of the consumer guarantee provisions.

2.1.4 Lack of clarity about major failures

Review Questions

Q14. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 (clarify the law on what can trigger a major failure), in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

As discussed briefly in the first submission, the SBDC believes that there is a need for further clarification of what constitutes a 'major failure'. The SBDC's clients often complain about the lack of clarity over this term of the ACL in regards to problems with motor vehicles. Many of the SBDC's clients who present with this issue report a failed cycle of repairs, particularly for a number of 'non-major failures'. For a small business consumer, having to take their vehicle to a repairer multiple times for the same issue is frustrating, costly and time consuming. Additionally, the small business consumer will often experience further loss whilst their vehicle is in for repairs as they will not be able to complete work.

The SBDC believes that amendment to the definition of major failure is required to ensure that a small business consumer who experiences multiple non-major failures with a good or service does not get caught in a failed cycle of repairs. Amending the ACL so that multiple non-major failures constitutes a major failure and therefore attracts the same remedies (replacement or refund), will assist in reducing the failed cycle of repair.

The Interim Report notes that the United Kingdom’s consumer protection legislation intends to prevent the cycle of failed repairs⁵ by allowing the consumer to reject a good after one failed attempt at repair. The SBDC believes that the CAANZ should consider whether such a model would be appropriate in the Australian context, as the SBDC believes that it would assist many small business consumers to get the appropriate remedy for a faulty good. The need for such a model is particularly highlighted in the case of a small business retailer that purchases goods from a supplier only to discover that the good is in fact unsafe.

However, the SBDC notes that introducing a model similar to the United Kingdom would have consequences on small business retailers and suppliers by increasing their obligation to give refunds for faulty goods. The SBDC believes that this could be overcome with a strengthened indemnity provision between suppliers and manufacturers. The need for a more robust indemnity provision is discussed in more detail further in the submission.

2.1.5 Industry-specific concerns

Review Questions

Q15. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?

In answering this question, the SBDC will focus on the motor vehicle industry. There are three parties in this industry that would potentially be affected by any reforms: the manufacturer, the dealer (supplier) and the consumer.

The SBDC believes that a specific compliance and education focus on the motor vehicle industry is required and is justifiable due to the cost and nature of the good. From a small business perspective, the investment in a motor vehicle is a significant cost and it is often the primary good relied upon by the small business owner to earn their living.

The following case studies presented in this section are included in the submission to highlight the nature of the problems reported to the SBDC regarding motor vehicles and the level of detriment suffered as a result:

⁵ Consumer Affairs Australia and New Zealand, 2016, *Australian Consumer Law Review Interim Report*, Page 55

Case Study – Second Hand Truck

A small business owner purchased a second hand truck for \$110,000 and was told it was a 2006 model with a rebuilt motor. The small business owner found out that the truck was in fact a 2005 model with its original motor and has experienced multiple issues since it was purchased. The small business owner claimed that the dealer had misrepresented the truck at the time of purchase, which was denied. The small business sought the assistance of the SBDC after failing to get a remedy through direct negotiation with the seller. The SBDC facilitated a settlement valued at \$28,000.

The SBDC notes that there have been calls for a specific provision to be included in the ACL to address consumer guarantee issues with motor vehicles. The SBDC recognises that creating a specific provision for the motor vehicle industry may create confusion. It also appreciates that the evolving nature of this industry (e.g. due to technological and market changes) is such that a provision created in the current context may become redundant when the industry does evolve. Despite this, the SBDC believes that action should be taken to ensure that small businesses experiencing issues with new or used vehicles have easier access to redress against the manufacturer. Whatever form this action takes, be it a specific compliance and education focus, or legislative amendment, the SBDC believes that the benefits gained by consumers will outweigh any detriment to motor vehicle dealers and manufacturers.

From a motor vehicle dealer's perspective, a strengthened and industry specific focus will increase their obligations, particularly relating to the time taken for repairs to be carried out. However, the SBDC believes that this can be overcome with a strengthened indemnity provision that ensures the manufacturer fulfils its consumer guarantee obligations, as discussed further in the submission.

When an issue with a motor vehicle arises, the dealer should assist the consumer to quickly resolve the issue. Similarly, the manufacturer needs to undertake the repairs in a timely manner if the fault is with their product, so that the dealer (as the supplier of the product) is not left with the cost of fixing a manufacturing fault.

In the SBDC's experience, motor vehicle dealers and manufacturers will often require the purchaser of the motor vehicle to appoint an independent assessor to determine the nature of the fault. Small businesses often cannot afford to do so and in some cases this prevents them from taking the matter any further with the dealer or manufacturer. The SBDC believes that this cost should lie with the manufacturer and not the consumer or the dealer.

Broadly speaking, the SBDC believes that the amendment should include provisions specifying:

- Limits on the number of times a vehicle should be taken in for repair for the same issue over a defined period (e.g. within the first year or two of purchase);
- That multiple issues causing the vehicle to be out of service for a defined period (e.g. more than two consecutive weeks) constitutes a major failure;
- Compensation provisions that state that the manufacturer (not the dealer) is responsible for compensating the small business consumer for the loss incurred as a result of having their vehicle out of action;
- Mandatory loan provisions that provides that the dealer must offer the consumer an equivalent vehicle to that being repaired for free until the vehicle is repaired; and
- The manufacturer is responsible for compensating the dealer for any loss they incurred as a result of a manufacturing fault (e.g. the cost of providing the consumer with a free loan vehicle).

Failure to address the issue of faulty vehicles has ramifications for the second hand vehicle market. In the SBDC's opinion without a sufficient response from Government on this issue, the problems will just continue to manifest. Such an example of this can be seen in the case study below:

Case Study – An Expensive Oil Leak

A small business owner purchased a four year old truck from a large truck dealer. The truck developed an oil leak soon after it was purchased. When the dealer was contacted about the problem, he was told that it would cost him \$80,000 to fix the problem. The small business owner questioned whether repairing this issue should be covered by warranty. The SBDC offered the client assistance through its ADR service.

Some small business owners purchasing a second hand vehicle end up with a 'lemon'. The case study above is just one of the many examples given to the SBDC by its small business clients and demonstrates the need to consider whether introducing lemon laws into the ACL is appropriate.

Review Questions – Consideration of Option 1 – Clarifying the law on what can trigger a ‘major failure’

Q16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a ‘major’ failure? Is so:

What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of ‘non-major failures’ or type of safety defect that would trigger a ‘major failure’?

Are there any relevant exceptions or qualifications?

Q17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?

Q18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?

The Interim Report seeks examples where the repair of a product is not an appropriate remedy. The SBDC has heard from numerous small businesses who express frustration from constantly having to return their motor vehicle to the dealer for repair. The SBDC believes that repair is not an appropriate remedy in all circumstances.

In line with the discussion in the Interim Report on the United Kingdom’s provisions that protect the consumer from being caught in the cycle of repairs, the SBDC has anecdotal evidence of small business retailers having to approach the manufacturer multiple times before getting a remedy.

Case Study – Brand New Prime Mover

A small business owner purchased a brand new prime mover for \$350,000. Since purchasing the vehicle, there has been an issue with the heat shield falling onto the engine of the vehicle. This compromised the safety of the truck and as a result the small business owner was unable to carry out his business of transporting dangerous goods. The dealer tried multiple times to fix the heat shield, however these attempts were unsuccessful. The dealer then fitted a new heat shield which also failed. The vehicle was returned to the dealer eight times before the small business owner sought the assistance of the SBDC. The small business owner lost work and therefore money every time the vehicle was in for repairs.

Case Study – Delay in repairs

A small business owner contacted the SBDC for assistance when a motor vehicle dealer delayed repairs on their business vehicle. The small business owner put the vehicle in for repairs under warranty; however the dealer kept the vehicle for over a month which in all circumstances is unreasonable and caused detriment. The SBDC tried to contact the dealer on behalf of the small business, however the dealer would not return communication.

Unconscionable conduct and unfair trading

2.3.4 Unfair trading

Review Questions

Q41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?

Q42. Is there further evidence of a gap in the current law that justifies an economy-wide approach?

The Interim Report queries whether there is a need to introduce a general prohibition against unfair trading in order to reduce market-wide or systemic conduct. When answering whether a legislative prohibition against unfair trading is required, there are two issues to consider. Firstly, whether there is systemic unfair conduct in the marketplace and, if so whether the current law is sufficient to address this.

The SBDC believes that if there is evidence of market-wide or systemic unfair conduct by larger businesses and that this should be addressed in order to level the playing field for smaller businesses. For example, the various State Small Business Commissioners and the Australian Competition and Consumer Commission (ACCC) recently collaborated in bringing action against The Community Network for a breach of the ACL. The Federal Court of Australia found that The Community Network, had breached the ACL by engaging in unconscionable conduct, making false or misleading representations and wrongly accepting payment for goods and services.⁶

The second consideration is whether the current system sufficiently protects consumers (including small business consumers) from unfair trading practices. The example provided above demonstrates that there are existing avenues available to consumers to get redress for unfair trading practices. However, the SBDC believes that there are significant barriers for small business consumers in accessing redress through the ACCC. Whilst there are no barriers to a small business consumer accessing Small Business Commissioners for assistance, getting an enforceable

⁶ Australian Competition and Consumer Commission, *The Community Network ordered to pay penalties of \$230,000*, 2 May 2016, available from: <http://www.accc.gov.au/media-release/the-community-network-ordered-to-pay-penalties-of-230000>, 5 December 2016

remedy against the other party relies on the other party's willingness to participate and reach agreement in mediation. In the SBDC's experience, the larger businesses that engage in this type of wide-spread unfair practice are usually those that do not willingly participate in voluntary mediation. These recalcitrant businesses are unlikely to provide a remedy to the small business consumer unless they are legislatively or judicially required to do so.

Whilst a small business consumer can seek redress for unfair trading practices through private litigation, often they cannot afford to do so. Alternatively, the small business consumer can seek assistance from the ACCC, but due to limited resources and identified priorities, the ACCC can only take this kind of action if there is evidence of wide-spread detriment across a number of consumers. Therefore, for an average small business consumer experiencing unfair practice from a larger business, there are significant barriers to accessing the ACCC.

The introduction of an unfair trading prohibition may reduce the amount and magnitude of unfair practices that currently occur in the marketplace. However, the SBDC believes that introduction of such a prohibition cannot be done in isolation. Small business consumers will still experience the barriers to accessing a remedy and in order for this new prohibition to be effective, there would need to be greater resources provided to the ACCC and other regulators to take action against those engaging in unfair practices.

Furthermore, introduction of a new prohibition in the ACL increases the compliance for all businesses as they have to gain an understanding of their new legal obligations. This could be somewhat addressed with the use of education material and workshops.

The SBDC believes that the introduction of a prohibition against unfair trading is worthy of the Federal Government's consideration, however believes that the parameters around this prohibition would require careful planning to limit unintended consequences for both businesses and consumers. If the Federal Government does introduce this prohibition, the SBDC strongly believes that it should be extended to also protect small business consumers and not just individual consumers. Extending such a protection to small business consumers would be in keeping with the Federal Government's agenda of increasing protection for small business.

Unfair Contract Terms

Options

1. Apply unfair contract terms protection to contracts regulated under the *Insurance Contracts Act 1984*.
2. Prohibit the use of terms previously declared unfair by the courts.
3. Expand the list of the kinds of terms that may be unfair (section 25 of the ACL).
4. Enable regulators to compel evidence from businesses to investigate whether or not a term may be unfair.

The SBDC strongly advocated for the extension of unfair contract term protections to small business⁷ and applauds the Federal Government for implementing this under the ACL. The SBDC noted with interest some of the issues that individual consumers experience when dealing with unfair terms in their standard form contracts, particularly their experiences when seeking redress.⁸ The SBDC commends CAANZ for reviewing this particular aspect of the ACL and urges that any amendments made to further protect individual consumers from unfair contract terms should also be extended to small business consumers.

2.4.3 Contracts as a whole

The discussion on whether a contract as a whole should be considered unfair raised some interesting issues that impact upon small business consumers. The SBDC notes that stakeholders to the Review submitted that some standard form contracts as a whole can be unfair, even if individual clauses are not unfair on their own. These stakeholders argue that the Court should have the ability to void these contracts in their entirety as this would assist in stamping out systemic unfairness.

The SBDC agrees with this sentiment, noting that some stakeholders argue that overly lengthy contracts that are complex and overuse legalese or other jargon should be deemed unfair as a whole. In previous submissions to various reviews⁹, the SBDC has pointed out that small business owners often do not have the time or knowledge required to read through and comprehend lengthy contracts. The SBDC maintains this position in support of the stakeholders¹⁰ who support the need to view

⁷ Small Business Development Corporation, Extending Unfair Contract Term Provisions to Small Businesses, August 2014, available from: <http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2014/Small%20Business%20and%20Unfair%20Contract%20Terms/Submissions/PDF/Small%20Business%20Development%20Corporation.ashx> 5 December 2016

⁸ For example, the submission from CHOICE

⁹ Ibid above; Small Business Development Corporation, Submission – Improving Australia’s Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law, 27 July 2012, available from the Small Business Development Corporation

¹⁰ For examples, the submissions by the Consumer Action Law Centre, CHOICE and Legal Aid NSW

the contract in its entirety when deciding if it is unfair.

The Law Council of Australia's Competition and Consumer Committee argues that such a protection is unnecessary because the ACL already provides for terms to be construed unfair in the context of the contract as a whole. Whilst this is correct, the SBDC questions whether the existing protection as framed is adequate. The Interim Report highlighted stakeholder feedback that some terms in a contract do not meet the criteria set out in the unfair contract term provision. The SBDC presumes that if the offending clause does not meet the criteria then the provision will not be triggered and therefore the Court does not have the statutory basis to review that clause. The SBDC therefore supports the contention made by other stakeholders that a provision is required to deal with situations where a contract has terms that when combined, create unfairness for the other party.

The SBDC believes that whilst this idea has merit, introducing a provision to allow a Court to void an entire contract is potentially fraught with legal and commercial difficulty, as it can cause confusion and uncertainty in relation to sanctity of contract.

Purchasing Online

4.1.6 Application of the consumer guarantees in the online environment

Online auctions

The SBDC believes that issues are emerging in regards to the ability of small business consumers to get a remedy for products purchased from online traders, particularly those based overseas.

The Interim Report queries whether the auction exemption in the consumer guarantee provisions should be reviewed in light of goods purchased via online auctions. The SBDC has come across examples where the auction exemption has impacted negatively on small business consumers, even where inspection of the goods had occurred, albeit in a very limited way. The case study on page 8 about vehicles purchased at auction highlights this point – the consumer had no way of inspecting the underneath of the vehicle before purchasing it and therefore was unaware that he was purchasing a damaged good. This highlights that even where an inspection has occurred, limitations on the consumer's ability to properly inspect goods should be taken into account when deciding whether the auction exemption is fair and reasonable. As the ability to inspect goods sold on an online auction are even more limited, the SBDC believes that review of the exemption for online auctions is necessary to protect consumers from detriment.

Other issues

Indemnification Provision – Manufacturer Compensating Supplier

Section 274 of the ACL provides the indemnification of suppliers by manufacturers for loss or damage suffered by a consumer of goods.

In its first submission, the SBDC called for a review of the indemnification provision governing the responsibilities of manufacturers to their suppliers. The SBDC highlighted the fact that a number of its clients complain that manufacturers are denying any responsibility for goods sold to suppliers or retailers that are subsequently found to be faulty. Anecdotally, the SBDC can report that a number of its clients take the advice given by the manufacturer on its face value and therefore believe that they are not entitled to a remedy when products are found to be faulty. In this regard, the SBDC believes that better education of manufacturers, suppliers and retailers is warranted to ensure that they are armed with the correct information on their rights and obligations when resolving a faulty good dispute.

The current provision indemnifies the supplier for any loss or damage incurred as a result of a failure to comply with the consumer guarantee provision in section 54 of the ACL (acceptable quality). However, in order to get a remedy, a supplier has to take the manufacturer to Court. The SBDC believes that it would be easier for the supplier to get a remedy if the provision clarified what loss or damage means. For example, small businesses complain to the SBDC that they struggle to get the manufacturer to refund them the cost of any labour or other products used to rectify the issue with the original good, as shown in the case study below:

Case Study – Labour Costs

A small business owner purchased paint to complete a job at their client's home. After applying the paint, the small business owner discovered that it was faulty and it did not match the description provided by the manufacturer. The small business owner purchased new paint and re-painted the client's walls. The manufacturer refunded the cost of the faulty paint however refused to compensate the small business for the cost of labour involved in rectifying the fault.

An alternative would be to reverse the onus onto the manufacturer, such that they are obligated to refund the supplier upon receiving evidence of the cost (including labour) to the supplier. The SBDC understands that there are issues associated with allowing consumers to claim loss and damage for the labour cost incurred to rectify a problem. This may open the market to false or inflated claims by a consumer. The SBDC believes that some of these issues could be overcome by prescribing a set amount of compensation for labour costs in the Regulations. Placing this in the Regulations would also allow the Government to amend the amounts as required, without the delay and cost of amending the Act itself.

As mentioned on page 9, the SBDC believes that clarification of the ability of a retailer or supplier to get compensation for loss incurred as a result of a faulty product, coupled with the removal of the re-supply exemption from the consumer guarantee provision, will assist these business to get a remedy for both the cost of the good and the ancillary cost.

The SBDC notes that the Australian Retailers Association's (ARA) submission to the Review also called for a review of the indemnity provision between the supplier and manufacturer.¹¹ The ARA called for this in light of extended warranty provisions; however the SBDC believes that strengthening of this relationship should be done with specific protections under the ACL that the supplier can rely upon against the manufacturer. The consumer should not have to pay for an extended warranty – this shifts the responsibility for fixing a problem onto the consumer (by making them pay for the warranty) rather than making the manufacturer responsible by setting parameters in the ACL.

This issue was articulated in Law Victoria's submission¹² with a practical example that is common to those reported to the SBDC by its clients. Their example went further to articulate the problems along the supply chain for goods that are on-sold multiple times before finally being installed in a consumer's house. Their submission reiterates the SBDC's view that it is difficult for small businesses to rely on their contractual rights to get a remedy and it would be easier to rely on the ACL provision. This sentiment was echoed by the NSW Small Business Commissioner.¹³

The SBDC conducted a short online survey of its clients to gather further information on how this issue impacts on small businesses. The following quotes were elicited from this survey process:

"[I had] issues with low quality products and low quality workmanship on processed products. I have returned these products for refund, exchange or rectify. But the cost to my business due to this issues is high in time wasted and causes us to lose customers and reputation"
[Small Business Consumer – Construction Industry]

"The consumer wants to blame us, the retailer, for manufacturing faults. If we try to appease the consumer, the manufacturer/importer won't back us. The extended amount of time it takes to get through to decision makers of some suppliers, (especially overseas), makes us look bad to the client"
[Small Business Consumer – Retail Industry]

¹¹ The Australian Retailers Association, Submission to the Australian Consumer Law, Available online at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Australian_Retailers_Association.pdf, 14 November 2016

¹² Law Institute Victoria, submission to the Australian Consumer Law Review, page 3, available online at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Law_Institute_Victoria.pdf, 14 November 2016

¹³ NSW Small Business Commissioner, Submission to the Australian Consumer Law Review, available online at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/NSW_Small_Business_Commissioner.pdf, 14 November 2016

“Lounge arms not fixed to the body of the seat properly. We repaired/replaced with no assistance from manufacturer. We never dealt with that particular supplier again.” **[Small Business Consumer – Construction Industry]**

“[I’ve had] many issues with faulty local processed glass. The outcome is that 99% of the time we end up losing our customers due to delays in completing work and faulty finishes” **[Small Business Consumer – Construction Industry]**

“Not only the faulty products but the arrogant approach of managers in dealing with these issues has caused our business dearly. We have not only lost a high amount of customers due to this issue. We have also lost a lot of time in returning, rectifying and repairing faulty products” **[Small Business Consumer – Construction Industry]**

“[I’ve had issues with] faulty clothing where the dye wasn't properly set. When customers wore [the] garment it damaged car seat covers and also rubbed off onto handbags or anything it came into contact with. [The] Wholesaler that it was purchased from denied responsibility - blaming the wholesaler that imported the product. The outcome was I had to refund money for faulty garments and had to reimburse my customers for damaged handbags, seat covers and other damaged clothing. Most wholesalers will not accept faulty garments back even if clothing was received in a faulty state. (Broken zips, missing buttons, incorrect stitching etc)” **[Small Business Consumer – Retail Industry]**

“Had problems with Glass purchased, it continually had waves in it due to their machine, we ended up purchasing our glass from another company.” **[Small Business Consumer – Construction Industry]**

“the effectiveness and efficiency of our business was affected which also caused significant stress.” **[Small Business Consumer – Construction Industry]**

“After threatening to break the professional relationship with the supplier I had the faulty item replaced.” **[Small Business Consumer – Construction Industry]**

The ramification for small business consumers who purchase faulty goods from manufacturers can be significant, particularly when the manufacturer refuses to provide a remedy to the small business, as shown in the case study below:

Case Study – Manufacturer’s refusal to remedy fault

The SBDC’s client was a small business owner who fits stone bench tops into customer’s houses. The small business purchased a container load of stone to cut into bench tops at a cost of \$116,000. Upon arrival, the small business owner inspected the products and informed the manufacturer that the backing was missing and the stone was wet. The manufacturer advised the small business owner that the stone was fit for purpose and due to a good working relationship and a product guarantee, the small business owner believed the manufacturer. The stone was then installed in customers’ homes. Eight months later, customers began to complain that their bench tops were cracking. The manufacturer provided the small business owner with \$27,000 to cover the cost of six of the faulty bench tops. A further 60 complaints were received from customers about the bench tops, however when the small business owner sought a refund from the manufacturer they refused the request. The refusal by the manufacturer to refund the cost of the 60 faulty bench tops has caused significant financial loss to the small business owner.

Application of the ACL – Government Entities

The Law Society of WA submits that it is unclear as to whether government instrumentalities engaging with consumers (e.g. ICWA) also have to comply with the ACL.¹⁴ This is an issue that the SBDC is considering in light of the unfair contract term protections recently introduced for small businesses.

Further clarity is needed on how the ACL in general applies to Government. For example, the SBDC understands that the ACL needs to apply to entities engaging in trade or commerce, however in a government context this is not always easy to define. Enhanced education of government entities, through presentations or written guidance material would help clarify the ACL’s coverage.

Conclusion

For further information about this submission, please contact Ms Darcy Bosch (Senior Policy Officer) on (08) 6552 3308 or email darcy.bosch@smallbusiness.wa.gov.au.

¹⁴ The Law Society of Western Australia, Australian Consumer Law Review – Response to Issues Paper, Available online at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Law_Society_of_WA.pdf, 5 December 2016