



Small Business Development Corporation

**Submission to the
Australian Consumer Law Review: Issues Paper**

May 2016

About the Small Business Development Corporation

The Western Australian Small Business Development Corporation ('the SBDC') welcomes the opportunity to provide further feedback in response to the Australian Consumer Law Review Issues Paper ('the Review').¹ The SBDC has prepared numerous submissions to reviews investigating consumer policy issues and has a keen interest in how these issues impact on the small business sector.

The SBDC is an independent statutory authority of the Western Australian ("WA") government and was established to facilitate the development and growth of small businesses in the State.

One of the SBDC's key strategic objectives is to advocate for a fair, conducive and productive environment for small businesses in WA. The SBDC strives to achieve this by influencing the policy and regulatory environment for small business. The SBDC also develops the small business sector through the provision of education materials, workshops and tailored business and commercial tenancy advice, amongst other things. These educative and advisory services assist small businesses to better understand their rights, in order to minimise their exposure to risk and therefore to disputes.

In 2011, the *Small Business Development Corporation Act 1983 (WA)* was amended to introduce the role of the Small Business Commissioner ("SBC") as the Chief Executive Officer of the SBDC and to establish an alternative dispute resolution ("ADR") service to assist small businesses to resolve their business-to-business and business-to-government disputes.

In order to build up a comprehensive picture of WA's small business sector, the SBDC has a multifaceted approach to gathering information. Statistical data about the sector is monitored from a variety of sources, including interactions with individual small businesses through the SBDC's advisory and ADR services, as well as undertaking frequent opinion polls and other surveys of small business operators in WA. The SBDC uses this information to inform evidence based policy development and program delivery, and to advocate on behalf of the small business sector to government agencies and industry.

¹ This submission does not represent the views of the Western Australian Government and is independently provided.

The SBDC's submission to this Review

The SBDC provides a unique small business perspective to this Review by highlighting how the ACL operates in practice for small businesses in WA.² This submission will highlight gaps in the ACL from a small business perspective and propose areas for reform. This will be supported by the use of case studies gained from client interactions.

The SBDC believes the legislative reform that resulted in the ACL is effectively protecting the interests of individual consumers. The fact that small business is considered to be a consumer for the purpose of some protections in the ACL is applauded. However, the SBDC believes that ACL protections should be extended further to small businesses via a change in the definition of 'consumer' for the purpose of those provisions.

The submission will contend that the characteristics of small business owners make them vulnerable when it comes to disputes. They have numerous barriers preventing them from accessing other legal remedies (e.g. breach of contract) available to them and need a more effective avenue to seek redress. The SBDC believes that the ACL is a more user-friendly avenue of redress as the protections are easy to understand and are clearly set out in comprehensive guidance documents. This makes redress more readily available to vulnerable consumers.

The SBDC's submission will also highlight an issue with the current regulator model in WA, which is creating a 'gap' in the ACL for small business consumers.³ The SBDC will argue that the regulator model be amended to ensure that small business owners are offered the same level of assistance by the regulator as individual consumers. Whilst this argument may be outside the scope of this Review, the SBDC believes that it is an important point to address during this process.

WA Small Businesses and the Australian Consumer Law

A Dual Role

Small businesses play a dual role in the consumer law context and this should be considered when making policy decisions about the application of the ACL to this sector. Small businesses act as a supplier or manufacturer of goods and services to other businesses or individual consumers. In this role, they need education about their obligations to consumers. Where they are the supplier of goods manufactured by another business, they need information on how to deal with disputes arising between them and the manufacturer.

² The SBDC's submission is written from a small business perspective in WA and focussed on the legislative framework and regulator model adopted in WA.

³ This submission will use the term "small business consumer" to refer to transactions and circumstances in which a small business is considered a consumer for the purpose of the protections in the ACL.

Small businesses are also a consumer of goods and services (“small business consumers”) and in this role they need education and support in order to feel confident and empowered to participate in the market. Arguably, small businesses participate in a larger number of transactions and spend a larger amount of money than individual consumers and potentially have a greater impact on the market. Therefore, it is appropriate to recognise the importance of their role as a consumer must and protect their interests. Further to this, the ramifications on small business owners of lesser protections can be detrimental to their livelihood.

The importance and characteristics of the small business sector

The small business sector is a significant contributor to the Australian economy and plays a vital role in the community as a source of income, employment and provider of essential services.

According to the latest Australian Bureau of Statistics (ABS) figures (June 2015), there are 214,197 small businesses (0-19 employees) in WA. The small business sector, which represents 97% of all WA businesses, employs 33.9% of the workforce.⁴

Despite the size of the sector, and its importance to the economy, the sector is fragmented. Small businesses can be found in all industries in Australia and their owners often work in isolation from each other. The fragmented nature of the sector means that overall small businesses don’t have a united voice and individual owners can be quite isolated and vulnerable to unscrupulous operators and business models.

The vulnerability of the small business sector was recognised by the Productivity Commission in 2008⁵ and was highlighted in a number of the SBDC’s submissions to Federal Government Reviews and Inquiries.^{6 7} The vulnerability arises from individual factors (e.g. age, language and cultural background), coupled with the characteristics of owning a small business (e.g. lack of time and money). Small businesses can also have an unequal bargaining power when dealing with more sophisticated businesses. These factors make them just as vulnerable as individual consumers in disputes and when seeking redress from the other party.

⁴ ACIL Allen Consulting 2014, *Report to the WA Small Business Development Corporation: Economic Significance of Small Business in WA Final Report*.

⁵ The Productivity Commission 2008, *Review of Australia’s Consumer Policy Framework Inquiry Report No 45*, Available from <http://www.pc.gov.au/projects/inquiry/consumer/docs/report> [30 July 2014]

⁶ Small Business Development Corporation, 2013 *Submission to the Productivity Commission Inquiry into Access to Justice Arrangements*, available from http://www.pc.gov.au/_data/assets/pdf_file/0007/129922/sub076-access-justice.pdf [30 July 2014]

⁷ Small Business Development Corporation, 2014 *Extending Unfair Contract Term Provisions to Small Businesses*, 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> [30 May 2016]

Small Business Access to Alternative Remedies

As well as being susceptible to disputes, small businesses are also as vulnerable as individual consumers when it comes to the ability to access remedies and enforce their legal rights. Small business owners lack the time and money to pursue a remedy against a larger business in the event of a dispute. The result of this is that often a small business, despite having a legal protection (either through contract or statutory protection) is unable to enforce their legal rights and pursue the remedies that they are entitled to.

A small business consumer in a dispute with a supplier or manufacturer may suffer a significant detriment if the dispute impacts on their cash flow and financial viability of their business. The impact of not being able to swiftly resolve disputes and obtain a legal remedy are felt at both a personal and professional level by small business owners and their families. Consequences include an inability to pay staff and suppliers, the threat of bankruptcy, stress and family breakdown. Therefore, it is vital that small business have access to an effective and user-friendly avenue for redress, where their legal rights are clearly articulated.

The SBDC believes that ACL, when it does apply, offers a user-friendly avenue to inform small business consumers of their rights and remedies. For example, a small business consumer can refer to the ACL guidance documents when trying to negotiate an outcome during a dispute with a larger business. These documents clearly set out legal rights and responsibilities of the parties. The fact that the Government has produced these documents provides weight to the small business consumer's request for a remedy.

However, small business is not always considered a 'consumer' for the purpose of all ACL provisions. In these circumstances, the small business owner must rely on the other avenues for redress, however as articulated earlier, there are many barriers that prevent these small business owners from pursuing their rights through these avenues.

The SBDC's advocacy on behalf of small business aims to increase the profile of the sector and make key stakeholders aware of their issues. In the consumer policy arena, the SBDC aims to influence the agenda to increase the number of ACL protections that apply to small business consumers by changing the definitions of consumer used in these provisions.

Small Business and the Regulator

As the SBDC understands it, the Productivity Commission will be examining the enforcement and administration arrangements underpinning the ACL. The SBDC will further expand on the interaction between small business and the regulator in WA in its submission to that review. However, the fact that small businesses are falling into a gap because of the regulator model in WA is worth highlighting in the context of

this Review of the ACL. This gap is consistently highlighted to the SBDC by its small business clients.

In WA, the Department of Commerce (Commissioner for Consumer Protection) is the regulator and is responsible for administering the ACL. The Department of Commerce (Consumer Protection) promotes consumer protection and fair trading in WA, by assisting consumers and enforcing the ACL.

The value of the work being undertaken by the Department of Commerce is evident in the results of the latest Australian Consumer Survey 2016, which reveals a high level of awareness of the ACL amongst WA based consumers.⁸ The SBDC believes that the Department of Commerce is doing a sterling job in assisting and educating individual consumers in WA.

The current legislative framework that guides the Department of Commerce prevents them from assisting small business consumers to enforce their rights under the ACL in the same way that they assist individual consumers. The lack of access to assistance from the regulator contributes to the small business consumer's lack of access to remedies and inability to seek redress.

In its submission to the Productivity Commission, the SBDC will propose amendment to the regulator model to ensure that small business consumers are provided with the same assistance by the regulator as individual consumers. It will also be argued that an increase in the client base of the regulator must be accompanied by an increase in funding to recognise the pressure this would place on the regulator's resources.

Structure and Clarity of the Australian Consumer Law

Review Questions

Q4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

Q7. Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

ACL Language

The SBDC believes that the language of the ACL is sufficiently clear; however there are areas of confusion amongst our small business clients. Terms that cause frustration amongst small business clients of the SBDC include "major fault" and "reasonable timeframes". Whilst these might be hard to define, a lack of definition creates enough uncertainty to create a loophole that larger business can exploit.

⁸ The Australian Consumer Survey 2016 revealed that 91% of WA consumers surveyed in 2015 were aware of the ACL.

Treatment of Consumer

The SBDC understands that different provisions of the ACL use different definitions of 'consumer' to guide its application. The SBDC supports that the definition of 'consumer' in the ACL is based on type of behaviour rather than defining an entity.⁹

A major provision relied on by small business is the consumer guarantee provision. As it is currently drafted, the definition of consumer in this provision does not capture all transactions in which a small business consumer would be party. The result is gaps in coverage for small business consumers, meaning that they fall in and out of the protection depending on the nature and cost of the goods and services they are purchasing.

The SBDC understands that an important question asked when developing consumer policy is 'what is the nature of the problem and are consumers commonly failing to have their problems resolved in a satisfactory manner.'¹⁰ The SBDC submits that a large proportion of our small business clients are not getting the appropriate remedy or having their consumer guarantee issues resolved satisfactorily. The reason that this is occurring is because the definition of consumer used in some provisions in the ACL precludes some small business transactions. The SBDC contends that this needs to be revisited to ensure that more small business transactions are covered by these specific provisions, particularly the consumer guarantees.

Some may argue that small businesses are better equipped than individual consumers and have the resources to protect their interests outside the scope of the ACL. On that basis, the definitions would not need revisiting. However, the SBDC challenges that assumption and contends that small businesses are just as vulnerable as individual consumers and as such need the same level of protection in the ACL. In this regard, a precedent has been set in relation to extending the protection against unfair contract terms in standard form contracts to small business parties. It would be prudent to review how this new model works once it is implemented and transfer that knowledge and experience to the question of extending other ACL protections to small business.

The consequences of taking no policy action in regards to this issue¹¹ can be catastrophic for small business owners. The detriment of being excluded from important protections, such as the consumer guarantee protection of the ACL is evident in the following case studies.

⁹ As noted on page 11 of the Australian Government Consumer Affairs Australian and New Zealand, 2016 *Australian Consumer Law Review Issues Paper*.

¹⁰ Department of Treasury 2011, *Consumer Policy in Australia A companion to the OECD consumer policy toolkit*, Government of Australia, Available from: <http://consumerlaw.gov.au/consumer-policy-in-australia/policy-toolkit/> [6 May 2016]

¹¹ Ibid above.

The \$40,000 threshold

The SBDC notes that the \$40,000 threshold has not been amended since its introduction in 1986.¹² According to the Australian Bureau of Statistics' (ABS) Consumer Price Index Inflation Calculator, \$40,000 as at March 1986 is worth \$104,541.06 in 2016 due to the effect of inflation over the 1986-2016 time periods.¹³ This threshold is very significant to and greatly disadvantages small business consumers, as they cannot get redress through the ACL for their acquisition of any goods or services of a greater value than \$40,000 that are not of a kind normally used for personal, domestic or household purpose.

There are many types of goods and services procured by small business that do not meet the fore-mentioned definition. For example, the cost of a service to introduce a client record management system would exceed the \$40,000 threshold and would not be considered a domestic product.

Case Study – Brewery Equipment

A small business client purchased brewery equipment for his boutique brewing business for \$160,000. The equipment did not meet Australian Standards due to bad welding and was smaller than the size ordered. There were significant delays in receiving a remedy from the supplier, leading to significant loss in productivity and therefore income. The client was not covered by the consumer guarantee provisions in the ACL.

The SBDC believes that these types of transactions should also be covered by consumer guarantee protections. The purchase of such goods or services represent a large investment for small businesses and failure of the supplier/ service provider to deliver an acceptable product or service can have dire consequences for that small business.

¹² The Australian Government Consumer Affairs Australian and New Zealand, 2016 *Australian Consumer Law Review Issues Paper*, page 11.

¹³ The Australian Bureau of Statistics' Consumer Price Index Inflation Calculator can be accessed via <http://www.abs.gov.au/websitedbs/d3310114.nsf/home/Consumer+Price+Index+Inflation+Calculator> [10 May 2016]

Case Study – Rural Sprayer

A small agribusiness operator purchased a new rural sprayer for \$126,500 to use in his business. The operator has ongoing issues with the sprayer, resulting in numerous repairs, however some issues were not rectified and resulted in a lot of 'downtime' where the sprayer could not be used. This led to inconsistent spraying and poor weed elimination, resulting in consequential loss to the business. The agribusiness operator attempted to engage the supplier in negotiations to repair the sprayer, however there was a breakdown in communications. The agribusiness operator approached the SBDC for assistance and after lengthy negotiations between the parties and the SBDC Case Manager, a resolution was reached. These negotiations may have been progressed more swiftly if the consumer guarantee provisions applied to this transaction.

If the \$40,000 threshold were raised, more small businesses transactions would be covered by the consumer guarantee protection resulting in greater protections for small business. Small business consumers need a quick outcome as lengthy disputes severely impact on their cash-flow and resources and could be the difference between bankruptcy and solvency.

The SBDC recommends increasing this threshold beyond \$100,000. The threshold has not been changed since 1986 and presumably it cannot be raised without legislative amendment and consultation, which is a lengthy and expensive process. In that regard, it is important that due consideration be given to raising the threshold to an amount that remains relevant between now and its next increase. Further to this, consideration should be given to ensuring the threshold value increases automatically and in line with the CPI.

Exemptions

There are a number of types of purchases that are deliberately excluded from the scope of important ACL provisions, such as consumer guarantees. The SBDC believes that some of these exemptions are having a detrimental impact on small business consumers and urges the Review panel to consider removing them.

Vehicles that are not used principally in the transport of goods on public roads

The SBDC receives a steady stream of complaints from small business owners experiencing problems with vehicles that they have purchased for use in their business. These vehicles include diggers, bobcats and loaders and therefore are not used principally for transporting goods on public roads.

When issues arise with these types of vehicles a small business has no recourse through the ACL.

The consequences when a fault or failure occurs with these types of vehicles can be significant to the small business owner. The loss experienced from such a failure

relates to the price originally paid to purchase the vehicle, as well as the cost incurred in having the vehicle out of action. Coupled with the time and effort spent trying to seek redress, these situations can have a dire impact on the small business.

Case Study – Mini Digger

A small business owner purchased a mini digger for \$27,000 from a large WA Company (“the supplier”) to use in his small business. The mini digger has had several major mechanical issues since it was purchased and the small business owner has arranged and paid for these issues to be rectified. When the dingo is not working or is in for repairs, the small business owner is losing money. The small business owner arranged for the manufacturer to inspect the mini digger and the conclusion was that as it is under warranty, the supplier is responsible for providing the repairs. The supplier refused to undertake the repairs, despite the manufacturer’s report and the small business owner’s multiple requests and letters.

It is commonly reported amongst the SBDC’s clients that when an issue arises with these types of vehicles, the dealer from whom they purchased it will deny responsibility and employ tactics to discourage the small business owner from pursuing a remedy.

Goods acquired for the purpose of re-supply

The ACL excludes goods purchased for the purpose of re-supply. The impact of this exclusion is wide-spread across the small business sector, particularly those in the retail industry. Practically, this exclusion means that all small business retailers who buy a product from a supplier or manufacturer do not have any remedy under the ACL when there is an issue with the goods.

Under the ACL, the retailer must provide a remedy to the customer who has purchased the item from them despite having no recourse further up the line. Small business retailers invest substantial amounts of money into purchasing products to sell to their customers and when they cannot sell these products on, their money is tied up until a resolution is reached. They might not have additional money to purchase replacement products, severely limiting their cash flow and ability to trade. Furthermore, the cost of obtaining a remedy for these types of situations will often outweigh the cost of the goods and therefore act as a disincentive to the small business owner seeking redress.

Case Studies

Faulty Dance Shoes

A small business retailer purchased \$2800 worth of dance shoes from a supplier who imports them from China. The shoes cracked and peeled and when the small business retailer tried to return them, the supplier refused to give her a remedy under the ACL due to the fact that she had purchased them to on-sell. The small business retailer could not sell the faulty stock and lost the money she had invested because she could not afford to pursue the remedy.

Faulty Gadgets

A small business retailer who sells gadgets and knick knacks at weekend markets purchased electronic gadgets from a supplier online. These gadgets were later recalled after being linked to a number of house fires. The retailer refunded customers who returned the products and ceased selling her stock but when she tried to return them to the wholesaler they refused to refund her. Knowing that the retailer was a small business without the resources required to pursue a remedy, the wholesaler refused to even discuss a remedy.

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

(a) *In the course of a process of production or manufacture*

As with the previous exemption, many small business owners acquire goods for the purpose of using them as a component in the production of their end product. When the good acquired for this purpose is faulty or not fit for purpose, this can prevent that small business from producing their final product, impacting on their ability to trade and their cash flow. Again, the small business owner does have a legal remedy in these situations; however pursuing these remedies are more difficult than being able to clearly point to a remedy in the ACL.

Case Study – Essential Oils

A small business owner uses essential oils as a component in her massage products. She purchased \$3000 worth of essential oils from an online company and when these were delivered they were out of date and congealed. As she could not use these oils for her products, she sought a refund from the supplier. The supplier refused to refund her the purchase price, or send replacement stock. The retailer tried to argue that the ACL provided her with a remedy, only to be rebutted by the supplier. Whilst the retailer could have pursued resolution through an alternative avenue, she could not afford to do so. Without access to an easy remedy (e.g. ACL) or regulator to help them, the business could not seek redress.

(b) In the course of repairing or treating other goods or fixtures on land

Small businesses that purchase building materials to use on their clients' homes do not have recourse through the ACL against the manufacturer when that product is faulty. Whilst they have access to other avenues of redress, a remedy may be achieved sooner if they were covered by the ACL consumer guarantee provisions.

Case Study – Timber Flooring

A small business floor supplier ordered timber flooring on behalf of a client whose floor he was replacing. When they received the timber flooring, it was warped and could not be fitted. The SBDC commenced negotiations with the timber flooring supplier and whilst at first the manufacturer appeared to be willing to investigate the claim, they soon refused to negotiate and denied that the product was faulty. When the customer whose house was being renovated got involved, the manufacturer finally began to negotiate and gave a part refund to the small business.

In some cases, the small business supplier will not get a remedy from the manufacturer and will be out of pocket:

Case Study - Decking

The small business operator purchased composite decking boards from the manufacturer and supplied these to a client. These boards were faulty and falling apart. The small business operator attempted to get a remedy from the manufacturer but the negotiations were protracted. To ensure that she met her obligation to her client under the consumer guarantee provisions, the small business replaced the product at her own cost. The manufacturer refused to refund the small business operator, who had to bear the cost for the faulty product.

Specific Protections

Review Questions

Q10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary cost on business?

Q11. Are there any changes that could be made to improve their effectiveness or address any of the issues in section 2.3 [of the Review Paper]? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

Q12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?

Unfair Contract Terms

The SBDC notes the Federal Government's decision to extend the protection against unfair contract terms in standard form consumer contracts (of less than \$300,000 or \$1 million for contracts over 1 year) involving small businesses, commencing in November 2016. The SBDC advocated for this change¹⁴ and will keenly follow how the progress of the implementation of this significant protection and its impacts on the small business sector. The SBDC applauds the Federal Government for this decision and implores the Federal Government to include the small business sector in any further protections implemented in this area.

Indemnification provisions – manufacturer compensating supplier

The Review Paper seeks opinions on the effectiveness of the indemnification provisions, which require the manufacturer to compensate suppliers for the cost associated with defects that are the manufacturer's fault.

In the SBDC's opinion, the protection of the consumer when faults or failures occur with their goods is working well, however these need to be extended further up the supply chain. As it currently stands, the ACL does not provide adequate protection or remedy to small business suppliers or installers when they receive a faulty product from the manufacturer. The costs incurred by the small business can be significant, particularly where this product has been installed into a customer's home or vehicle before its fault was discovered.

For example, where a small business service provider has installed a good as a part of their service and it turns out to be faulty, they must rectify the fault for the end consumer. This often involves costs that are not recoverable from the manufacturer, such as those associated with the labour and ancillary products needed to rectify the issue. In these situations the small business incurs additional costs to rectify a problem that they did not cause.

Case Study

A small business mechanic purchased an engine to install in a client's vehicle. This engine started leaking oil and the mechanic sought a remedy from the manufacturer. Whilst the manufacturer offered a full refund for the faulty engine, the mechanic was not compensated for the time and costs associated with removing the faulty engine from the customer's car and replacing it with a new engine. The mechanic incurred significant costs as a result of the faulty engine.

In some cases, the manufacturer will refuse to compensate the supplier, despite having a legal obligation to do so. This causes unnecessary costs (e.g. labour cost) to the small business in rectifying problem for the consumer, despite the fact that they did not cause the problem.

¹⁴ Ibid, 7.

Case Study

A small business installed solar panels in residential homes. The small business owner purchased a part from a supplier, who obtained these from a manufacturer in China. The small business owner installed the parts into the solar panels and then installed them into the homes of residential customers. After installation, faults occurred with the solar panels and it was discovered that the fault was with the product purchased through the supplier. Despite initial resistance, the supplier finally agreed to provide a part refund for the cost of the faulty product. However, the supplier refused to compensate the small business for the cost of labour in removing the solar panel from homes and replacing the faulty part. In this case, the small business owner incurred costs associated with the purchase price of the faulty good and labour costs.

Lemon laws

The Review Paper highlights the challenges faced by consumers seeking redress through consumer guarantees for faulty motor vehicles. For example establishing where the fault is major and what a reasonable timeframes for repairs may be.

The SBDC concurs with the Queensland Parliament's Legal Affairs and Community Safety Committee's (the Committee) findings that for consumers who have purchased a 'lemon', the financial cost is significant.

The SBDC has received a number of complaints from small business owners who have experienced significant issues with motor vehicles. As highlighted by the Committee, the consequences of such an incident can be devastating, particularly for a small business operator who relies on that vehicle to operate their business. Anecdotally, the SBDC is aware of small business operators who have experienced significant stress as a result of seeking redress for a faulty vehicle, resulting in health and family issues, as well as cases where the small business operator has lost their business and family home.

Case Study

A small business owner purchased a truck from a reputable dealer in WA. After taking delivery of the truck, the small business owner noticed issues with gear selection such as the vehicle getting stuck in gear. The small business owner paid \$2500 to repair a part; however it kept suffering issues and was off the road for a significant period of time, causing the truck driver to lose contracts and jobs. In addition to getting the gearbox repaired, the small business owner incurred a significant cost to tow the truck to a repairer.

The small business owner believes that the truck is not of acceptable quality and requested assistance from the dealer. The dealer responded to these requests with a resolute refusal to offer any assistance or compensation.

Clarification of what is a reasonable timeframe for repair would be of great assistance to small businesses, who suffer great losses when suppliers fail to provide remedies in reasonable timeframe.

Case Study

A small business operator purchased a prime mover for \$160,000. Since purchasing the truck, there were a series of faults with numerous components of the truck, such as the turbo charger, radiator, coolant header tank and water pump. The small business operator complained about these issues and eventually the dealer offered to repair some of the issues. The truck experienced further issues and the small business operator believed that these amounted to a major failure and requested a replacement vehicle.

The small business operator experienced lengthy delays in getting a remedy due to inaction by the dealer.

Often, disputes are lengthy due to arguments about what constitutes a major fault and who is responsible for remedying it:

Case Study

A small business sub-contractor purchased a vehicle for his business in 2010. The vehicle had a three year manufacturer's warranty and in September 2012 it began developing faults. These were immediately reported to the dealer, who denied that it was a fault that was covered by the manufacturer's warranty. There was an argument about whether the fault was a major or minor failure and who was responsible. The vehicle could not be used until it was repaired, resulting in a loss of income for the business.

The SBDC supports further consideration of whether the consumer guarantees relating to vehicles need to be strengthened to include a new 'lemon law'. The SBDC agrees with the Committee's recommendation that a national approach is needed to

this issue and that the law should incorporate clear and practical definitions and provisions, such a mandatory time and repair and further clarification of what a 'lemon' is and the obligations on the supplier or manufacturer to repair or replace the vehicle.

Consideration should be given to extending such a protection to other types of vehicles, such as prime movers, diggers, bobcats and farm vehicles. Small businesses rely on these vehicles to operate their business and therefore for the livelihood of themselves and their families are at stake when issues occur. As such, they would benefit greatly from a lemon law that applies to these vehicles.

Other Issues

Predatory behaviour of larger businesses

Anecdotally, the SBDC is aware of incidences where a larger business takes advantage of a small business' inability to pursue their legal remedy. Whilst legally, the larger business is in the wrong and the small business is entitled to redress, the larger business knows that they can get away with breaching the rights of the smaller business because there will be no consequence.

Case Study

A small business owner purchased an exercise bike for their gym. Upon receiving the exercise bike, the small business owner noticed a fault with the computer system of the exercise bike and contacted the supplier for rectification. The supplier refused to provide a remedy and referred the small business directly to the manufacturer. The manufacturer arranged for a technician to attend the premises and fix the bike on a number of occasions; however the problem was not rectified. The exercise bike was removed by the technician and the manufacturer agreed that the bike had a major fault and credited the money to the supplier, who should have passed this onto the small business. The supplier offered the small business a store credit however this was of no use to the small business owner who had to purchase a new exercise bike from another supplier in order to maintain a level of service to her customers.

The supplier refuses to respond to any communication from the small business.

Often times the larger business will just refuse to enter negotiations. Without the assistance of the regulator to pursue a remedy or funds to seek legal redress a small business cannot pursue its rights.

Case Study

A small business owner was supplied with a part for a refrigerator which he installed for his client. The part was faulty but the supplier refused to replace it and insisted that because the small business owner was not a preferred installer, the warranty was void. Despite attempts by the small business and the SBDC to get the other party to negotiate an outcome and the fact that the consumer guarantee provisions did apply, the other business refused to even engage in conversation.

Reach of the ACL – international private action and recognition of foreign judgements

There appears to be confusion amongst the small business sector as to whether the ACL applies to products purchased overseas. Many small businesses who contact the SBDC do not realise that the ACL does in fact apply to overseas suppliers and manufacturers.

Regardless of whether the ACL applies or not, it is very difficult for a small business based in WA to pursue a remedy against an overseas manufacturer. The best outcome is if an overseas supplier or manufacturer responds to a request for a remedy at the first instance. However, in reality many small businesses are left chasing manufacturers who ignore their legal obligations.

The SBDC notes that for an Australian consumer to take private legal action against an overseas supplier or manufacturer, they need the consent of the Federal Minister under section 5 of the *Competition and Consumer Act 2010 (Cth)*. This, in combination with a lack of resources, time and knowledge on how to pursue their rights against overseas traders, means that getting a remedy is almost impossible for a small business consumer.

The Review Paper highlights that work is being done to create a uniform and streamlined system for recognising and enforcing foreign judgments. The SBDC supports the work in this area to streamline the rules around recognition and enforcement of Australian judgements in countries where there is no formal agreement. However this still doesn't help small businesses as they can't take private action in their own right (due to the legislation) and secondly they cannot afford it.

The SBDC suggests that further education of the sector be undertaken to raise awareness of the applicability of the ACL to overseas purchases.

Guidance Documents

The SBDC's business advisers use the guidance documents prepared by the Federal Government daily to inform and advise our small business clients. Overall,

the SBDC believes that these documents are extremely useful and are a valuable resource to time poor small businesses.

To quote one of the SBDC's experienced Business Advisers:

"I find the PDF of the Consumer Guarantees booklet so useful when dealing with time poor small business owners.

The booklet is invaluable and so helpful. I email it to the business owner, as a PDF, and suggest they read relevant sections..... They really appreciate being able to zero in on specific and relevant information.

The booklet is well written and the examples in the booklet really help business owners (and customers) understand the intent of the law."

Whilst the guidance documents are invaluable, the SBDC has a few suggestions to improve upon the consumer guarantee booklet to clear up some misconceptions about the application of the provision. In particular, there is confusion amongst some of the SBDC's clients about the application of the consumer guarantee provisions to motor vehicles, particularly high ticket ones like prime movers. Small business owners seeking to rely on the consumer guarantee provision for their prime mover issues are often told by the supplier that these vehicles are not covered. The SBDC believes that this is not the intention of that provision and believes that many disputes could be resolved earlier if the guidance documents gave an example where a consumer guarantee applied to a high priced vehicle, such as a prime mover.

Educating Small Business

Small businesses benefit from education and advice from regulators and other government bodies regarding their legal rights and responsibilities. The SBDC believes that the guidance booklets produced to complement the ACL are an excellent resource for small businesses and regularly sends the PDF or website reference to our clients.

The SBDC has been providing workshops and seminars to small businesses for many years and has received positive feedback from participants regarding this format of education. The SBDC also hosts seminars in which government agencies present information to our small business clients. Workshops and seminars are an excellent way to communicate important information directly to the small business sector. The SBDC believes that small businesses would appreciate receiving more ACL information in this format and that any seminar run by the regulator would be well attended.

Another form of education conducted by the SBDC is via individual appointments between our Business Advisers and small business clients. Recently the ACCC presented information to our staff on the operation of the consumer guarantee provisions and this knowledge has been transferred to our clients.

The SBDC would be happy to provide further information and advice on educating small businesses on ACL issues if required.

Conclusion

For further information about this submission, please contact Ms Darcy Bosch (Senior Policy Officer) on (08) 652 3308 or email darcy.bosch@smallbusiness.wa.gov.au.