

Our ref: D16/3313

Ms Julie Abramson
Consumer Law Enforcement and Administration
Productivity Commission
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Dear Ms Abramson

Consumer Law Enforcement and Administration – Issues Paper

I welcome the opportunity to provide feedback to the Productivity Commission's Issues Paper on Consumer Law Enforcement and Administration ('the Review').

The Western Australian Small Business Development Corporation ('SBDC') recently provided a submission (**attached**) to the Australian Consumer Law Review Issues Paper conducted by Consumer Affairs Australia and New Zealand ('CAANZ'). Please refer to that submission for background information on the role of the SBDC and our views on the scope of the Australian Consumer Law ('ACL') in relation to the small business sector.

As pointed out in the SBDC's submission to CAANZ, the small business sector has a dual role in the consumer law arena. In one role, small businesses act as a supplier or manufacturer of goods and services to other businesses or individual consumers. Their other role, as a consumer of goods and services ('small business consumer'), is significant given their number (over 2 million in Australia) and representation across industries. The SBDC maintains that a small business consumer could be just as vulnerable as an individual consumer when it comes to disputes arising under the ACL.¹

The Vulnerability of Small Business Consumers

Given the potential vulnerability of individual small business owners and the significance of their consumer role, they should be protected by the law and assistance (including the enforcement of their rights under the ACL) should be

¹ For a detailed explanation of the reasoning behind the SBDC's position, please see the SBDC's submission to the Federal Treasury's "Extending Unfair Contract Term Provisions to Small Businesses" consultation dated August 2014 and the SBDC's submission to the Productivity Commission's inquiry into "Access to Justice Arrangements" dated August 2014.

provided by the regulator/s. More detail on the sources of this vulnerability, and the importance of the small business sector, can be found in the SBDC's submission to CAANZ.

In that submission, and during meetings with the CAANZ Secretariat as part of its ACL Review consultations, the SBDC raised an issue with the administration of the ACL from the view point of the small business sector. This relates to the legislative framework and the limited responsibilities of the regulator to provide assistance to individual small business owners when they experience issues or disputes as a consumer of goods and services. Whilst neither that review, nor the current review, directly deals with the scope of regulator assistance, the SBDC believes that it is an important issue that should be addressed.

Small Business Consumers within WA's Legislative Framework

In WA, the Department of Commerce (specifically the Commissioner for Consumer Protection) is the regulator and has responsibility for administering the ACL as adopted by the *Fair Trading Act 2010 (WA)* ('Fair Trading Act'). The Department of Commerce promotes consumer protection, product safety and fair trading in WA by assisting consumers, promoting compliance and enforcing the ACL. Consumers also have access to the Australian Competition and Consumer Commission ('ACCC') when dealing with a consumer law dispute.

The value of the work being undertaken by the Department of Commerce and the ACCC 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.² In this regard, the SBDC believes that the Department of Commerce and the ACCC have done a great job in assisting and educating individual consumers in WA about their respective rights and obligations under the ACL.

The framework guiding the Department of Commerce in providing this assistance is found in the Fair Trading Act. Under that Act, the Commissioner for Consumer Protection is empowered to receive, investigate and act on complaints from consumers concerning matters affecting their interests as a consumer.³ A consumer for the purpose of that Act does not apply to people who "carry on a trade or business".⁴ As such, the Commissioner for Consumer Protection is only able to conciliate complaints relating to the purchase of goods or services for personal or domestic use.

Consequently, small business consumers are generally not entitled to assistance from the Department of Commerce on an individual basis for disputes under the ACL. There is however provision in the Fair Trading Act for the Commissioner for

² The Australian Consumer Survey 2016 revealed that 91% of WA consumers surveyed in 2015 were aware of the ACL.

³ Section 56(1)(c) of the *Fair Trading Act 2010 (WA)*

⁴ Section 7(2) of the *Fair Trading Act 2010 (WA)*

Consumer Protection to institute or defend legal proceedings on behalf of businesses⁵ if he is satisfied that it is proper to do so and is in the public interest.⁶ The SBDC understands that this power is limited to proceedings in which the amount does not exceed \$100,000.⁷ Whilst this provision is positive for the small business sector in general, it does not help individual small business consumers with their day to day consumer law disputes as these are unlikely to satisfy the “public interest” test.

This legislative framework therefore restricts the amount of assistance or advice that the Department of Commerce is able to provide to small business consumers who telephone their call centre. The SBDC is unable to comment on the number of small business disputes that the Commissioner for Consumer Protection has pursued in the public interest.

Other Sources of Assistance

An alternative source of government assistance available to small business consumers in WA is the SBDC. When a small business contacts the SBDC for assistance with a consumer law dispute, they generally receive advice and information on the process they should try to take to resolve their matter.⁸ Disputes between a small business and another business can also be referred to the SBDC’s Alternative Dispute Resolution (ADR) service in an attempt to achieve resolution. However, the SBDC is not a regulator and its powers are limited and do not allow it to make enforceable orders against parties.

The SBDC’s ADR service is modelled on a philosophy of assisting parties to resolve their dispute rather than imposing an enforceable decision on them. It was implemented as an alternative to the legal system by providing parties with a lower cost and less formal option to getting a dispute resolved. As a result, parties come to SBDC’s ADR service in a voluntary capacity⁹ and must be willing to try and resolve their dispute in good faith.

While the SBDC has a relatively high resolution rate for those utilising mediation¹⁰, it is not always possible to get parties to attend or co-operate at mediation. When faced with a “rogue” supplier or wholesaler that does not operate within the spirit of the ACL and who refuses to participate in ADR, the small business consumer’s only redress is legal action. As the SBDC has highlighted in past submissions, small

⁵ Section 58(2)(b) of the *Fair Trading Act 2010 (WA)*

⁶ Section 58(1)(b) of the *Fair Trading Act 2010 (WA)*

⁷ Section 58(3)(a)(i) of the *Fair Trading Act 2010 (WA)*

⁸ Section 11(2) of the *Small Business Development Corporation Act 1983 (WA)*

⁹ Only those with a retail shop lease dispute will be compelled to utilise the SBDC’s ADR service.

¹⁰ 76% of general small business disputes that went to mediation for the years 2013-14, 2014-15 and 2015-16 resulted in an agreement being reached.

business owners often lack the financial resources and time required to pursue disputes through the judicial system.¹¹

Experience When Seeking Assistance

The SBDC's Business Advisers are aware of a number of instances where a small business owner has sought advice regarding a consumer law dispute after the regulator was unable to provide assistance.

They can often be confused and disappointed as to why they could not receive the assistance of the regulator, as in their eyes they are a consumer under the ACL and therefore expect the regulator's assistance in protecting their consumer rights. Some of these small business consumers then also express their frustration that the SBDC is also not able to enforce the ACL on their behalf.

There are also instances where there is "greyness" over the provision of advice to a member of the public in relation to a consumer law dispute. For example, the SBDC will receive a call from a member of the public who is not a small business owner but has been referred by the Department of Commerce, as seen in the case study below:

CASE STUDY – GAMBLING SOFTWARE

A member of the public purchased gambling software for personal use but used funds earned through his business to do so. There was an issue with the software and the customer contacted the Department of Commerce for assistance but was referred to the SBDC. The SBDC was unable to help this person as the issue they sought assistance on was not related to the operation of their small business.

Another area where it is unclear as to which agency should assist relates to people seeking help for a consumer law dispute in their capacity as a private landlord. These are sometimes referred to the SBDC because they are considered to be a small business by the Department of Commerce; however SBDC does not consider them to be a small business as the following case highlights:

CASE STUDY – WINDOW COVERING

"X" purchased blinds from a reputable window covering business. She paid for the company to measure the blinds on a rental property that she leases to tenants, but when installed the blinds did not fit the window properly. "X" requested that the company fix the problem but did not get a resolution. She called the Department of Commerce for assistance and was referred to the SBDC as they believed she was a small business. However, "X" was a private landlord and not a small business as defined by section 3 of the *Small Business Development Corporation Act 1983*. Unfortunately, the SBDC was not able to assist her beyond providing general advice on how to pursue a complaint through the Magistrate's Court.

¹¹ Small Business Development Corporation 2014, *Submission to the Productivity Commission Inquiry Access to Justice Arrangements*, available from the SBDC

Similarly, the SBDC is aware of small business consumers who have been frustrated when they have not been able to resolve a dispute over a good that was purchased predominantly for their personal use, as the following cases highlights:

CASE STUDY – USED CAR

A small business owner lodged a complaint against a car dealership in WA regarding the purchase of a ute in his capacity as a consumer. While the sales contract included two conditions that the dealer had to complete prior to sale, these were not met when the car was delivered to the consumer. The first time the consumer attempted to start the car it struggled and subsequently it would not start, resulting in the consumer incurring towing expenses. The consumer tried to resolve the issues with the dealer, but they refused to respond to his calls and emails. The consumer contacted the Department of Commerce but was referred to the SBDC because the car he purchased was a ute and would sometimes be used for his business. The SBDC provided general advice on how to pursue a complaint against the car dealer but could not offer further assistance.

CASE STUDY – PAINT

A small business owner bought paint from Bunnings to paint his trailer. He discussed his requirements with the sales person and ordered the paint that was recommended. When the paint arrived at Bunnings, he picked it up and applied the first coat that day. Despite following the instructions, the paint ran. The small business owner raised this as an issue with Bunnings and followed their advice to buy a second tin of the paint for the second coat, however the same issue reoccurred. The small business owner attempted to resolve the issue with Bunnings directly as he believed there was a problem with the batch of paint. Bunnings refused to help and directed the client to the paint manufacturer Dulux. After a lack of assistance from Bunnings and Dulux, the small business owner contacted the Department of Commerce. He was referred to the SBDC as he was a business owner, despite the fact that he purchased the paint in his capacity as a consumer and the goods purchased were of a kind ordinarily used for household or domestic purposes. The small business consumer expressed his frustration to the SBDC, highlighting the amount of time and money he had lost trying to resolve this issue.

The SBDC's Position

The SBDC recognises that ACL regulators are working within the constraints of their legislative and resource frameworks and have limited funding that has to be allocated to areas of highest priority for the public interest. Whilst the SBDC recognises these issues and limitations, it also believes that more should be done to assist small business consumers to resolve their disputes at a micro-level.

In practice, ACL regulators should have greater scope and clarity to assist all consumers (whether an individual or small business consumer) in the resolution of consumer law disputes. The concerns that arise between these cohorts are ostensibly the same, so it should not matter who the complainant is. In WA, this would require the removal of the exclusion found in section 7(2) of the Fair Trading Act relating to people who carry on a trade or business. In addition to this, any broadening of a regulator's client base should be accompanied by a commensurate increase in their agency resourcing.

Thank you for the opportunity to provide feedback on this important issue. For more information on this submission, please contact Ms Darcy Bosch (Senior Policy and Advocacy Officer) on (08) 6552 3308 or darcy.bosch@smallbusiness.wa.gov.au.

Yours sincerely

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SMALL BUSINESS COMMISSIONER

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