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Garry Clements

Chairman

Consumer Affairs Australia and New Zealand

By email: ACLReview@treasury.gov.au

Dear Sir,

Review of Australian consumer law (ACL) by the CAANZ.

The following is a submission on the ACL review. I am a member of the SME Committee of the Business Law Committee of the Law Council of Australia and I do not propose to copy its submission.

I focus on other issues.

The ACL had its genesis in Part V of the Trade Practices Act 1974 and then developed into mirror Federal/State and Territory legislation in the 1980' s- based on Part V of the TPA.

The ACL commenced on 1 January 2011. It is a single generic consumer protection law that applies across Australia to a large degree NZ, its overall framework reflects what went before and in reality is the culmination of some 37 years of development. It is not new law and on the face of it is somewhat of a mish mash and that is because of its history.

The ACL is jointly administered and enforced by Federal, State and Territory consumer law regulators.

The current situation

ACL has generally worked well and has been a major achievement in a federal system and the NZ link.

ACCC has generally done a good job but there are other players such as ASIC and Fair Trading authorities. In addition, there are other consumer protection regimes, not just the ACL.

This submission

No doubt some submissions will focus on drafting issue and some fine detail. This submission focuses on some issues of principle.

I note that the Productivity Commission (PC) has recently been given a reference on the Administration and Enforcement of the ACL. Clearly that reference overlaps this review. Some of the issues raised in this submission are relevant to the PC Inquiry.

The following are some specific issues that impact on small business and consumers generally.

A. Coverage of the ACL

- Small business and guarantees. - small business transaction have a \$40,000 cap and some exemptions from guarantee rights such as exclusion of goods bought for resale or to be used up. This all harks back to an era where people could fully inspect and assess products. There is also the fact that there is a limit on damages in relation to small business purchases.
- Limitations on liability- some classes of businesses such as Australia Post, energy suppliers, airlines, insurance providers, architects have statutory limitations on their liability.
- Charities- the way most charities are structured means the ACL is unlikely to apply.

Possible action

There should be a comprehensive review of all exemptions or limitations of coverage or liability under the ACL as part of this review. Along the lines of the regulation review regime that was part of national competition policy, namely are the exemptions or limitation in the public interest or not?

In relation to consumer guarantees and small business.

- The \$40,000 cap is possibility ok for service only transaction but should be substantially higher for goods transactions or goods and service transactions.
- The exclusions in relation to products purchased for resale or to be used up in some production process by the small business should be repealed.
- The limitation on damages in relation to non-consumer transactions should be repealed.

B. Unfair contract terms

- UCT- the current b2b UCT was a "belt on" to the consumer provisions and whilst welcome there is a need to review and accommodate some commercial issues that do not arise in the consumer environment-
- There is also a concern where there is 'unfair' conduct within the framework of a contract but does not point to any specific unfair contract terms.

Possible action –

Changes to UCT law

- ***"The term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier";***

This is possibly onerous for small business as in many cases there may not be a "significant" imbalance, a simple imbalance should be enough.

Further the "legitimate interests" issue may be a hard test to meet by a plaintiff in a commercial context.

- ***"the law excludes the upfront price of the good or service";***

We do not understand why upfront price is excluded, it will cause loading of that price and issues that may be optional now, eg insurance, be loaded into the upfront price.

Critically in a commercial context the 'upfront price' should not be excluded in a renewal context as businesses will often be in a captive situation and can be gouged on the up front price.

Unfair conduct-

This issue is all the more important in the now common situations where a small business main competitor is also a major supplier. There is then a real incentive for unfair conduct by the supplier against the small business.

C. Enforcement

- Enforcement of remedies- whilst consumers can take action in small claim Tribunals it is hard to enforce orders where a respondent is recalcitrant.
- Remedies generally- there is still a huge void to resolving SB disputes short of going to a Court or Tribunal.
- Cross border sales- as all cross border sales involve a payment platform the linked credit provider concept already in the ACL can be extended to cover all such sales.

Possible action

The review assess how Tribunal orders are complied with and what to do if they are not complied with. One suggestion is that consumer affairs authorities be able to assist in the enforcement of orders where the successful applicant has tried but has been unsuccessful.

Cross border sales- the ACL be amended to make all payment platforms linked credit providers.

State and Territory consumer affairs authorities be able to resolve both consumer and small business complaints. In addition, local mediators be appointed by business and regulators to mediate disputes.

D.Other consumer protection regimes

- Holistic approach at national level- there should be joint jurisdiction between ACCC and other agencies having consumer type roles. In particular ASIC. AHPRA. Therapeutic goods etc.

Possible action

The ACCC as the pre-eminent consumer administrator should have co- jurisdiction with the other agencies.

Specifically, the financial services carve out in the CCA should be repealed and ASIC and ACCC both have the jurisdiction.

The ACCC and relevant agencies to enter into MOU's to facilitate proper administration.

E.A culture of compliance

- Standing behind your product- a major failing is that many businesses either through ignorance or deliberate action stonewall on consumer problems or buck pass- a failing of culture and a need of constant education by governments and industry associations. A major area is tradespeople and IT companies. It is all very well having the law but there must be a culture of compliance and satisfying customers. There are countless examples of this issue every day.

Possible action

Governments and business associations and educational bodies need to actively foster a culture of 'stand behind your product'.

More needs to be done to avoid disputes at the point of sale.

I would be happy to expand on this submission.

Yours truly,

Hank Spier