



INSTITUTE OF
**PUBLIC
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**Comments on
*Treasury Laws
Amendment
(Australian
Consumer Law
Review) Bill 2018*
Exposure Draft**

28 FEBRUARY 2018

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* (ACL Bill) and related Regulations. The ACL Bill proposes amendments to the *Australian Securities and Investments Commission Act 2001* and the *Competition and Consumer Act 2010* following release of the *Australian Consumer Law Review Final Report* in March 2017.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The IPA's submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou on 0419 942 733 or vicki.stylianou@publicaccountants.org.au.

Yours faithfully



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IPA Submission

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Exposure Draft – Australian Consumer Law

The Institute of Public Accountants (IPA) welcomes the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* (ACL Bill) and related Regulations. The ACL Bill proposes amendments to the *Australian Securities and Investments Commission Act 2001* and the *Competition and Consumer Act 2010* (CCA) following release of the *Australian Consumer Law Review Final Report* (the ACL Review Final Report) in March 2017.

The IPA does not have any comments on the specific detail of the amendments proposed. Instead, the IPA wishes to raise a number of policy considerations that need to be addressed alongside the proposed amendments.

Private damages actions

The ACL Bill proposes a change that will allow a party bringing a private action for breach of the ACL provisions to rely on both *admissions* of fact, as well as *findings* of fact, in subsequent proceedings. This is consistent with the change made by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* in relation to private actions for breach of the competition law provisions (section 83 CCA).

The IPA is supportive of this change, however, in isolation, it will not be sufficient to address issues relating to access to justice for breaches of the ACL.

The ACL Review Final Report recognised “... the difficulty that consumers and small businesses face in accessing remedies”¹. Unfortunately, as “[m]any of the issues relate to evidentiary rules and broader processes in civil justice systems” CAANZ considered them to be “beyond the scope of the consumer law and this review process”². The IPA believes significant work needs to be done in this area to improve access to justice for small business.

The issue of access to justice has been raised in a number of other reviews, including:

- a. *Competition Policy Review Final Report* (2015) (Harper Report) in relation to competition law breaches:

¹ Commonwealth of Australia, *Australian Consumer Law Review Final Report*, 2017, p 80, available at <http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/final-report/>

² Id.

“Access to remedies has been a roadblock for many small businesses, and the Panel finds that access should be improved”³; and

- b. Productivity Commission Report into *Access to Justice Arrangements* (2014) in relation to legal disputes generally.

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has recently launched an inquiry into access to justice issues for small business (see <http://www.asbfeo.gov.au/justice-for-small-business>).

A number of avenues should be available to help small business access justice. For example, the Productivity Commission recognised that parties may have access to “community legal education, legal information (including self-help kits) and minor advice” to help resolve disputes privately⁴. Small business commissioners and other ombudsmen (at State and Federal levels) also have a role to play in offering alternative dispute resolution (ADR) solutions. The Harper Report recommended:

“Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.”⁵

However, not all disputes are able to be resolved in this way.

Where a small business is not able to resolve its ACL dispute, it may:

- a. lodge a complaint with the Australian Competition and Consumer Commission (ACCC) (or relevant State fair trading office);
- b. bring a private action for damages under section 236 ACL; or
- c. join a representative (collective) action.

Each of these options present their own challenges.

Complaints to the ACCC (or relevant State fair trading office)

The ACCC is empowered to take action in the public interest. In 2017, the ACCC received more than 3400 consumer law complaints from small businesses⁶. Given the volume of complaints and the obligation to take action in the public interest, not all small businesses who lodged a complaint will have had it addressed by the ACCC. Thus, there needs to be other solutions available to small business.

The State fair trading offices also have jurisdiction in relation to the ACL but their jurisdiction is limited to assisting with conciliation, without the ability to make a decision⁷. A complaint lodged with a State body is also likely to face similar resourcing issues. For example, the

³ Commonwealth of Australia, *Competition Policy Review Final Report* (Harper Report), 2015, p 30

⁴ Productivity Commission, *Access to Justice Arrangements*, 2014, p 2

⁵ Commonwealth of Australia, *Competition Policy Review Final Report* (Harper Report), 2015, Recommendation 53, p 85

⁶ ACCC, *Small Business in focus*, July to December 2017

⁷ See for example the NSW Office of Fair Trading website that explains its approach to a complaint

http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_services/Resolving_issues/General_complaint_handling_page? and Consumer Affairs Victoria which describes one of its services as “assistance to conciliate a dispute with a business or landlord”

(<https://www.consumer.vic.gov.au/about-us/services-we-provide>). The Queensland Office of Fair Trading states “We cannot make judgements like a Court ... [or] force a business to compensate you or rectify a problem” (<https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/make-a-consumer-complaint/understand-the-complaint-process>)

Queensland Office of Fair Trading website states clearly: “We can’t always act on every complaint ...”⁸.

Private actions for damages

Although a small business may bring a private action for damages for breach of the ACL (section 236), such actions are likely to be out of the reach of most small businesses due to the time, cost and delay involved.

In the context of competition law breaches, the Harper Report found:

“From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws. A private action would be beyond the means of many small businesses. In some cases, a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship”.⁹

The same situation is likely to arise in relation to ACL breaches.

Representative actions for damages

Representative actions for damages may be commenced in the Federal Court of Australia provided at least 7 members of a group have a common issue (section 33C *Federal Court of Australia Act 1976*). This provides a potentially attractive avenue to obtain justice for small businesses who have suffered as a result of a common breach.

In a study of 25 years of class actions completed in 2017, Morabito found that 9.1% of representative claims were in relation to consumer protection issues¹⁰. This is more promising than the number commenced in relation to competition law breaches (only 0.9%). However, small businesses are also likely to face hurdles in bringing a representative action:

- a. **Evidence of the breach.** Although potentially easier than in relation to a competition law breach (where cartels are usually highly secretive), a small business may struggle to gather and collate the necessary evidence of an ACL breach without the investigatory powers of the ACCC. This makes ‘follow-on actions’ (those commenced following a successful action by the ACCC) more likely to be successful for small businesses.
- b. **Finding a ‘representative’.** One of the small businesses will need to act as the ‘representative’ as section 33D of the *Federal Court of Australia Act 1976* requires the representative to have standing to bring the claim. This raises two issues:
 - i. The risk of conflict between the small business who is the representative (controlling the litigation) and the small businesses being represented; and
 - ii. No small business wishing to act as a representative because of the risk of exposure to substantial legal costs¹¹.

⁸ <https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/make-a-consumer-complaint/understand-the-complaint-process>

⁹ Commonwealth of Australia, *Competition Policy Review Final Report* (Harper Report), 2015, p 470

¹⁰ Morabito, Vince (2017b). *An Empirical Study of Australia’s Class Action Regimes – Fifth Report, The First Twenty Five Years of Class Actions in Australia*. Available at SSRN: <https://ssrn.com/abstract=3005901> or <http://dx.doi.org/10.2139/ssrn.3005901>

¹¹ Emmerig, J and M. Legg (2017), “Twenty-Five Years of Australian Class Actions – Time for Reform”, 36 *Civil Justice Quarterly* 164

A debate needs to be commenced regarding reform of the representative proceedings to make them more accessible to small businesses.

Other potential solutions

There are a range of other potential solutions that could be considered to provide better redress for small businesses who have suffered loss or damage as a result of an ACL breach:

a. Court based solutions:

- i. Increased monetary jurisdiction of the small claims tribunals. Although Victoria currently has an unlimited monetary jurisdiction, many of the limits in the small claims tribunals in other States and Territories are low for the types of disputes a small business may want resolved.
- ii. Fast track procedures to resolve simple, low value ACL disputes.
- iii. Online ADR and court systems, similar to those being introduced in overseas jurisdictions¹².
- iv. Increased penalties for breaches of the ACL which will act as a greater deterrent to those considering practices that infringe the law. The IPA notes the *Treasury Laws Amendment (2018 Measures No. 3) Bill 2018* currently before Parliament which proposes an increase in the penalties that can be awarded by the courts for breaches of the ACL to match those proscribed for breaches of the competition law provisions. This is a step in the right direction but depends on the courts also being prepared to order higher penalties.

b. Non-court based solutions:

- i. Increase in available information which would enable small businesses to better understand their rights and obligations, and potentially enable disputes to be resolved at an earlier stage.

The Productivity Commission recognised that a lot of material is available, however, “better coordination and greater quality control in the development and delivery of these services would improve their value and reach”¹³.

- ii. Compensation schemes such as the one agreed to be implemented as part of the section 87B enforceable undertaking provided in the *Coles* unconscionable conduct case. Coles undertook to appoint an independent arbiter (Jeff Kennett) to review its conduct vis-à-vis the suppliers in question and assess whether they were entitled to any refunds. This was recognised by the court as “an important part of the resolution of this proceeding”¹⁴.

Further detail on these potential solutions can be provided, on request.

¹² Legg, Michael (2016). “The Future of Dispute Resolution: Online ADR and Online Courts”, [2016] University of New South Wales Law Research Series 71

¹³ Productivity Commission, *Access to Justice Arrangements*, 2014, p 2

¹⁴ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at para 123

Unconscionable conduct

The IPA is supportive of the extension of the unconscionable conduct provisions to publicly listed companies and agrees with the rationale of the ACL Review Final Report that public listing does not always equate to equal bargaining power.

The IPA also agrees that CAANZ should examine in more detail, the potential need for a general prohibition against ‘unfair trading practices’:

“Noting the evidence of persistent unfair business practices, CAANZ is committed to investigating further whether a prohibition of unfair trading would provide additional protections beyond those currently in the ACL, and how it could be implemented in Australia.”¹⁵

The IPA is aware of practices frequently used by stronger market players in negotiations with small businesses that are unfair. Examples commonly arise in relation to shopping centres where small business owners are often in a weaker bargaining position when negotiating leases and lease renewals with shopping centre owners. A small business owner may only be offered a renewal at a significantly increased rental or may be required to ‘relocate’ within the shopping centre with all fitout expenses to be paid by the tenant. These costs can be in the hundreds of thousands of dollars and may lead to the small business being unable to renew the lease. It is difficult for small business to understand whether conduct is ‘unconscionable’ in these circumstances, especially given that there is “some uncertainty in how the provisions will apply, and whether particular conduct is unconscionable according to the principles used by the courts” (ACL Review Final Report, p 49). Commencing an action for unconscionable conduct is likely to be out of the reach of most small business owners in any case. The simpler unfair contract terms protections are often not applicable as the leases are not ‘standard form contracts’.

Other examples commonly arise in the banking sector. The ASBFEO *Inquiry into small business lending* provides excellent examples of small business owners being treated unfairly by the banks, for example in relation to the initial mortgage terms, loan rollovers and in circumstances of (technical) default (see http://www.asbfeo.gov.au/sites/default/files/030217-ASBFEO_Report.pdf). ASBFEO called for the banks to introduce standard form contracts for small businesses, which would then benefit from the unfair contract terms protections.

In a submission to the Competition Policy Review in 2014, the IPA identified a range of unfair price situations that did not have the protection of either the unconscionable conduct or unfair contract terms (as then in force):

- a. when goods or services are in short supply as a result of supplies being disrupted by a natural disaster or strike;
- b. when alternative supplies of goods or services are not available to a particular business, at all or within a reasonable time, and advantage is taken of a business’s urgent need for them;
- c. when a supplier has only one significant customer who uses its monopsony power to force that business to accept an unfair selling price, or contribute to the (dominant) customer’s retail marketing efforts;

¹⁵ Commonwealth of Australia, *Australian Consumer Law Review Final Report*, 2015, p 51

- d. when advantage is taken of a business's inability to obtain supply elsewhere to extract an additional payment in respect of past supplies; and
- e. when advantage is taken of an existing tenant's investment in good will or fit-out when negotiating a renewal of the tenant's lease.

In its 2014 submission, the IPA recommended amending the unconscionable conduct and unfair contract term provisions to make it clear that "it is unconscionable conduct for a firm to use its superior bargaining power to force a customer (or supplier) to accept an unfair price and to make void a contractual term specifying an unfair price"¹⁶. It was suggested this could be achieved by:

- (i) including 'price' in the list of matters to which the court may have regard under section 22 ACL (unconscionable conduct);
- (ii) deleting section 26(1)(b) (unfair contract terms).

To date, these submissions have not been accepted by government. The IPA requests that the circumstance outlined above be taken into consideration by CAANZ when considering the need for a general 'unfair trading practices' prohibition.

It will also be important that the ACCC utilise the new section 46 to prosecute those employing exploitative behaviours (such as excessive pricing) against small businesses.

Unfair contract terms

The IPA is supportive of the extension of the ACCC's investigative powers to assess unfair contract terms. The extension of the unfair contract term provisions to small business contracts was supported by the IPA and it is essential that the ACCC have adequate powers to investigate potentially unfair contract terms.

However, as noted above, the IPA is of the view that many unfair business practices fall outside the unfair contract term provisions because the relevant contracts are not 'standard form'. For this reason, the IPA is supportive of the CAANZ proposal to consider whether a general prohibition against 'unfair trading practices' is necessary in Australian law which will hopefully go some way to addressing the current 'gaps' in small business contract protection.

Consumer protection provisions

The Bill makes a number of proposed changes to strengthen consumer protection in relation to consumer guarantees, product safety, voluntary recalls, unsolicited consumer agreements and false billing.

The IPA is generally supportive of the strengthening of these consumer protections. As has been recognised, many small businesses are in the same position as consumers vis-à-vis their understanding of their legal rights and obligations and their ability to enforce those rights:

"Businesses, and particularly small businesses, should have similar protections to consumers under the ACL in most circumstances as they often behave like individual consumers and may lack the time and resources to assert their consumer rights."¹⁷

¹⁶ IPA, *Submission to Competition Policy Review*, June 2014, p 4

¹⁷ Commonwealth of Australia, *Australian Consumer Law Review Final Report*, 2015, p 10

To make these provisions work effectively for small business, the ACL Review proposal to increase the monetary threshold in the definition of 'consumer' from \$40,000 to \$100,000 (Proposal 15) must be implemented. The Ministers for Consumer Affairs have asked for a regulatory impact assessment to be completed on this proposal to inform future decision making¹⁸. It is hoped that this indicates an intention to introduce this amendment sooner rather than later.

It is likely that many small businesses will also need to comply with the amended provisions, as they are often the suppliers of the goods or services to the 'consumer'. It will be necessary for government and/or the ACCC to inform small business of these changes in a simple, non-technical way. This will assist with compliance by small business.

¹⁸ Legislative and Governance Forum on Consumer Affairs, *Joint Communique of Meeting of Ministers for Consumer Affairs*, Melbourne, Victoria, 31 August 2017