



Australian  
Competition &  
Consumer  
Commission

## Credit Cards, Contracts & Company Hijackings

Dr Michael Schaper FIPA  
ACCC Deputy Chair  
IPA WA Congress  
May 2016

### Outline



Excessive card surcharges



Unfair contract terms



Business scams

## The ACCC: What We Do

- National regulator: oversees laws on consumer protection, equitable competition, product safety, infrastructure access
- Also regulates some specific industries (such as energy, telecommunications), industry codes (franchising, horticulture) and price monitoring (airports, postage, stevedoring)
- An independent statutory agency within the Treasury portfolio
- Dual educative and enforcement function
- Enforcement agency...does not set policy

## Legal Framework

- Principal legislation: **Competition & Consumer Act 2010** (previously known as *Trade Practices Act 1974*). Includes the **Australian Consumer Law**
- Laws apply across the country
- Apply to all activities “in trade or commerce” – **legal structure is usually irrelevant**
- Covers **both goods and services**
- Activities of government often exempt
- ACCC cannot impose penalties: **court-based litigation** (but can issue infringement notices)

# 1. Card Payments in Context



“Each month, around \$45 billion of purchases are processed through more than half a billion card transactions,” Alex Hawke MP

“MasterCard has estimated the cost of surcharging to Australian consumers to be in the vicinity of \$800 million per annum,” Submission to the Financial System Inquiry.

Between January 2015 and February 2016 the ACCC received more than 200 complaints and enquiries about payment surcharging

## New Law Banning Excessive Payment Surcharges



In February 2016, the Competition and Consumer Amendment (Payment Surcharges) Act 2016 became law.

The legislation inserted a new part into the Act banning excessive payment surcharges and provided new powers for the ACCC.

A surcharge will be excessive if it exceeds the permitted cost of acceptance. The costs included in the permitted cost will be defined in a Reserve Bank of Australia standard.

The ban will not come into effect until the RBA standard goes live. The RBA has sought stakeholder views on a draft standard. There is no firm date for publication of the standard.

## How Will the Ban Work?



Reserve Bank of Australia standard will define permitted costs that can be included in a surcharge



Banks will provide information to merchants on cost of acceptance



Merchants must ensure the surcharge applied is not excessive



Consumers who feel they have been charged an excessive surcharge can complain to the ACCC

## What Powers Will the ACCC Have To Enforce the Ban?

Surcharge information notices

Infringement notices

Court penalties up to \$1,164,780

Court ordered injunctions

Court ordered consumer redress

## 2. Unfair Contract Term Laws



Protect both consumers and small businesses from unfair terms where they have little or no opportunity to negotiate



Unfair contract terms laws have applied to standard form consumer contracts since July 2010



In November 2015, Parliament extended protections to cover small businesses contracts from 12 November 2016

## What's An Unfair Contract Term?

Standard form contracts cannot contain terms that:

cause a significant imbalance in rights

are not reasonably necessary to protect the business's interests, and

cause any detriment to the consumer or small business



A court or tribunal looks at transparency and the contract as a whole before deeming a term unfair.



Unfair term is void (treated as though it never existed), however the rest of contract will continue to bind.



Terms that set out the price are not covered by the UCT law.

## Why Do Small Businesses Need Protection?



On average small businesses were offered about 8 standard form contracts in the past 12 months



Small businesses less likely to thoroughly review the contract...too complicated and they lack legal expertise



30% of small businesses spend less than 9 minutes reviewing standard form contracts



60% of small businesses claimed to have experienced unfairness in terms and conditions



44% of small businesses reported experiencing some harm as a result of the unfair terms

Source: The Commonwealth Treasury, on behalf of CAANZ, undertook a survey from 23 May 2014 to 1 August 2014 on business contracting practices and unfair contract terms.

## Consumer Example: ACCC v Chrisco Hampers

In 2015, the Federal Court found that Chrisco included an unfair contract term in 2014 lay-by agreements relating to the 'HeadStart Plan'

How does a **HeadStart Plan** work? Your direct Debit payments will continue until your order is fully paid (no later than **24th October 2014**). After the 24th October 2014, a **HeadStart Plan** will be created for you and payments will continue accordingly. A **HeadStart Plan** will be created for you and payments towards next year's order, while giving you time to decide exactly what products you want.

- The term allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by order
- Consumers were required to 'opt out' to avoid having further payments automatically deducted

## Consumer Example: ACCC v Europcar Australia

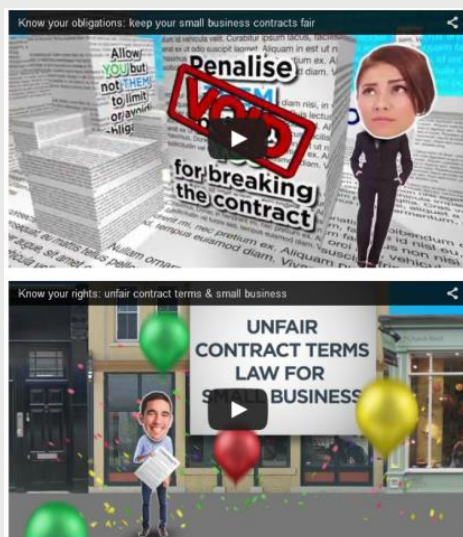
The ACCC instituted court proceedings against CLA Trading Pty Ltd trading as Europcar Australia.



The Court found various terms in Europcar's rental agreement were unfair because they held consumers liable for vehicle loss or damage regardless of whether the consumer was at fault...

- The Federal Court declared that terms in Europcar Australia's 2013 standard rental agreement to be unfair, and therefore void.
- Europcar was ordered to pay a penalty of \$100,000 for making false or misleading representations about consumers' liability in the event of vehicle damage.

## Unfair Contract Terms Law for Small Business: Know Your Rights



## How Do The Small Business Laws Apply?



Applies to standard form contracts



One of the parties to contract has less than 20 employees



Upfront price is less than \$300,000 (\$1 million for multi-year contracts)

Laws enforced by ASIC (financial products and services) and ACCC and state/territory ACL regulators (every-day goods and services)

## Time To Get Ready...



New law applies to standard form small business contracts entered into or renewed from **12 November 2016**



Some industries of focus: advertising, telcos, franchising, retail leases



Compliance focus also covers independent contracting, IT consultants, engineers, architects



## Small Business Scenarios

### Contract for internet services

Under a term of the contract, the internet service provider has the right to change its prices or services at any time without prior notice to the small business.

The small business does not have the right to end the contract, even if the internet service provider increases the price significantly.

### Contract with an advertising company

Despite the 12 month contract, a term has the effect of automatically renewing the contract for a further year, unless the small business gives written 6 months notice.

The small business must pay a large fee if it wishes to terminate the contract early.

### Other terms that may raise concern

Right to unilaterally vary the contract

Automatic rollover

Limited liability

Terminate franchise agreement with no cause

Liquidated damages

Wide indemnity

## Unfair Contracts Law - Financial Services

Applies to (standard form) contracts for business loans, credit cards, client/broker agreements

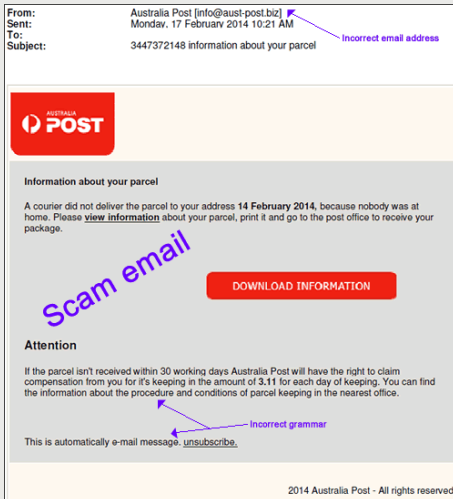
...and to SB contracts covered by Code of Banking Practice and Customer-Owned Banking Code of Practice

Does not cover insurance contracts

The upfront price criterion (\$300,000/\$1 million) does not include any interest payable or contingency fees/charges

i.e. if a SB takes a bank loan of \$950,000 over 25 years, interest rate 10% and late fees \$50 per incident, it will be covered by the new law

## 3. Ransomware Scams



Ransomware freezes your computer and demands a ransom to regain access

Even if you pay the ransom, there is no guarantee that your computer will be unlocked

In 2015, the ACCC received more than 4,400 reports about ransomware and malware scams with more than \$388,000 reported lost

Ransomware comes in many guises such as Australia Post failed parcel deliveries or alleged AFP fines for speeding

Don't follow links or download files from suspicious emails (especially .exe or zip files)

Back-up your computer on a stand-alone hard drive, so you can restore factory settings and re-install your data

## Business Email Compromise Scams

### "I'm a scam": How it works

Scammer gets access to company's email system via virus or phishing attack

Scammer sends email from 'the boss' advising a financial officer of an urgent \$ transfer

Scammer pressures the officer to quickly wire \$ to strike a major deal

Money sent is lost for good

### Protect your business

Install and update security software

Advise payments staff to be suspicious of requests for secrecy to transfer money

Put in place sound financial security procedures including a two-step verification process for wire transfer payments

## Where Else Can I Take Disputes?

Many contractual disputes are outside the ACCC's ambit, franchisees and small businesses can consider the use of alternate dispute resolution.

Office of the Franchising Mediation Adviser

• [www.franchisingmediationadviser.com.au](http://www.franchisingmediationadviser.com.au)

National Small Business & Family Enterprise Ombudsman

• [www.asbfeo.gov.au](http://www.asbfeo.gov.au)

New South Wales Small Business Commissioner

• [www.smallbusiness.nsw.gov.au](http://www.smallbusiness.nsw.gov.au)

South Australian Small Business Commissioner

• [www.sasbc.sa.gov.au](http://www.sasbc.sa.gov.au)

Victorian Small Business Commissioner

• [www.sbc.vic.gov.au](http://www.sbc.vic.gov.au)

Western Australian Small Business Commissioner

• [www.smallbusiness.wa.gov.au](http://www.smallbusiness.wa.gov.au)

Australian Securities & Investments Commission

• [www.asic.gov.au](http://www.asic.gov.au)

## 4. ACCC Small Business Contacts



**Small business helpline**

**1300 302 021**



**[www.accc.gov.au/smallbusiness](http://www.accc.gov.au/smallbusiness)**



**Small Business Info Network**

Sign up at [www.accc.gov.au/sbin](http://www.accc.gov.au/sbin)



**Free Online Training Programs**

[www.ccaeducationprograms.org](http://www.ccaeducationprograms.org)

***Small Business in Focus***

