Consultation Paper: Extending Unfair contract term Protections to Small Businesses

Submission by the Victorian Small Business Commissioner

1. Background: the role of the Victorian Small Business Commissioner (VSBC)

The VSBC was established in 2003 as an independent statutory body to provide, *inter alia*, quick, low cost dispute resolution services to businesses in dispute with another business or government. The predominant policy rationale behind the establishment of the VSBC was to assist businesses resolve disputes quickly and pragmatically, avoiding the cost, distraction and other adverse impacts of litigation and 'getting businesses back to business'. Quick resolution of disputes is far more likely to enable a business relationship to continue successfully, compared with adversarial litigation. As such, the VSBC role is a key contributor to business productivity.

Since 2003 more than 13,000 applications for assistance with business disputes have been received by the VSBC. Ninety-eight per cent of disputes are business-to-business disputes. Trend growth in applications is around 6 per cent per annum.

The predominant form of dispute resolution provided by the VSBC is mediation, and a mediation settlement rate of around 80% has been consistently achieved since establishment. Some 20 to 30 per cent of disputes are resolved prior to mediation through early engagement with the parties by VSBC staff.

The VSBC provides dispute resolution services under five pieces of Victorian legislation:

- *Small Business Commissioner Act* 2003 ('SBC Act')
- *Retail Leases Act* 2003 ('RL Act')
- *Owner Drivers and Forestry Contractors Act* 2005 ('ODFC Act')
- *Farm Debt Mediation Act* 2011 ('FDM Act')
- *Transport (Transport and Miscellaneous) Act 1983* ('Taxi Act')[1]

There is no definition of 'small business' in any of the five Acts; the VSBC does not assess the size of a business to determine eligibility for access to the services.

Obligations, incentives to participate and procedures differ somewhat between the dispute resolution functions in these five Acts, although a mediation service is common. The VSBC has no powers to compel a party to participate with the Office under any legislation, although different Acts provide encouragement to participate: a party refusing to engage in a dispute under the RL Act or the ODFC Act may have a costs order made against it at VCAT;

[1] From 30 June 2014

a party unreasonably refusing to engage under the SBC Act may be named in the VSBC Annual Report to Parliament; a creditor refusing to engage under the FDM Act cannot take enforcement action against a farmer, while a farmer refusing to engage under the FDM Act enables a creditor to directly proceed with enforcement action.

In all cases, a certificate issued by the VSBC can be used by a party in VCAT or in a Court.

The number and proportion of dispute applications received by the VSBC under each of the five Acts in 2013-14 is shown in Table 1.

TABLE 1: 2013-14 dispute applications by Act*

RL Act	911	61.6%
SBC Act	396	26.8%
ODFC Act	45	3.1%
FDM Act	126	8.5%
Taxi Act**	0	0%
TOTAL	**1,478**	**100%**

* The VSBC receives other types of applications which are not 'disputes'.

**Commenced 30 June 2014.

The amounts in dispute vary from a few hundred dollars to many millions of dollars. The median amount in dispute is around $10,000, and the mean over $100,000.

All disputes handled by the VSBC relate to some form of contract – whether standard form, customised, or oral – and range from complex, legally prepared documents through to handwritten quotes with few if any terms and conditions.

While the VSBC does not have an explicit policy advocacy role under any of its Acts, the experience of dealing with thousands of contractual disputes between businesses (and business to government) can provide useful input to the policy issues raised in the Consultation Paper.

2. Experience with 'unfair' contract terms in disputes

The VSBC has received an estimated 30 – 40 disputes in the past 12-18 months under the SBC Act concerning contractual terms which, if in standard form consumer contracts, would likely be considered unfair and therefore void under the Australian Consumer Law (ACL).

In two instances, the VSBC has received more than ten complaints, on similar bases, with the same business over a number of years. In the context of disputes received by the VSBC,

such numbers are rare. In other instances, there may be one or two disputes with the one business.

Disputes have related to sectors including waste management, online advertising, serviced offices, onsite advertising, leased equipment (equipment, services and financing), print advertising and online search optimisation.

As with most dispute resolution services, it is likely that for every one dispute lodged with the VSBC, there are many times more disputes arising, but not escalated – either because the aggrieved business is not aware of the potential to refer the dispute, or is convinced by the supplier (or its own legal adviser) that the contract terms are legally binding and to pursue the matter is going to cost more than the potential relief sought.

In a number of instances, the complainant asserts that representations were given by the salesperson at the time of contract execution, contrary to what subsequently occurred. Invariably no variation was made to the contract to reflect the alleged representations.

In other instances, where sales were effected over the phone, the complainant was asked to confirm (recorded) that it agreed to comply with the supplier's terms and conditions, without seeing them or having all of them read out, only to discover unpalatable terms when the contract arrived in the mail.

In almost all instances, the font size of the terms and conditions are tiny, making reading the terms difficult. Further, the layout of the terms can actively mitigate against reading and comprehension, for example where no headings are used, sentences are long and legalistic, and paragraphs non-existent.

Attachment 1 to this submission is a speech by the VSBC to the Victorian Waste Management Association in May 2014. Pages 4-8 refer directly to the question of 'unfair' terms in business contracts. It lists many examples of contract terms in waste management contracts received by the VSBC which are, or are likely to be 'unfair' if in consumer contracts. Such terms are common in contracts in other sectors seen by the VSBC. As the paper argues, currently these terms are not illegal under Australian Competition and Consumer Law (unless breaching the high thresholds of misrepresentation, misleading / deceptive conduct or unconscionability), but are not consistent with building and maintaining successful business relationships with customers. The 'rolling' nature of many of the contracts for 2 or 3 years, with costly termination clauses, are designed to lock the customer in to services they may no longer want, particularly when terms or prices have been unilaterally changed. Apart from anything else, these clauses locking in the customer for lengthy periods work against a competitive market.

The use of these terms in the waste management sector appears to be widespread. The VSBC has received a number of complaints against six providers in this sector, large and small. It is likely that, when an employee of a larger provider decides to leave to start their own contracting business, they use the key components of contract terms used by others in the industry, perpetuating the spread of such terms throughout the sector.

While competition principles may suggest that a supplier could offer 'fair' contract terms as a point of differentiation in the market, it would appear that this has not happened to date in this sector, presumably as the benefits to suppliers of the 'unfair' terms exceed any potential benefit a single operator may gain from offering more equitable terms.

The provisions of Section 185 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic) provide the Victorian Civil and Administrative Tribunal (VCAT) with the power to make any order it considers fair, including declaring any unjust term void or otherwise varying a contract to avoid injustice for business to business contracts where the amount in dispute does not exceed $10,000. This is not limited to 'standard form' contracts. This provision first appeared in the *Fair Trading Act* 1999 (Vic) as section 109. VCAT must consider a range of factors before making such a determination. Despite this, the contract terms seen by the VSBC in the waste management sector and other sectors continue to offer terms which would appear to be unfair if in consumer contracts, and potentially unjust in business contracts.

The VSBC understands that other State Fair Trading Acts do not include provisions such as s.185.

In dealing with these disputes, which typically relate to amounts in the thousands of dollars rather than the tens of thousands of dollars, the legality of the terms and the contract under the ACL can make it difficult to resolve the dispute. The 'unjust' provisions of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic) do not appear to be influential in encouraging suppliers to amend their contract terms. The requirement (and the cost) for a purchaser to take an action at VCAT to possibly have a term of a contract deemed 'unjust' and void mitigates against such action, particularly for amounts of a few hundred or thousand dollars. The apparent breadth of the Tribunal's powers under s.185 has also been questioned. [2]

If the supplier views customers as 'transactional' rather than looking to build long term successful business relationships with the purchaser, there is little incentive for the supplier to settle these dispute through ADR – particularly if the contract also indemnifies the supplier's legal costs arising from a dispute. Nonetheless, the VSBC has been able to resolve many of these disputes.

3. General position on the extension of unfair term protections to small business

The VSBC supports in principle the extension of unfair contract term protections under the ACL to businesses purchasing goods or services on standard form contracts. This would provide a consistent Australia-wide set of protections for business purchasers.

The basis for this position is that 'unfair' terms in contracts lead to disputes, and do not support the development or maintenance of successful long term relationships between businesses. Nor do they support a competitive marketplace when they are industry-wide, as there is little incentive for an individual business to take a different position. Even when

[2] Christ Church Grammar School v. Bosnich & Anor [2010] VSC 476.

not industry-wide, these terms serve the purpose of locking a customer in to a supplier for a period. The supplier does not expect the customer to be a long term customer, and exploits the legality of these terms under the ACL to benefit at the expense of the customer. Provided enough prospective customers sign the contract, either not reading or understanding the terms or being assured orally that they wouldn't be activated, the supplier can continue to offer such terms regardless of whether others in the industry do so or not.

In 2007 the VSBC commissioned research to identify key characteristics or behaviours for forming and maintaining successful business relationships[3]. Seven essential behaviours were identified and agreed by leading businesses and associations. One of these was 'Commitment' – to treat every relationship (transaction) as a long term relationship based on trust.

From VSBC experience with disputes, contract terms in standard form contracts are rarely read, understood or (if understood), remembered by the purchaser when terms need to be acted upon. While it is accepted that the legal position is that a party signing a contract is taken to have read and understood the contract, in practice this is often not the case. The form /layout and font size of terms can also often be very difficult to read easily.

The VSBC experience is that many small and medium businesses have disputes caused by such terms, and not just the 'unsophisticated' small business. The legality of these terms under the ACL and the amounts in dispute mitigate against legal action, and the terms either lock the purchaser into unwanted services for a long period or expose the purchaser to costs (allegedly reflecting damages incurred by the supplier) for early termination.

Consumer unfair terms under the ACL (and the Victorian *Fair Trading Act* prior to 2011) have been clearly identified in a number of Tribunal and Court cases (refer citations in Attachment 1). The VSBC considers that such terms in standard form business contracts are equally unfair, but currently are not illegal and therefore not void under the ACL. The VSBC sees no benefit in unfair terms in standard form business contracts, legally or illegally, as such terms are not consistent with building and maintaining successful business relationships, and lead to business disputes.

The VSBC is unaware of any VCAT outcomes arising from the application of s.185 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic) in regard to a business-to-business dispute[4].

The question of whether unfair contract term protections should extend to some but not all businesses as purchasers of goods or services via standard form contracts implies the acceptability of a supplier offering some businesses contract terms that are 'fair' and other

[3] The report is available at http://www.vsbc.vic.gov.au/media-and-publications/forming-and-maintaining-winning-business-relationships

[4] A VCAT decision (Law v. MCI Technologies 2006 VCAT) under the Fair Trading Act 1999 (Vic) relating to s.109 (which is the precursor to the current s.185 of the Australian Consumer Law and Fair Trading Act 2012 (Vic)) relates to a business-to-consumer dispute. However, see Christ Church Grammar School v. Bosnich VSC 2010 for a rebuttal of the breadth of this provision.

businesses contract terms that are 'unfair', for provision of the same service. It is difficult to rationalise such duality.

The issue of what constitutes a 'standard form' contract also needs consideration. Many contracts, whether business-to-consumer or business-to-business, include some form of discussion or negotiation between the parties to finalise specific characteristics of the contract. In rental contracts this includes agreeing the starting rent, any rent-free period, the number and duration of options, and so on. In franchise agreements this includes selection of service or product 'tiers' and associated costs, the levels of training and supplies provided, the location of the site or breadth of region, and so on. In gym membership contracts it is the selection of frequency of visit and type of services accessible. Such variation does not move these contracts away from being standard form contracts. It is the terms and conditions of a contract, rather than the description of the goods/services and price, that determine whether the contracts is standard form.

Franchise Agreements

While in principle the VSBC supports extension of unfair contract term protections to all businesses as purchasers via standard form contracts, the nature of a franchising agreement is such as to warrant special consideration, particularly in light of the recent review of the Franchising Code of Conduct.

By definition a franchise agreement specifies a range of contractual rights of a franchisor to direct the activities and conduct of a franchisee. These can include:

- The right to change aspects of the agreement at the discretion of the franchisor;
- Agreed prior estimate of costs incurred by the franchisor and other damages in the event of franchisee default;
- The jurisdiction in which any legal action must be taken;
- Different rights of franchisee and franchisor to terminate the agreement.

The three criteria to be satisfied for a term to be considered unfair under the ACL are:

- It causes a significant imbalance in the parties' rights and obligations under the contract;
- It is not reasonably necessary to protect the legitimate interest of a party to the contract (and the party who would be advantaged has the onus of proof that the term is reasonably necessary); and
- It causes detriment to a party to the contract if applied.

Arguably, franchise agreements by their nature cause a significant imbalance in parties' rights and obligations under the contract, and in many cases terms in the agreement would cause detriment to a party (i.e. the franchisee) if the term was applied. The key criteria to consider, therefore, is whether a term in a franchise agreement is 'reasonably necessary' to protect the legitimate interests of the franchisor.

A franchisor will typically argue that all terms are reasonably necessary to protect its interests in the franchise system; otherwise it will not offer the franchise opportunity. If the ACL unfair term protections applied to franchise agreements, it is likely that (a) there would be a number of Court cases requiring a franchisor to demonstrate that terms in an agreement are reasonably necessary to protect its interests[5]; and (b) there would be a reduction in the number of new franchise systems and new franchise offers made available in the market.

The recently proposed changes to the ACL and the Franchising Code go some way to addressing some of these issues. Improved disclosure should increase understanding by aspiring franchisees of what they are buying; ensuring any legal action takes place in the jurisdiction of the franchisee addresses one unfair consumer term identified in past cases; as does making void the attribution of legal costs by the franchisor to the franchisee arising from pursing dispute resolution provisions of the agreement. Requiring a franchisor to demonstrate the business case for large expenditures by franchisees softens one of the common 'unilateral variation' clauses in franchise agreements.

While it is considered there may be some types of clauses in franchising agreements which should be subject to unfair contract term provisions, given that proposed changes to the Franchising Code have only recently been finalised and are yet to be implemented, it is considered appropriate not to extend unfair contract term protections to franchising agreements at this time. Rather, it is proposed that the changes are given time to have an effect. It would be appropriate to consider the extension of unfair contract terms protections to franchise agreement at the time the Code is next scheduled for review.

Retail leases

Retail leases are subject to State and Territory laws in Australia. The majority of retail leases in Victoria are based on standard form contracts provided by either the Law Institute of Victoria (LIV) or the Real Estate Institute of Victoria (REIV).

The *Retail Leases Act 2003* (Vic) provides a balance of rights and obligations of landlord and business tenant. As such, it could be said that it seeks to ensure the contractual relationship between the parties is 'fair'. Commercial leases for non-retail premises are not subject to specific legislation.

Both retail and non-retail commercial leases may be in standard or non-standard form. The LIV and REIV standard form lease is drafted to be suitable for either retail or non-retail premises, with provisions often qualified by the term 'Unless the Retail Leases Act applies…..'.

While it could be argued that the *Retail Leases Act* 2003 (Vic) and similar State and Territory laws provide sufficient regulatory protections to businesses entering into leases, the VSBC considers the preferable approach is that standard form property leases not be excluded from extension of ACL unfair term protections to businesses. It is understood that there is

[5] Subject to when the application of ACL unfair term provisions applied to existing franchise agreements.

no express exclusion from consumer unfair term protections under the ACL for State or Territory consumer laws, for example residential tenancy law.

Government contracts

A third area of business contract warranting attention is government contracts with business. Government entities contract with businesses for the supply of goods and services, including construction. Governments provide standard form contracts for procurement, particularly for smaller amounts. The larger the amount contracted, the more likely negotiation will occur over the terms of the contract, moving away from a standard form contract.

There is no reason why standard form Government contracts with business should not be subject to ACL unfair term provisions extending to businesses. Indeed, governments should be 'model businesses' in their contractual dealings with business, including the terms in standard form contracts.

This role of governments as 'model businesses' is consistent with other obligations on government to behave as 'model litigants'. At the Commonwealth level, the Commonwealth is required to act as a model litigant pursuant to the Legal Services Directions 2005 (Cth). In Victoria, the Government is required to act as a model litigant pursuant to the Model Litigant Guidelines.

Contracts for finance

Consistent with the above views, the VSBC considers that standard form contracts for finance to business should be subject to the same unfair contract terms regime as are standard form contracts for finance to consumers.

4. Preferred Option

Option 3 is supported as the preferred option.

Defining scope

Unfair term protections for standard form contracts should apply to the purchasing entity. The 'size' of the supplier business should be irrelevant. These terms operate in favour of the supplier, and against the interests of the purchaser. It is the purchasing business that needs the protections of unfair term extension.

While the Consultation Paper refers to small business throughout, it must be noted that the arguments for protections against unfair terms in standard form business contracts extend to the non-consumer purchaser, not just business. That is, protections should extend to not-for-profit entities, associations, etc. and not just incorporated or unincorporated businesses. The problem to address is the terms of the supply agreement, not the structure of the purchaser. It would be anomalous if unfair contract term protections covered consumers and businesses, but not associations, cooperatives, etc.

As the Consultation Paper suggests, to have thresholds of 'small business' definition which are not readily apparent to a supplier when engaging with a purchaser would be confusing, inefficient and basically unworkable. These also change over time. These include a purchasing entity's annual turnover, or number of staff.

Extending the scope of unfair contract term protections to transactions below a certain threshold amount also raises issues of reducing impact through the effects of inflation over time, and how to measure a transaction value. Many standard form contracts offer variable service choice – for example, number of times per week, number of months/years duration, basic or premium service, and so on. Suppliers would be able to have 'fair' and 'unfair' contracts in their briefcase, depending on the service choice chosen by the purchaser and the resulting transaction value, which would be a ridiculous scenario. While s.185 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* has a threshold of $10,000, it does not appear to have had any noticeable effect on business to business contract terms in Victoria; the rationale for the threshold amount is unknown. The ACL does differentiate for certain consumer unfair contract term protections for transactions below $40,000. If a transaction threshold was preferred, the same threshold with this existing consumer threshold would simply the communication task.

The final option in the paper is to extend protections to all purchasing businesses unless they are publically listed. Of the options presented, this is the preferred option as it is likely to extend the protections to the greatest number of purchasing businesses/ entities. While there is no particular logic to the proposition that listed companies should be subject to unfair terms in standard form contracts, a small number of identifiable businesses with sufficient resources to comply with listing obligations – and therefore some assumption that they are more likely to read, understand and if necessary negotiate contract terms - is the 'smallest' excluded group in the options presented.

However for reasons argued above, to avoid disputes arising and to foster successful business relationships, 'unfair' terms have no place in any standard form business-to-entity contract (with the possible exception of franchising agreements until next review). The preferred and simplest approach is to make unfair contract terms void in any business-to-entity contract, no matter the size or structure of the purchasing entity. For consumer protections, there was no exclusion of such protections to those consumers with education levels above a certain grade, or income above a certain level. All consumers are protected. So should all purchasing businesses/entities be protected.

5. Response to selected focus Questions

1. *How widespread is the use of standard form contracts for agreements with small business and in what circumstances are they used?*

Of the 400 (approx.) general commercial disputes received by the VSBC in 2013-14 under the SBC Act, around 10% would relate to specific terms and conditions which, in consumer contracts, could be considered 'unfair'.

While the volume of 30 – 40 such disputes with the VSBC may seem small, the current legality of such terms, often associated with legal cost indemnities if disputes progress, act

as major disincentives to businesses to escalate these disputes. Research indicates that 3%-5% of small businesses each year say that they have experienced a 'serious' commercial dispute (excluding retail lease disputes) with another business each year. In Victoria, that equates to 15,000 – 26,000 such disputes, compared with the 400 matters brought to the VSBC in 2013-14 under the SBC Act. If the same 10% of commercial disputes relates to 'unfair' terms, the volume in Victoria is in the order of 1,500 – 2,600 per annum.

2. *What types of transactions are they commonly used for, that is for which goods and services, in which industries and over what range of transaction values?*

The disputes handled by the VSBC occur in a range of industries including waste management, online advertising, print advertising, serviced offices, onsite advertising, search engine optimisation, and leased equipment.

The amounts in dispute generally tend to be in the hundreds or thousands of dollars, rather than tens of thousands or more. However a recent VCAT case (Economix Building Supplies Pty Ltd v Veolia Environmental Services (Australia) Pty Ltd (Civil Claims) [2014] VCAT 646 (2 June 2014)) on such matters was over two amounts totalling around $20,000.

3. *What are some of the benefits and disadvantages of standard form contracts*

Standard form contracts are of benefit to the supplier as a common set of terms apply to all such contracts, avoiding the need for customised contract development or management compliance.

For the purchaser, they offer a quicker contractual arrangement than a customised negotiated contract. However, the disadvantage is that the purchaser can easily assume that the terms of the contract have been 'approved' by some body (e.g. industry association, etc.), or that a competitive marketplace has led to terms which are generally acceptable. Another major disadvantage of many such contracts is that the terms and conditions are often very hard to read, whether due to small font, lack of headings/breaks, extremely long sentences, or 'legalese'.

4. *To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?*

The VSBC experience is that businesses complaining about contract terms generally did not read the fine print prior to signing.

5. *To what degree do small businesses try to negotiate contracts that are presented on a 'take it or leave it' basis? Are there types of goods and services where small businesses are more likely to try to negotiate contracts?*

The VSBC experience is that small businesses do not try to negotiate over terms in standard form contracts. The inherent imbalance in bargaining power between supplier and purchaser strongly mitigates against any such negotiation.

6. *What considerations influence the design of terms and conditions in standard form contracts?*

Anecdotal comments from some participants in the waste management sector suggest that having 'locked in' contracts for 2-3 years average has a direct impact on the value of a business, whether as a listed company or in the event of prospective sale. These terms also mitigate against competition in the marketplace, making it difficult for new entrants to establish new customers when most are locked into contracts.

7. *What terms are businesses encountering that might be considered 'unfair'?*

Refer to Attachment 1 for specific examples of terms in disputes at VSBC. While based on the waste management sector, similar terms appear in all other sectors mentioned above.

8. *Do these terms relate to the operation of the contract or to remedies available under the contract?*

Both.

9. *What detriment have businesses suffered from unfair contract terms and are there examples of business sectors where detriment is particularly prevalent?*

Refer question 2 for industry sectors where such disputes have come to the attention of the VSBC.

Detriment arises:

- Where a purchaser terminates the contract (either because services are no longer needed or an alternative supplier has been sourced) unaware of the contract terms and faces alleged damages and administrative cost claims for breach in accordance with contract enforcement;
- Where a purchaser wants to terminate a contract and discovers the termination costs that will be incurred should they proceed. The purchaser often is outraged at the contract terms, and will progress time-consuming interaction with the supplier challenging the terms, etc. This may extend to obtaining legal advice. The detriment (in addition to time and direct costs incurred) is this sense of outrage that they've been entrapped/tricked into something they hadn't been (made) aware of, and that they are either stuck with the contract duration or have to pay to get out. The detriment is the damage to the business relationship and in confidence and trust in the marketplace.
- When lock-in contracts inhibit competition in the marketplace, to the detriment of all purchasers in the market.

10. *How do unfair terms in standard form small business contracts impact on confidence and trust in the market?*

Refer to Question 9.

11. *Who is including 'unfair' terms in contracts to small businesses? Is it larger business and/or a third party (such as a lawyer) drawing up the contract?*

The waste management sector is illustrative of such terms occurring in contracts offered by the very large players as well as the very small. No doubt the large players will have had legal advice in the development of their contracts, and usually have the advantage of in-house lawyers who can ensure contract terms are enforced. It is likely that the small supplier utilises others' contracts to develop its own, and may need to rely on external legal advice to enforce its contracts. The VSBC experience is that suppliers often engage the services of debt collection agencies to recover monies owing under these contracts. By introducing this third party, the relationship, if any, between supplier and purchaser is completely terminated and destroys any chance of maintaining a business relationship.

Disputes with both large and small players have also been experienced in the online and print advertising sector.

12. *Is it the terms or the process by which some contracts are negotiated between small business and business to be the primary issue for small businesses?*

Both, although generally, the problem is the terms themselves.

Often the terms are not explained, read or understood by the purchaser. However, sometimes representations made by the saleperson (for example, that 'we never enforce those terms') can lead to a contract being signed and such representations having no validity (due to difficulty in proving) when problems arise.

In one VSBC example, the purchaser explained that he had shopped around a few suppliers to obtain the best price for a standard service, and contracted with the lowest quote. Six months later the supplier had increased the price, based on a 'unilateral variation' clause. The purchaser said that he entered into the contract based on lowest price, and wouldn't have done so if he had known the price could be changed. Omitting to explain clearly to the purchaser at the time of the quote that the price was subject to unilateral variation could be considered misrepresentation, but for a few thousand dollars in dispute the cost of litigation would be prohibitive and the outcome uncertain.

If the terms are 'fair' the process of negotiating and executing a contract is benign.

13. *To what extent do small businesses engage legal services prior to signing standard form contracts? What transaction value does a contract need to have for businesses to engage legal advice? Are there any other factors that would influence a business' decision to engage in legal advice prior to signing a standard form contract?*

Anecdotally, businesses bringing matters to the VSBC did not seek legal advice prior to signing the contract. Some may do so when a problem arises, but the amount in dispute limits the extent of legal advice sought and any litigation arising in most cases.

14. *Are there examples of instances where risks have been unfairly shifted to small businesses in contracts?*

Examples include supplier indemnities beyond what a purchaser is reasonably responsible for; unilateral variation clauses without limitation ensures all pricing risk falls on the purchaser; supplier determination of what is a breach of contract can prevent a purchaser terminating for poor supply/service; terms which mitigate against good service such as 'time is not of the essence' clauses.

15. *How are small businesses currently addressing issues with respect to unfair contract terms? Are they resolving complaints informally or addressing complaints through more formal channels such as regulators?*

Can only comment on disputes lodged with the VSBC, where purchasers are clearly using our voluntary, low cost mediation service to try to resolve the dispute without recourse to litigation. However, there is no obligation on the supplier to engage with the VSBC although, from 1 May 2014, the VSBC can determine that a business has 'unreasonably refused' to engage in ADR and publish their name in the Annual Report to Parliament.

16. *How many businesses offer goods and services to small businesses via standard form contracts?*

Unable to comment.

17. *How many of these contracts treat business customers and consumers differently?*

Anecdotally, some suppliers have indicated to the VSBC that they treat business customers differently to consumers precisely because they know the current law does not extend to small businesses. This practice perpetuates the different, unfair, treatment of consumers and small businesses.

Some suppliers have also pointed out that the unsolicited consumer agreement provisions under the ACL do not apply to small businesses. While such protections go beyond unfair contract term protections, the inability of a small business to use cooling off provisions to vacate an oral contract (often by phone) when they have the opportunity to read the contract terms has led to a number of disputes at the VSBC. Having 'fair' terms in contracts reduces the likelihood of businesses wanting to break a contract on viewing the terms and conditions.

18. *To what extent are businesses relying on/enforcing unfair contract terms?*

Some such disputes with VSBC result in negotiated resolution, whether through mediation or resolution prior to mediation. However, others do not resolve as the respondent declines to engage in the process, preferring to rely on their contractual rights to obtain termination fees, etc.

19. *Do existing regulatory mechanisms provide comparable protection for small businesses from the inclusion of unfair contract terms in standard form contracts? Do they achieve the overall policy objective of helping to provide a level playing field for small business customers when interacting with other businesses through standard form contracts?*

The only regulatory mechanisms currently available for small businesses aggrieved at such terms are the ACL regulators insofar as a contract may breach the high thresholds of unconscionability, misrepresentation or misleading/deceptive condunfair contract term. Given the demands on and competing priorities of these regulators, and (generally) the relatively low amounts in dispute, it would be a relatively rare occurrence for one of the regulators to take such a case.

The VSBC is not aware of any actions taken by Consumer Affairs Victoria (as regulator) in regard to a business-to-business contract under s.185 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* or its precursor under the *Fair Trading Act 1999 (Vic).*

Businesses aware of the dispute resolution services offered by Small Business Commissioners can avail of those services (as many do). The VSBC cannot compel a party to participate in ADR, however.

20. *What is the extent of any overlap between the proposed unfair contract term law for small businesses and existing regulatory mechanisms?*

If unfair contract term protections were extended to business, the ACL regulators would be the relevant bodies to take action to test terms in the relevant Tribunals/Courts and have them declared void. Such outcomes can be used by the regulators to 'encourage' businesses to ensure that their contracts do not include unfair contract terms.

As noted above, VSBC experience is that both large and small businesses use standard form contracts with unfair terms. Arguably, the regulators are more able to influence the larger businesses, with corporate reputations to protect, than the smaller businesses. Industry association may have an important role to play to ensure their members, large and small, are aware of the extension of unfair contract term protections and require compliance as a condition of membership.

The provisions of s.185 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* are understood to be unique to Victoria. Extension of unfair contract term protections under the ACL would provide consistent national protections to all businesses covered.

21. *Do existing enforceable regulatory mechanisms provide adequate, accessible and timely avenues for redress?*

No. The current regulatory regime for consumer protections takes time for matters to be investigated and appropriate enforcement action (or influence) to be undertaken. This may or may not include redress for parties. Extending unfair contract term protections to business would simply add to the demands on the regulators.

Currently, as such terms in standard form business contracts are not illegal, the primary regulatory redress for an aggrieved business is for claims of unconscionable conduct,

misrepresentation or misleading and deceptive conduct. All present challenging thresholds to meet, and would incur substantial cost for an individual action.

Regulator action in Victoria under the.185 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* are possible, but to date have not occurred.

Having unfair contract term protections extended to (small) business would assist Small Business Commissioners in resolving disputes, whether at mediation or prior to mediation.

22. *What role do market forces play in reducing the incidence of unfair contract terms and are they sufficient to address the problem?*

Ideally, a competitive business in a marketplace where 'unfair' terms existed in standard form business contracts should be able to identify the competitive advantage of offering contracts which did not include such terms, and build its market share by promoting such contractual terms to business customers.

Factors mitigating against such market conduct include:

- Where large players rely on the 'lock-in' nature of their contracts to reinforce their business worth (whether on the stock exchange or for financing purposes), the willingness of any to move to more competitive terms is non-existent;
- Where the industry is dominated by a few large players, the impact of a small competitor achieving much change in market conditions may be limited;
- A business not including unilateral variation terms in its contract would generally need to offer a fixed contract price higher than its competitors with such contractual terms, to accommodate the risk of cost increases. Purchasers interested in the 'headline' price may be less inclined to choose the supplier with the fair terms;
- Other 'unfair' terms may only be viewed as relevant by the purchaser if they occur – for instance, unreasonable indemnities for the supplier, termination costs, etc. – and at the start of most contracts the expectation is that things will progress without a problem.

On balance, the factors working against a market response to this issue are likely to outweigh any competitive market reaction. This balance may vary according to market structure.

23. *Do unfair contract terms impact upon competition between businesses, particularly by increasing the cost and risk of doing business for small businesses more than for large businesses? Is there scope for greater competition between businesses in the absence of unfair contract terms?*

Lock-in provisions of contracts work against a competitive marketplace. Large purchasers with more resources (including in-house lawyers) may be more inclined to read contracts and negotiate better terms than would a small business purchaser.

24. *Are there any industry led responses that currently address the identified problem, and have they been effective or ineffective?*

Unable to comment

25. Are future industry led responses a viable approach to addressing the problem?

If 'industry led' response means some leadership / direction provided by an industry association or body, this will depend on the structure of the industry, the composition of the industry body, and the ability of the industry body to influence members. Some change is possible in some sectors, but unlikely in others.

If 'industry led' means arising from the individual actions of competitive businesses, again the likelihood will be influenced by the nature of the industry. However, in the industry sectors where the VSBC disputes come from, there has been no indication of change over the past few years. If anything, disputes relating to 'unfair' terms have increased over this period. Maybe this reflects some awareness of the consumer protections available, and a mistaken belief that such protections are not limited to consumer purchasers.

26. Are existing regulatory interventions and mechanisms effective?

No.

27. Would information disclosure requirements impact the decision of small businesses to review standard form contracts and/or consider the terms included in standard form contracts?

Greater disclosure obligations on standard form contracts would be of some assistance in drawing such terms directly to the attention of the purchaser prior to contract execution. In one contract seen by the VSBC, the rolling / lock-in nature of the contract was included, in bold, directly below the signature space for the purchaser to sign.

Signed acknowledgement by the purchaser that they 'have read and understood all terms of this contract' are unlikely to improve awareness of 'unfair' terms in a contract.

Such disclosure obligations on standard form contracts may lead to less disputes arising (as they reinforce to the purchaser that they were aware of the terms) but may do little to encourage suppliers to remove such terms from their contracts, particularly where such terms are endemic in an industry.

28. What are the costs to business in complying with disclosure obligations relating to other types of information?

Unable to comment.

29. Would a list of unfair terms or a default template created by the government, or by industry, assist small businesses in considering whether to sign a standard form contract?

It would assist businesses understand the types of terms to look out for in contract fine print, but may not result in any change in the contract terms offered by the supplier, particularly where endemic in an industry.

30. Would these approaches reduce the incidence of unfair terms in standard form contracts?

Disclosure and information are more likely to ensure that businesses are aware of such terms when they sign contracts than lead to a reduced incidence of such terms in standard form contracts. Such solutions were considered insufficient when protections for consumers were introduced in 2011. This is a demand side and a supply side problem which needs to be tackled on both sides.

31. How would these approaches impact on the flexibility of businesses to include terms that may be unfair in some instances, but are not unfair when applied to their particular circumstances?

While Tribunal and Court decisions on consumer unfair terms emphasise that the context must be taken into account, the examples of what is an unfair term is reasonably clear in most instances. Parties to a transaction would be free to negotiate the 'opting in' of a term which may otherwise be considered unfair, but such negotiation immediately differentiates a customised contract from a standard form contract.

32. Would the benefits of a targeted legislative response (such as only deeming specific unfair terms offered to small business as void) outweigh the costs of such an approach?

The approach adopted for consumer unfair terms (criteria to be satisfied, having regard to the context) is preferable to a limited list of terms deemed 'unfair'. A list approach is too prescriptive and would lead to variation, loopholes and avoidance. An indicative list of terms, in information materials rather than legislation, provides some clarity to businesses without being prescriptive.

The three criteria in the ACL provide clarity to the principles involved. In comparison, the provisions of s.185 of the *Australian Consumer Law and Fair Trading Act* 2012 (Vic) identify a range of factors VCAT may have regard to in determining whether a term is unjust, but does not present the principles as the ACL does.

33. How would such an approach interact with existing regulatory protections?

A differentiated approach to unfair terms in consumer contracts and business contracts would cause confusion and costs to suppliers, and to regulators.

34. Are particular types of terms in standard form contracts (such as unilateral contract variation, or termination rights) more likely to be considered 'unfair' by small businesses?

Refer to Attachment 1 which refers to a number of contract terms considered unfair by businesses lodging disputes with the VSBC. Consumer protections do not differentiate between 'a little' unfair and 'a lot' unfair; neither should business protections.

35. Does this option reduce flexibility for businesses to provide contracts which provide overall benefits to consumers? Would some businesses move to negotiated contracts?

It is preferable to use the same approach for consumer and business protections. Some businesses may prefer to move to negotiated contracts (with unfair terms) but that requires the agreement of the purchaser, who has protected standard form contracts available from competitor suppliers.

36. Are there any unintended consequences that could arise from this option?

Unable to comment

37. If businesses were unable to include unfair contract terms in their agreements, would small businesses be able to better compare the value of competing offers to supply/acquire?

Yes

38. To what extent will contracts be reviewed if these new laws were implemented?

All standard form business contracts would need to be reviewed if new laws were implemented. The benefit to suppliers is that 'unfair' terms in current contracts are inconsistent with building and maintaining successful business relationships. The benefit of reviewing their contracts, other than complying with the law, is that their business relationships with customers will be improved, and the likelihood of ongoing business increased.

39. For businesses who offered standard form contracts to consumers prior to the introduction of the ACL, what was the estimated compliance cost from adapting to the ACL unfair contract terms?

Unable to comment. (However, you may also want to ask what were the benefits – for example, less customer complaints).

40. Are there other options not considered in this paper that would effectively address the problem?

Unaware of any. Consumer unfair contract term protections have provided a clear, useful precedent which should be extended to all standard form business contracts.

ATTACHMENT 1

Contract Disputes – How to prevent them; How to deal with them

Presentation by Geoff Browne, Victorian Small Business Commissioner to the Victorian Waste Management Association

27 May 2014

Thank you for the opportunity to speak to you this morning. My presentation will:

- Provide a quick overview of the role of my Office;
- Summarise key changes to my legislation which came into effect on 1 May 2014;
- Review the types of contract disputes my Office deals with, including those in your industry;
- Provide an update on the Commonwealth review of business-to-business contracts; and
- Leave you with a challenge/ opportunity to do something about contract disputes in your industry.

Role of the Victorian Small Business Commissioner (VSBC)

The VSBC is an independent statutory role established under its own Act by the State Government in 2003. While the VSBC has a number of functions under that Act, today our predominant function is to provide a quick, low cost dispute resolution service for businesses with a commercial dispute with other businesses.

I also have dispute resolution roles under other specific legislation – Retail Leases Act 2003; Owner Drivers and Forestry Contractors Act 2005; Farm Debt Mediation Act 2011; and from 1 July 2014, the new Taxi Reform legislation.

The policy rationale for our dispute resolution role is to enable businesses to resolve disputes without having to go through litigation, and get back to business – and that is equally applicable to the business complaining and the business against whom the complaint is made. Litigation takes a long time, is costly and time consuming, and is a major distraction to your business. It can often result in parties to litigation incurring costs which far exceed the amount in dispute. And it can have adverse effects on business performance, work related stress and the general health and wellbeing of the business owner – particularly smaller businesses.[6]

[6] Research conducted by the VSBC surveyed businesses involved in commercial litigation with another business in VCAT in 2012. The survey obtained data on direct expenditures and time spent on the litigation, as well as qualitative impacts of the litigation on work related stress and general health and wellbeing of the business

Some commercial disputes must by law be referred to my Office for attempted resolution before they can progress to litigation. These are commercial disputes relating to landlords and tenants in retail leases, owner drivers and their hirers, and farmers in default of a farm debt.

Other commercial disputes can be brought to my Office, but there is no statutory requirement to do so. These include general commercial disputes relating to supply contracts; licencing agreements; franchises; distribution agreements; non-retail leases; and so on.

Our services

Our main form of dispute resolution is mediation. I appoint an independent expert mediator to sit down with the parties under tight confidentiality, and work with the parties to try to identify a resolution of the dispute they are both happy with. My Office is not part of the civil justice system, so mediation through my Office (unlike disputes lodged with VCAT or the Courts) is not on the public record.

The role of the mediator is not to determine who is right or wrong, or make a determination. The role of the mediator is to facilitate effective communication between the parties and try to find a pragmatic resolution of the dispute. The settlement is not necessarily defined by legal obligations or precedent, and can be quite creative. Avoiding subsequent litigation provides a strong incentive for most parties to try to resolve the dispute through mediation.

Another key benefit of mediation is that it is far more likely to enable the parties to continue to conduct business together. The outcome is quick, pragmatic, and acceptable to both parties. Once involved in a litigation process, it is very difficult to continue a business relationship. Research[7] conducted by my Office in 2007 found that one of the key elements of building and maintaining successful business relationships is identifying and resolving disputes early and quickly, and avoiding litigation.

For most mediations, we charge each party $195 for a half-day mediation. This is a highly subsidised fee for the mediator. While most mediations are conducted in our Offices in Melbourne, last year 20% were held in regional Victoria. We send the mediator to the regional location, hire the venue, and cover the travel costs of the mediator. All the parties pay us is $195 each.

If the parties wish to bring along representation, they can, obviously at their cost.

---

owner. A summary of the survey results are provided in 'Avoid the Costs of Litigation', an Information Sheet available at www.vsbc.vic.gov.au

[7] Report is available at www.vsbc.vic.gov.au

Over our 11 years, we have conducted more than 6,000 mediations, with a settlement rate averaging 80%. Satisfaction of those using the service is consistently around 93%. And not all disputes we receive progress to mediation. This financial year, about 30% of disputes have been resolved by my staff through shuttle engagement with the parties – at no cost to either party.

While our predominant activity relates to business-to-business disputes, we also deal with business-to State or Local government disputes, although this has traditionally been only 2% of our total volume.

Unfortunately, a number of parties to a dispute refuse to engage with my Office. I have no powers to compel participation although for certain disputes I can issue a certificate certifying mediation has been refused, which can have costs consequences for the refusing party if the matter subsequently progresses to litigation. This has the effect of reducing the refusal to mediate rate for those types of disputes.

Refusal to engage is regrettable, as in many cases these disputes will escalate to litigation, with costs and other impacts on both parties. $195 for a half day mediation, within a few weeks of the dispute being lodged, and the likelihood of a continuing business relationship, must be a better outcome on any measure.

Amendments to the Small Business Commissioner Act 2003

However, Amendments to my Act, commencing on 1 May this year, will I believe encourage more 'general commercial' disputes to be brought to my Office, and increase the willingness of respondent parties to engage with us.

The key change is that I now have the power to issue certificates to parties relating to general commercial dispute lodged with my Office. Certificates can be issued to state:

- that alternative dispute resolution (ADR) has been attempted, but been unsuccessful;
- that ADR is unlikely to resolve the dispute; or, importantly,
- that a party has *unreasonably refused* to participate in dispute resolution with the Office.

Provision of a certificate that mediation has been attempted, unsuccessfully, can be useful to the parties as evidence to a Court that they have sought to resolve the matter through ADR, thereby satisfying requirements of the Civil Procedures Act.

However, if I issue a certificate that a party has unreasonably refused to participate in ADR, I may also publish the name of that refusing party in my Annual Report, tabled in Parliament. I expect this will provide greater incentive for Respondent parties in general commercial disputes to engage with my Office, and significantly reduce the relatively high refusal rate experienced in in the past decade for these types of disputes.

I have developed guidelines on what 'unreasonable refusal' means, and these are on our website, although every case will need to be considered on its merits.

So my first 'take away' for you today is, if you find yourself in a commercial dispute with another business, whether as the complainant or the other party, be prepared to use our services and try to resolve the dispute quickly and pragmatically. Importantly, I have no constraining definition of 'small business', so will take disputes involving most businesses.

Common causes of contract disputes

I'd now like to turn to some of the common characteristics of 'general commercial' disputes lodged with us, and in particular some of the terms and conditions in these contracts which are often the basis of the dispute.

Let me give you some examples. Ask yourself whether you as a consumer would sign a contract – say a contract for mobile phone services or personal training services – with these terms:

> "The Contract may be varied by Supplier at its sole discretion with effect from publication by Supplier of the varied Contract"
>
> "At any time during the term, Supplier may vary the fees upon giving notice to the customer"
>
> "The Customer acknowledges that the Fees are subject to change without notice"
>
> "Time is <u>not</u> of the essence in relation to the performance of the Services" (emphasis added)
>
> "This agreement is for a three year period and unless either party advises the other party in writing no more than 60 days and no less than 30 days prior to the end of the period that it wants to terminate the agreement, the agreement is automatically renewed for a successive period of the same duration, and at the Suppliers discretion, on these terms and conditions or the terms and conditions applying at the time of renewal." (And no right of Customer to terminate otherwise without significant cost.)
>
> "In the event of an early termination of this agreement by either party (except as a result of a breach by Supplier) the customer agrees to pay damages equating to the service fees relating to the remaining period of the agreement"
>
> "Supplier may refuse to provide the services in its absolute discretion"
>
> "If the customer receives an offer to provide the services from a third party (at the end of the contract term), the Customer grants to the Supplier last right of refusal for the further provision of the Services by Supplier at the same price until one year after expiry

or termination of this Agreement. This clause survives termination or expiry of this Agreement".

"The Supplier may terminate the agreement at any time during the term by giving the customer 30 days notice." [The customer can't terminate during the term without incurring a $300 administration fee and paying the Supplier the amount payable for the balance of the term as 'agreed liquidated damages'.]

"If your dispute results in a chargeback your account will be sent to collections and you will incur a penalty fee. If you have a dispute and contact a government department you will incur an hourly fee for the time needed to resolve it." [regardless of the validity of the dispute]

"Early cancellation fee is 20% of the invoiced amount. Collection fee is 15% of the outstanding amount. Administration fee is $100. Penalty fee is $100. Hourly fee is $100. "

"We accept no liability for any loss whatsoever"

Under the Australian Consumer Law (ACL), such terms would be, or would likely be, deemed 'unfair terms' and thereby void in standard form consumer contracts. These are contracts between a business and a consumer where there is no negotiation over the terms and conditions – a 'take it or leave it' contract.

The ACL considers terms 'unfair' in a standard form consumer contract where the term satisfies three requirements:

- It causes a significant imbalance in the parties' rights and obligations under the contract;
- It is not reasonably necessary to protect the legitimate interest of a party to the contract (and the party who would be advantaged has the onus of proof that the term is reasonably necessary); and
- It causes detriment to a party to the contract if applied.

Most of the terms presented above have been found by a Tribunal or Court (whether under the ACL, or the Victorian Fair Trading Act prior to the ACL, which included unfair contract terms provisions) to be unfair terms and therefore void in consumer contracts[8].

[8] FCA 2013: ACCC v.Bytecard PL Consent Orders, cited by DLA Piper Australia in online article 'Australia: ACCC obtains its first unfair contract terms declaration: ACCC v Bytecard Pty Limited', 4 August 2013; ; VCAT 2009: Director of Consumer Affairs v. backloads.com ; VCAT 2008: Director of Consumer Affairs v. Trainstation Health Clubs; VCAT 2006: Director of Consumer Affairs v AAPT

The general type of terms considered unfair are:

- Unilateral variation, without right of customer to terminate to avoid changes without penalty
- Indemnity in any circumstances for the supplier
- Supplier right to terminate contracts at any time without cause while the customer's right to terminate are subject to conditions
- Unreasonable limitation of liability for supplier
- Imposing an unreasonable indemnity burden on customer, including legal cost on customer / limiting customer's rights to sue.
- Penalising the customer – costs on customer of termination significantly more than the cost arising on supplier of termination [such an amount is, or is likely to be significantly more than the Supplier's reasonable costs reasonably incurred because of the early termination]
- Supplier unilaterally to determine the consequences of a breach of the agreement
- Supplier right to terminate service provision where trivial or inconsequential breach.

However, such terms in contracts between businesses are not currently captured under the ACL. While in my view such terms remain unfair terms, they are not void or illegal (unless they extend to unconscionability or misrepresentation).

Some terms in business-to-business disputes may be considered onerous and therefore unenforceable. In Bonola v. Elite Oriental Products [2012] VCAT 431, the member commented that

> *"The words 'This agreement will be automatically renewed for extra 3 years unless the Clients give written cancellation notice to Supplier at least 3 months before the end of the term' are arguably unenforceable, as they constitute an onerous clause which has not been sufficiently brought to the Applicant's attention".*

As the member said further:

> *"The common law of contract places an onus on the party seeking to enforce an onerous clause. … I consider (this clause) to be onerous, because there is no justification for the contract rolling over for a three year term. …. As the Respondent does not go out and buy new equipment or hire new staff in reliance on a new three year term, there is no commercial justification for the renewed term being so long."*

As the VCAT member further comments, the onerous nature of terms in contracts are particularly problematic where a customer has not had the opportunity to read the contract before entering into it. Where both parties sign a contract the Courts have generally taken

the view that both parties have read and understood the terms of that contract. Nonetheless, bringing potentially onerous clauses to a customer's attention, prior to signing, is better business practice than trying to hide such clauses, notwithstanding the clause itself may not be considered as consistent with building and maintaining successful business relationships.

The Bonola case also considered the question of damages arising to the Supplier from cancellation of the contract by the customer. The terms of the contract required the customer to pay the Supplier the amount payable under the contract for the (rolled) three year term if cancelled during the term.

The VCAT member noted:

> *"Of course, such clauses are unenforceable if they operate as a penalty. To be enforceable, such a clause must provide for the payment of a genuine pre-estimate of damage."*

In this case, the VCAT member interpreted the 'damages' clause as requiring a payment on cancellation of the full three years' fees, rather than the balance of the fees for the three year period, and found the clause on this interpretation a penalty and therefore not enforceable. Nonetheless, even if the clause was clearly for payment of fees for the balance of the term (as the examples provided above tend to be), the question remains whether requiring payment of the balance of the fees for the term is a 'genuine pre-estimate of the damage' suffered by the Supplier, notwithstanding a term of the contract stating this is the case. Clearly the amount envisaged is gross revenue, so I find it difficult to accept that such amount could constitute a 'genuine pre-estimate' of damage or loss to the Supplier when the product or service is not being supplied.

VCAT decisions are specific to the case and do not bind the Courts. Nonetheless, this case raises questions about the enforceability of rolling contracts, the justification for the term to 'roll over' for such a lengthy period, and the associated 'damages' clauses based on gross revenues forgone as an estimate of loss.

My Office has received a number of disputes relating to such contract terms in a number of industries. One of the most prominent is your industry, the waste management sector. All of the examples given above are from the fine print in waste management services terms and conditions, from a number of suppliers, large and small. Other industry sectors also feature: online and onsite advertising; online search optimisation; serviced offices; and leased equipment. The Bonola case was about the security monitoring sector.

While many of these terms may currently not be illegal in business-to-business contracts, in my view they are clearly unfair. Arguably, they are designed to bind the customer into

onerous provisions, which cannot be consistent with building ongoing successful business relationships.

Unfair contract terms in Business Contracts – Commonwealth review

The Commonwealth Government made an election commitment to extend consumer protections against unfair contract terms to small business. A consultation paper on this issue is expected to be released by the Commonwealth very soon.

The recent Federal budget allocated $1.4m over four years to support this election commitment. It is going to happen.

While I suspect a lot of the submissions to the consultation paper will focus on defining 'small business', in my view that misses the point. These terms are unfair. I see no reason why any standard form business to business contract should contain such terms, regardless of the size of the client business. Can you imagine the situation where a Supplier has both 'small' businesses and 'medium' businesses as clients, and has two forms of standard form business contracts – one with fair terms and the other with unfair terms. In my view a ridiculous situation.

An Opportunity and a Challenge

The use of contract terms I've previously mentioned appears widespread in your industry. I suspect it's evolved as new small businesses take on board the terms the larger players have been using, perpetuating the spread of such terms.

My final 'take away' message is that you have an opportunity to address these unfair terms before the outcomes of the Commonwealth review are known, and legislation changes, which may be some time.

This could be progressed by the industry association taking a lead, and developing guidelines as to what terms it considers should not be included in contracts. Alternatively, some businesses may see the opportunity to pursue a competitive advantage by removing unfair terms from its contracts and promoting its 'good business' terms to current and prospective customers.

Or you could do nothing until forced to by changes to Commonwealth law. If this is your preference, I ask you to reflect on how these terms assist you in maintaining business relationships, and what customer complaints you have to deal with arising from these terms.

Proactive or reactive? The choice is yours.

Thank you for the opportunity to speak with you today.