

ACCC Chair Rod Sims criticizes B2B unfair contract terms

On 31 August, ACCC Chair Rod Sims addressed the Council of Small Business Organisations Australia's (COSBOA) National Small Business Summit on recent ACCC enforcement action regarding unfair contract terms and limitations the ACCC has identified in the B2B unfair contract terms law and codes of conduct.

Enforcement outcomes

The ACCC's enforcement model seeks to identify important and systematic issues and make targeted strategic interventions, with a view to leveraging off these to drive broader compliance. Last year, the ACCC focused on the introduction of the small business unfair contract term provisions (**unfair contract terms**), including:

- action against JJ Richards & Sons Pty Ltd for unfair contract terms including an automatic five-year rollover clause, a unilateral price variation term and a broad indemnity provision
- twelve terms in standard form contracts used by two Servcorp Ltd subsidiaries were declared unfair and therefore void, and
- ATM provider Cardtronics admitted its subsidiary, DC Payments, offered contract terms with small businesses that may be unfair under the ACL. The company gave an enforceable undertaking to change potentially unfair terms under their existing contracts. Cardtronics complied with the ACCC investigation and has undertaken not to enforce unfair terms for existing merchants.

Changes needed to B2B unfair contract term law

Mr Sims believes that the B2B unfair contract terms law needs considerable strengthening. The Government has committed to commencing a review by the end of this year.

Mr Sims identified two fundamental limitations of the current law

1. unfair contract terms are not illegal. Although the ACL allows the contract term to be challenged in court, it does not prohibit the existence of terms in contracts, and
2. the ACCC cannot seek civil pecuniary penalties when a term in a contract is declared unfair and void by the court, and cannot issue infringement notices for potentially unfair terms. Penalties should apply to these terms otherwise no incentive exists for businesses to ensure their contracts do not contain such terms.

Other problems identified by Mr Sims were:

- the definition of standard for contract should be reviewed to ensure that the full suite of contracts that are in fact standard form are covered by the definition
- the current small business contract threshold under the law is not covering all small business transactions and should be reviewed e.g. authorised motor dealers, dairy contracts, trucking
- the ACCC cannot currently use their compulsory information gathering power under s 155 of the *Competition and Consumer Act (CCA)* to investigate unfair contract terms, as they are currently not illegal. The ACCC largely relies on evidence being provided voluntarily.

Codes of conduct

Mandatory codes of conduct are vital to setting standards for better business practices and can add value when correctly designed and administered. These codes must be enforceable with strong incentives to comply in order to be effective.

The ACCC recommends that civil pecuniary penalties be introduced for all breaches of all codes and that the amount of penalties available under the CCA for a breach of a prescribed industry code to be increased to reflect penalties currently available under the ACL.

[Read the full speech here](#)