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Manager, Consumer Policy Framework Unit

<http://www.treasury.gov.au/ConsultationsandReviews/Consultations>

Extending Unfair Contract Term Protections to Small Business

The Australian Communications Consumer Action Network (ACCAN) would like to thank Treasury for the opportunity to contribute to the Extending Unfair Contract Term Protections to Small Business consultation. ACCAN is Australia's peak body for consumer representation in communications. We represent residential consumers and small businesses including not-for profit organisations in so far as they are consumers.

Our submission briefly outlines small business usage of telecommunications services, then goes on to address two of the questions raised in the Consultation Paper.

Small businesses and telecommunications contracts

ACCAN identifies small businesses as being up to 20 employees. This is consistent with the approach used by the Australian Bureau of Statistics (ABS) and the Telecommunications Industry Ombudsman (TIO)¹².

To maintain competitiveness in a global market small businesses are becoming more digitally engaged. Telecommunications services are critical for small businesses success. ACCAN funded research by Market Clarity found small businesses fear being cut off from their service, with 62% of small businesses fixed line users indicating that the impact of a one-day service fault would be severe or catastrophic.³

We note that the Australian small business community faces similar issues to general consumers when it comes to dealing usage of telecommunications services. The TIO list of top 5 consumer complaints is identical for small business consumers and residential consumers, amongst which is "poor contract information". In January-March 2014, 23.6% of complaints related to 'contract' issues.⁴

¹ ABS, 2014, "small business is defined as a business employing less than 20 people" accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1321.0>

² TIO, 2014, "The small businesses that can contact us usually have up to 20 full-time employees. We will take into account if employees are permanent, casual, and if employment is seasonal or voluntary, and \$3,000,000 annual turnover" accessed at <http://www.tio.com.au/consumers/small-businesses>

³ Market Clarity, 2013, 'Small Business Telecommunications Service Use and Experience' p56

⁴ TIO, January – March 2014, accessed at <http://www.tio.com.au/publications/statistics>

Anecdotally we know many small businesses are offered a “take it or leave it” contract from telecommunication service providers. Often, a business is unaware that there is any alternative available other than what is offered on a provider’s website. Small businesses are encouraged into fixed term contracts and bundling arrangements to save money or get more services for their money. As they are generally time poor and with limited access to the staff resources of bigger business, such as dedicated legal counsel, they are limited in their ability to comprehend sometimes onerous contract terms.

Research has found 95% of small businesses use business grade services for their fixed line services.⁵ These business grade services vary by provider but generally include faster response times, a dedicated account manager, and download and upload speed guarantees not available to residential customers. Small businesses pay slightly more to receive these improved service features. For example, a Telstra residential customer pays \$73 a month for 50GB of data bundled with a fixed line phone, whereas the comparable plan for small business is \$80 a month.⁶

Many small businesses are forced to accept these premium services due to a provider’s contractual restrictions. For example, the ‘acceptable use policies’ of providers such as Telstra, Dodo and Vodafone exclude any business use from their domestic contracts.⁷

How do small businesses differ from consumers in relation to their interaction with standard form telecommunications contracts?

The Fine Print, ACCAN commissioned research published in 2013, surveyed 42 standard consumer telecommunications contracts across providers and a range of products, to assess compliance with the ACL and Telecommunications Consumer Protection Code.⁸ The study found that a number of standard contracts distinguished between consumer and small business customers, primarily for the following reasons:

- *‘consumer customers are subject to more onerous regulatory requirements, in particular regarding disclosure under the TCP Code and substantive fairness under the ACL;*
- *business customers may have higher usage needs; and*
- *business customers are likely to suffer greater ‘consequential’ losses in the event of failures in their service’.*

⁵ Market Clarity 2013, ‘Small Business Telecommunications Service Use and Experience’ p40

⁶ [http://www.telstra.com.au/small-business/broadband/adsl/index.htm#tab-plan-option-1;](http://www.telstra.com.au/small-business/broadband/adsl/index.htm#tab-plan-option-1)
<https://www.telstra.com.au/broadband/home-broadband/>

⁷ Dodo, *Standard Form of Agreement 10.24; Standard terms for the supply of the Vodafone Mobile Telecommunications Service – Customers Commencing or Renewing o or after 1 January 2011* Section 2 7.2

⁸ <http://accan.org.au/files/Reports/ACCAN%20Fine%20Print%20research.pdf>

Business usage was explicitly excluded from many standard consumer contracts. For example, ‘Dodo and Vodafone contracts were particularly strident and precluded use of the service for any business purpose.’⁹

What terms are small business encountering that might be considered unfair?

- Consumer guarantees and potentially unfair terms

It is important telecommunications providers who distinguish between business and consumer customers recognise that business customers may still be protected as ‘consumers’ under the consumer guarantee provisions in the Australian Consumer Law (ACL)¹⁰, and the Telecommunications Consumer Protections Code (TCP Code).¹¹ In particular, the definition of a consumer for the purposes of the consumer guarantees in the ACL is very broad and is not premised on how a customer actually uses the goods or services. The threshold test of a consumer for the purposes of a guarantee is based on the price of the good or service (under \$40,000) and over \$40,000 if it is of a kind ordinarily acquired for personal domestic or household use or consumption

ACCAN’s *Fine Print* research noted that a person who acquires a good or service for their business may still be a consumer protected by the guarantees in the ACL. If, for example, telecommunications providers define consumers more narrowly in their consumer contracts, they will have to acknowledge the possible application of the consumer guarantee regime to those contracts with small business. Failure to do so was identified as potentially unfair, rendering this type of term misleading and void. For example, the Dodo standard form of agreement was a case where a supplier failed to disclose possible ACL liability in its consumer contract. Dodo excluded liability for losses incurred in connection with the conduct of a business:

“As Your Service is provided to You for personal, domestic or household use, We do not accept liability for losses that result from the use of Your Service in connection with the conduct of a business.”¹²

We are concerned that a small business owner faced with this contract term may not be aware the ACL consumer guarantees still offer protection.

- **Excluding business usage from standard consumer contracts**

As mentioned above, some standard contracts specifically exclude business usage. *The Fine Print* made particular mention of Dodo and Vodafone contracts, and noted that terms that exclude business usage ‘are likely to be unfair’,¹³ noting that occasional use of a consumer service for business should not be a contractual breach, and should not disadvantage a person using their service predominantly for personal use. It is realistic to anticipate that an individual may use their

⁹ The Fine Print, p.49: Dodo, *Standard Form of Agreement* 10.24; *Standard terms for the Supply of the Vodafone Mobile Telecommunications Service – Customers Commencing or Renewing on or after 1 January 2011* Section 2 7.2.

¹⁰ <http://www.accc.gov.au/business/business-rights-protections/business-rights>

¹¹ <http://www.commsalliance.com.au/Documents/all/codes/c628>

¹³ Fine Print, p.50

phone mainly for personal use, but if running a small business may occasionally use it for business purposes. The following examples are given to illustrate this point:

- ‘a plumber who answers an emergency call on his or her personal mobile;
- an lawyer who occasionally uses the home computer to look up information; or
- a ‘mummy blogger’ who accepts a one-off fee for allowing the launch of a new baby product to be advertised on her blog.

These customers all satisfy the regulatory and common sense definitions of a consumer. Yet their conduct would breach a contractual restriction on using the service for *any* business use’.¹⁴

Individuals starting out in small business could potentially be particularly vulnerable to such contractual terms, as they are more likely to be using standard consumer contracts with no awareness that using their service for business purposes puts them at risk of breach of contract.

Such restrictions on use are likely to be unfair, in particular where they allow for a telecommunications provider to terminate the service as a result. They are also disproportionate to the risk to the provider represented by occasional business use.

The ACCAN research recommendation was that:

‘A fairer approach would be to preclude customers from using services provided for personal use *predominantly* or *primarily* for business purposes..... (which) gives a degree of flexibility to a customer who uses the service predominantly for personal use but occasionally for business use’.¹⁵

Concluding comments

Extension of the unfair contract provisions of the ACL would assist small business telecommunications users in addressing the potentially unfair contract issues identified above, and assist the market in delivering more competitively priced telecommunications products aimed at small businesses. ACCAN supports the Government’s initiative to extend unfair contract provisions to include small business, as it promises to deliver real benefits for small business usage of essential telecommunications services.

Sincerely,



Kelly Lindsay
ACCAN Project Officer, Small Business

¹⁴ Ibid, p.50

¹⁵ Ibid, p.50