



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY



ACCI Submission: Unfair Contract Term Protections for Small Business

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**The Australian Chamber of Commerce and Industry
is the leading voice of business in Australia**

Canberra Office

COMMERCE HOUSE
Level 3, 24 Brisbane Avenue
Barton ACT 2600

PO BOX 6005
Kingston ACT 2604
AUSTRALIA

T: 02 6273 2311
F: 02 6273 3286
E: info@acci.asn.au
W: www.acci.asn.au

Melbourne Office

Level 3, 486 Albert Street
East Melbourne VIC 3002

PO BOX 18008
Collins Street East
Melbourne VIC 8003
AUSTRALIA

T: 03 9668 9950
F: 03 9668 9958
E: melb@acci.asn.au
W: www.acci.asn.au

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1. INTRODUCTION

The Australian Chamber of Commerce and Industry (ACCI) supports - in principle - the proposal to legislate to apply protections against unfair contract terms in standard-form contracts to small businesses. These protections are currently applied only to consumer contracts. ACCI members have expressed concerns about the issue of unfair contract terms for small businesses and believe there is a role for the government in applying protections against unfair contract terms.

ACCI further recognises that the implementation of such protections may increase the compliance burden on businesses of all sizes. These protections may also lead to increased transactions costs where these standard-form contracts have a legitimate role to play in the regular course of conducting a business.

It is critical that any legislation to enact unfair contract term protections is carefully designed so that the protections do not impede the legitimate use of standard-form contracts, particularly for transactions conducted between small businesses. Likewise, there is a role for non-regulatory measures, such as provision of information, education, and voluntary access to alternative dispute resolution mechanisms to complement the legislative measures and reduce the need for a stringent enforcement-based regime.

Of the four options outlined by government in the consultation paper, ACCI supports a mix of Option 2 (light touch/non-regulatory responses) and Option 3 (legislative amendment to extend the existing UCT provisions to contracts involving small businesses) to address the issue.

2. DEFINING SMALL BUSINESS

The issue of defining small business for regulatory purposes remains a challenge. There are currently numerous definitions for small businesses used by federal, state and territory governments for various purposes, but most specifically regarding regulation and data collection.

Feedback from ACCI members suggests some businesses can find it confusing to apply different definitions of 'small business' to their own circumstances. For instance, some entities may be classified differently for the following purposes:

- data collection by the Australian Bureau of Statistics (ABS);
- eligibility for small business tax concessions; or
- coverage by the Small Business Fair Dismissal Code.

ACCI acknowledges the merits of applying a single definition of ‘small business’ and the potential for a reduced regulatory compliance burden. Specifically, these would include:

- more reliable and consistent data collection (both by regulatory agencies and the ABS), resulting in more informed policy making and more informed advocacy; and
- greater clarity and transparency around eligibility for government assistance - specifically small business tax concessions and exemptions such as the Small Business Fair Dismissal Code.

However, ACCI also acknowledges that it is neither practical nor desirable to use a single definition that applies across all government agencies and that a tradeoff between simplicity and policy effectiveness exists.

Of the four options presented in the consultation paper on how to define small business, it is ACCI’s position that none of the definitions adequately addresses the considerable variation across and within industries. This is the case whether the definition is based on numbers of employees (varies according to labour intensity and scale of production), size of annual turnover, transaction values or the prevalence of publicly listed companies in an industry.

Therefore, ACCI does not support one option for defining small business over others but makes the following general comments and recommendations:

- if small businesses are defined as any business that is not a publicly listed company then the definition risks covering too many contracts/transactions, particularly if small business-to-small business contracts are covered;
- if a transaction value threshold is used, consideration should be given to using industry-specific thresholds and these should be indexed to maintain the real value of the thresholds over time;
- if an annual turnover threshold is used, the threshold should be indexed to maintain the real value of the threshold over time;
- if an employee threshold is used, then it should be applied on a full-time equivalent (FTE) basis to take into account varying levels of utilisation of part-time and casual staff.

3. INCLUSION OF FINANCIAL SERVICES

ACCI supports the inclusion of financial services contracts being included in any UCT protections regime for small business. The case study below serves to highlight the need for financial services to be included. It also illustrates the potential for various remedies to be applied.

3.1 Loan covenants – a case study

A \$2,500,000 loan via a Trust was arranged by a large mortgage originator. Funds were provided to the Trust by three of the major banks. The loan was for a term of five years. With the loan funds and equity funding, a commercial development consisting of eight generously sized office suites, was undertaken in Newcastle. The building was fully leased with a net income of \$280,000 pa. This amount was double the amount required to meet the interest payments obligations.

Part way through the loan term, I was informed that the banks that funded the Trust wanted their money back as the banks wanted to wind up the Trust. I had negotiated a competitive interest rate at the time that I arranged the loan and therefore did not want to repay the loan early. I had conducted the loan in a meticulous manner within the terms of the Loan Facility.

I was told that the banks would rely on a clause in the Mortgage Common Provisions, which broadly stated that if, in the bank's opinion, the secured property had decreased in value, then I was in default and that the Trust could then call in the loan. I maintained that it had not decreased in value.

Both sides engaged lawyers and the solicitors started writing letters. The banks obtained a valuation, which showed that the property had dropped in value. We obtained a valuation that showed that it had **not** dropped in value.

Soon thereafter, I received a phone call from a receiver, Hall Chadwick, saying that:

1. They had been appointed as receiver to my property.
2. They had, that day, instructed my tenants to pay their rent to the receiver
3. They had appointed agents to sell my property.
4. They also approached my bank, the NAB and instructed them to pay the balance of the funds in the account that received the rent, to them.

The balance was over \$120,000.00 at that time. I was on the back foot. Fortunately I had other resources and other bank accounts. My only option was to go to the Supreme Court in order to obtain an injunction, as a matter of urgency, to prevent the property being sold as a mortgagee sale. So that was what I did.

I could have taken the case to a full hearing in the Supreme Court. However, the upside for me if I had won the court case was that the loan would continue for the final year of the five-year period. This was desirable, but not a large upside. The downside was that I would have had to pay my legal costs as well as the banks' costs, including their legal costs as well as the receiver's costs, which were all ongoing and very substantial. So in the end I settled. I agreed to pay 50% of the banks' costs and pay out the loan within 14 days, which I did. My solicitor's costs were \$68,000. In addition I paid 50% of the banks costs. The banks' costs were \$70,000 and accordingly I paid \$35,000 to the banks at settlement.

The key point of the case study is that although I was not in default, the banks, with their deep pockets and intimidating behaviour, achieved their objective, to have

their loan repaid early to suit their own commercial interests. To protect my asset from a mortgagee sale cost me in excess of \$100,000.

Fortunately I was in a position where I could write a cheque for \$2,500,000 to pay out the bank within 14 days as required, to enable a settlement. If I had not been able to do so, my choices were that I could have allowed the bank to sell my property as a mortgagee sale or continue to fight the court case. In most cases the borrower would not be in such a strong financial position. Accordingly the banks would take possession of the property, sell it by way of mortgagee sale and most likely destroy the borrower's business and income. If there were a shortfall, the banks would most likely bankrupt the business owner. This draconian behaviour that I experienced is not an uncommon event. The banks resort to this type of behaviour regularly, particularly at times of economic slowdown.

4. REMEDIES

The case study presented in Section 3.1 not only highlights the issues associated with the provision of credit to small businesses, but also applies more broadly to standard-form contracts generally. The key problem in this example is that a larger entity has the power to unilaterally decide a contract has been breached and act swiftly to terminate the contract. To level the playing field, the smaller entity must have options available to it to contest such a decision.

The following sections discuss the roles that various government agencies can play in facilitating better outcomes without necessarily resorting to heavy-handed government intervention in business-to-business contractual agreements.

4.1 Mandating the inclusion of dispute resolution and appeal clauses

The aims of any unfair contract term protections for small businesses should be:

- in the first, instance, to provide realistic, cost effective avenues for small businesses to have disputes involving standard-form contracts with larger or more powerful businesses resolved in a timely and cost-effective way;
- for all businesses to be provided with information and knowledge about how to make standard-form contracts in a fair and efficient manner;
- as a last resort, for standard-form contracts to be altered where certain terms are deemed unfair according to the criteria outlined in the current consumer protections regime.

Ultimately, in order to avoid imposing new regulatory burdens on businesses, existing services should be utilised. Education and the provision of information must be exploited to the greatest extent possible to businesses of all sizes. Only when these options have been exhausted should government intervention in business transactions involving standard-form contracts be considered.

ACCI supports the encouragement of the inclusion of dispute resolution clauses and independent avenues for small businesses to appeal decisions made by one party to a standard-form contract. This would help to ensure that businesses generally have the opportunity to retain the benefits of entering into standard-form contracts (such as lowered transactions costs and the ability to manage risks). However, small businesses need to be able to do so on an equal footing with larger entities that would otherwise have greater bargaining power to impose unreasonable obligations.

4.2 Referral to existing services and small business advocacy within government

4.2.1 Role of the Small Business and Family Enterprise Ombudsman

The Small Business and Family Enterprise Ombudsman (SBFEO) can perform a useful service by referring small businesses to the appropriate existing service for a resolution of their dispute with another business over standard-form contracts. The SBFEO can also provide information and advice to small businesses about their options to have such disputes resolved.

The SBFEO should not directly provide dispute resolution services that are currently provided by State and Territory Small Business Commissioners or the Commonwealth Ombudsman but should be given powers to perform investigations and refer disputes to the appropriate authorities.

The SBFEO could collect useful data and provide formal avenues for review and policy advocacy within government. The SBFEO could also be empowered to collect detailed data on contractual disputes involving standard-form contracts and how the disputes were resolved (if at all).

Ideally, the SBFEO would collect data based on business sizes and industries involved. If necessary, the SBFEO could be authorised to undertake research using such data and present findings and recommendations to Commonwealth, state and territory governments for policy changes or target areas for the ACCC to focus their attention. The data and research could form the basis of an annual report by the SBFEO to be tabled in the Commonwealth Parliament. The data would also enable organisations like ACCI and its members to provide better informed representation to government agencies.

4.3 Alternative Dispute Resolution Services

4.3.1 Roles of the State and Territory Small Business Commissioners, the Commonwealth Ombudsman and others

Small Business Commissioners exist in four states – New South Wales, Victoria, Western Australia and South Australia. These Commissioners are all independent statutory officers and while their roles vary from state-to-state, they focus on investigating disputes and providing dispute resolution services. They also work collaboratively with the Australian Small Business Commissioner (within the Australian Competition and Consumer Commission) on issues that affect multiple jurisdictions. In the other four states and territories, government agencies such as fair trading offices, small claims and civil tribunals, conflict resolution service providers and the court system provide avenues for dispute resolution.

The Commonwealth Ombudsman investigates disputes involving Commonwealth Government agencies and makes formal recommendations to the Government where issues arise to improve government administration processes.

There also exist a range of industry-led Ombudsmen, such as the Financial Ombudsman Service (FOS) and the Telecommunications Industry Ombudsman (TIO) who provide dispute resolution services in relation to disputes in specific industries. Some of these bodies enforce mandatory industry codes of practice, while others deal with voluntary codes of practice.

The Australian Small Business Commissioner provides information and referral services to these existing providers and ACCI recommends that this continue under the Small Business and Family Enterprise Ombudsman.

4.4 Education and provision of information to users of standard-form contracts

4.4.1 The Australian Competition and Consumer Commission (ACCC)

The ACCC has a strong role to play in educating and informing users of standard-form contracts to make them fairer – ensuring an enforcement approach is a last resort. Indeed, this was the approach taken by the ACCC during the review phase of the new Australian Consumer Law. A March 2013 industry review report noted that 79% of problematic terms identified by the ACCC during the review were deleted from, or amended in, standard-form consumer contracts¹. This lends support to the notion that a similar approach is warranted if the consumer protections are to be extended to small businesses.

4.5 Varying standard-form contracts, striking out unfair terms and applying penalties – a last resort

The experience of the implementation of UCT protections to standard-form consumer contracts shows that non-regulatory responses are able to achieve significant changes without the need for costly and protracted enforcement actions by the ACCC. The ACCC has only successfully commenced and concluded one case in relation to UCTs and has commenced another case that has not concluded yet. There is every reason to suspect that a similar outcome can be expected with the extension of UCT protections to small businesses.

Businesses that make use of standard-form contracts that can show they have made an effort to remedy suspected unfair contract terms and have provided genuine options for contractual dispute resolution should be able to avoid enforcement actions. Enforcement actions should only be taken in circumstances where other avenues for resolution have been exhausted. This will help to keep the regulatory compliance burden to a minimum.

¹ ACCC, *Unfair Contract Terms, Industry review outcomes*, March 2013, p.1, <http://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf>

5. ABOUT ACCI

5.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

5.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY **BUSINESS SA** CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY** **ACCI MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA (THE) **NATIONAL BAKING INDUSTRY ASSOCIATION** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE