



## **Australian Hotels Association (AHA)**

Submission in relation to:

### **Extending Unfair Contract Term Protections to Small Businesses - Consultation Paper Response**

Unfair Contract Terms Consultation Paper  
Small Business, Competition, and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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## 2 Summary

The Australian Hotels Association (AHA), the peak employer representation association in the hospitality and accommodation sectors, is pleased to provide this submission addressing the issues outlined in the *Extending Unfair Contract Term Protections to Small Businesses Consultation Paper* dated May 2014

The key responses to the issues identified in the Discussion Paper include:

- The AHA favours Option 3— legislative amendment to extend the existing UCT provisions to standard form contracts involving small businesses;
- In relation to the definition of small business the AHA would be comfortable with either “No definition but exclude publicly listed companies from being a claimant” or “No definition as such and rely on the criteria for UCT to exclude those who do not warrant UCT protection.”
- In relation to what is a standard form contract, the AHA agrees with what is in the current consumer focused UCT law and in particular the rebuttable presumption in relation to whether a contract is standard form or not.
- AHA has identified what it considers to be “unfair” provisions of a standard form contract.
- The application of any new law should apply to all contracts including if the contract is between two small businesses.
- Any new law should cover financial products and services. There should be no exemptions but there should be a defence if a mandatory code or contract terms is being followed.
- The exclusion should not apply to the ability to change the “upfront price” during the period of the contract and particularly upon renewal of a contract where one party is in a captive situation. **The renewal issue is one of critical concern.**
- Once the new law comes into effect contracts prescribed by law or those that mirror mandatory codes should be reviewed.

### 3 About the AHA

The Australian Hotels Association (AHA) is an organisation of employers in the hotel and hospitality industry registered under the *Fair Work (Registered Organisations) Act 2009*. Its membership of more than 5,000 licensed hotel businesses includes pub-style hotels plus three, four and five-star accommodation hotels located in each state and territory.

While some hotels are part of national or international chains or corporate entities that operate in several jurisdictions, the majority are small owner-operated businesses serving their local communities in accordance with the laws of their particular state or territory.

The AHA's accommodation hotel members are serviced by Tourism Accommodation Australia, a division of the AHA. The AHA has branches located in every Australian capital city and a Canberra-based national office.

### 4 About the hotels industry

The hotel industry is a significant employer, with more than 278,000 persons employed between the hotel sector (188,000)<sup>1</sup> and the accommodation sector (90,000)<sup>2</sup>, and an annual wages and salaries contribution of \$5.41 billion. In addition there are an estimated 20,000 employees in the casino sector<sup>3</sup>.

Although some hotels are large-scale operations with hundreds of employees which form part of national or international chains, the majority of AHA members are small, locally-owned businesses serving their surrounding communities. In 2005-06 only 145 of 65,197 businesses in the ABS Accommodation, Cafes & Restaurants sector employed more than 100 people.<sup>4</sup>

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<sup>1</sup> PricewaterhouseCoopers (2009) *Australian hotels: More than just a drink and a flutter*

<sup>2</sup> Australian Fair Pay Commission (August 2008), *Accommodation, Cafes and Restaurants Industry Profile, Research Report No. 1/09*

<sup>3</sup> Australasian Casino Association, *Submission to the Parliamentary Joint Select Committee on Gambling Reform*, 31 January 2011

<sup>4</sup> Australian Bureau of Statistics (2007), *Australian Industry 2005-06*

## 5 Response to Key Focus Questions

### 5.1 The Policy Background

The AHA strongly supports the Government's policy of the regulation of unfair contract terms (UCT) and conduct related to such contract terms.

The AHA notes that an unsuccessful attempt was made in 2009 to legislate for UCT in business to business contracts and is pleased that the issue is being pursued once more with vigour.

It will be important as to what the new law will cover and how it is to be enforced, including self-enforcement.

The AHA does not seek a regulatory structure that would punish businesses as such but for the UCT law to condition market behaviour and to create a more balanced commercial contracting environment.

AHA members are constantly required to enter into standard form contracts with little or no negotiation. AHA Members have many suppliers who are also competitors to our members and as such wish to dictate the terms of operation of our members' business. The AHA has entered into collective bargaining arrangements with some suppliers but with limited success. A list of terms that the AHA considers "unfair" is at **Appendix A**.

The AHA notes that there is some concern expressed about interaction between the Harper Review and the proposals in the Discussion Paper. It is the view of the AHA that that is not a concern and that UCT laws should precede Harper as any outcome from Harper may take a while. We hope that the business to business UCT will become law in January 2015.

The Discussion paper lists 4 Options for a policy response to the UCT issue, namely:

- Option 1-the status quo;
- Option 2 — light touch or non-regulatory responses;
- Option 3 — legislative amendment to extend the existing UCT provisions to standard form contracts involving small businesses; and
- Option 4 — legislation to require small business standard form contracts to be negotiated on request.

The AHA favours **Option 3**.

Later in this submission we set out some concerns about the existing consumer focused UCT law and in particular, exclusions.

### 5.2 Definition of "Small Business"

There have long been difficulties in trying to define "small business". This was an issue in relation to the fast track collective bargaining provisions of the *Competition and Consumer Act 2010* (CCA) and section 20-21 of the *Australian Consumer Law* (ACL).

The *NSW Motor Dealers and Repairers Act 2013* has unfair conduct provisions, as has the *Commonwealth Independent Contractors Act*. Neither defines small business as such but each relies on the characteristics of the weaker party.

The AHA further notes the importance of transparency so that contracting parties know when they need to comply with the UCT provisions.

Some of the options include:

- A definition based on transaction value. The difficulty here is what value? Also with all such thresholds there will be sterile arguments whether the UCT law applies or not and who is in and who is out. Some will fall just in, others just out. The 2009 proposals had a monetary threshold of \$2 million contract value. The collective bargaining notification law has a suite of thresholds starting at \$3 million annual transactions.
- A definition based on the characteristics of the "small business" (for example, annual turnover or number of employees). For example, the *Privacy Act 1988 (Privacy Act)* defines a small business as being one that has less than \$3 million annual turnover. The difficulty here is transparency – how does a contracting party know the annual turnover, etc of the party with which it is contracting? Also the “in and out” issue arises as well.
- An "opt in" approach. The concept here was that if a business meets defined characteristics, they could then inform a party that they are contracting with that they are a small business, and that they wish to invoke the UCT protections; if they don't expressly opt in, then the UCT provisions don't apply. However, there are difficulties such as: How do you avoid a large business refusing to deal with a business that seeks to opt in? How do you ensure small businesses are aware of the need to opt in?
- No definition but exclude publicly listed companies from being a claimant. This has some attraction as it will exclude most large companies and is easily identifiable.
- No definition as such and rely on the criteria for UCT to exclude those who do not warrant UCT protection. This was the initial approach in the 2009 proposals.

The AHA would favour either of the **last two options**.

### 5.3 What is a “Standard Form” Contract?

The primary focus is on just how much needs to be negotiable before it ceases to be a standard form contract?

The AHA agrees with what is in the current consumer focused UCT law and in particular the rebuttable presumption in relation to whether a contract is standard form or not.

### 5.4 What Might Constitute an ‘Unfair “Provision of a Standard Form Contract?’

The AHA generally agrees with what is in the current UCT law but see later comments. Again the rebuttable presumption in relation to the “protection of legitimate interests” is important.

## 5.5 Scope of the Application of any New Law

The questions to be addressed are as follows:

- *Should the extension of the UCT provisions apply to contracts involving the supply or acquisition of goods or services, or only contracts involving the acquisition of goods or services by a small business?*

Whilst this may be against the narrow interest of AHA members the AHA view is that all contracts should be covered, too many anomalies arise if there is not universal operation.

- *Should the extension of the UCT provisions apply to contracts between two small businesses, or just contracts where only one party is a small business (however defined)?*

See comments above.

- *Should the extension of the UCT provisions also cover financial products and services provided to small business so that the ASIC Act provisions remain consistent with equivalent ACL provisions, or should the ASIC Act provisions continue to apply only to standard form consumer contracts?*

Yes, most definitely. Again see comments above. It is also the AHA view that there should be no exemptions but there should be a defence if a mandatory code or contract terms is being followed.

- *Should the “upfront price” of the good or service be excluded?*

This is an important issue for business, especially small business. Whilst at the outset of a contract when there has been a choice whether to enter into the contract or not such exclusion is understandable. The exclusion should not apply to the ability to change the “upfront price” during the period of the contract and particularly upon renewal of a contract where one party is in a captive situation. **The renewal issue is one of critical concern.**

- *Should the “main subject matter” of the contract be excluded?*

Please refer to the comments as those above.

- *Should contracts prescribed by law or contracts that mirror a mandatory Code be excluded?*

There should be no exclusions but contracts prescribed by law or mirroring a mandatory code should be a defence. Having said that once the new law comes into effects contracts prescribed by law or those that mirror mandatory codes should be reviewed.

## 6 Conclusion

The AHA has expressed strong support for the government’s policy direction to broaden the definition of UCT to include small businesses. Small businesses must comply with a bevy of local, state and national regulations that both prosper and hinder their operations. Further regulation

should only be introduced where the outcome works to the advantage and or protection of small businesses.

The new provisions should be legislated to cover all contracts and include the provision of financial products and services. The upfront price components of contracts should not be excluded as this is an important issue for small businesses being subject to automatic price increases with contract renewals.

The proposed extension of the UCT protections to small businesses will help to create a level playing field and greater transparency in the provision of goods and services.



## **APPENDIX A-unfair contract terms.**

**Contract terms** that the AHA considers as "unfair" in a small business context include:

- Permit the supplier but not the customer to avoid or limit the performance of the contract, terminate it, vary its terms or renew or not to renew the contract.
- Permit the supplier to:
  - change prices without the customer's right to terminate the contract (lock in terms);
  - unilaterally determine when the contract has been breached;
  - unilaterally vary the characteristics of the goods or services to be supplied; and
  - assign the contract to the customer's detriment without the customer's consent.
- Penalise the customer but not the supplier, for breach or termination of contract.
- Limit the customer's right to sue the supplier.
- Limit the supplier's explicit liability for its agents.
- Limit the evidence the consumer can lead in proceedings on the contract.
- Impose the evidentiary burden on the customer in proceedings on the contract.
- Demand entry to business premise and seize goods owned by the business
- Deem the contract to be an agency relationship yet force the property in the goods to pass to the so called agent.
- Supplier to push the full costs of meeting warranty obligations onto the other party.
- Where there is third line forcing or full line forcing without the consent of the other party,
- A term that allows a party to demand to see the business accounts of another,
- A term that demands access to a party's bank account for the payment of moneys claimed to be owed.
- A term that allows one party to supply as much product as it decides and the other party must accept that product and pay for that product.
- A term that transfers costs from one party to another, without the agreement of the other party.
- A term where the sanctions for termination voluntary or otherwise are disproportionate.
- A terms where the fees payable are based on extraneous issues e.g. broadcast fees are based on the liquor sales of the whole venue and not on the areas where the broad can be viewed,
- Disproportionate security demanded in the case of non-payment of accounts.
- Where a small business is credited for unsold product the payment of the credits is unduly delayed or simply continually rolled over to pay for new product.