

8 August 2014

The Treasury  
Langton Crescent  
PARKES ACT 2600

## **Extending Unfair Contract Term Protections to Small Businesses**

Thank you for the opportunity to provide input to this important inquiry. We apologise for the late lodgment.

COSBOA has been seeking relief for its members from the behaviour exhibited by some larger businesses through the misuse and abuse of contracts; particularly around negotiation of contracts and the lack of good faith and also the inclusion of clauses and information that is to the detriment of the small business person.

### **Definition of small business**

We need to define small business in a way that does not create confusion, inhibit growth or have unintended consequences. We believe that for the purposes of tax, a turnover threshold should be \$5 million and we believe that should also apply to contract issues.

### **Differences between big and small business – it is all about process and communications**

COSBOA's approach to this issue is based on achieving productivity and health in the small workplaces of Australia by creating simpler and easier to understand processes.

When considering this, we should first note some of the differences between big and small business.

A small business owner is closely connected with his or her business; they do not make a profit the same way as a big business, instead they generate an income and a living. Measuring success is not about a share price, it is about income, time with the family, lifestyle, interaction with customers, interaction with suppliers, happy and productive employees and personal health.

Experts in contract law are very rarely employed directly by a small business person. Therefore what would be a drain on a small business person is not necessarily a drain on a big business.

In the end, the bigger problem for small business people is that by nature they are trusting and optimistic. Indeed if they were not of that ilk they would not ever start or purchase their own business. A small business person should not be punished for possessing these personality traits. The people who make comments "*it's their own fault if they sign a dodgy contract*" or "*there's one born every day*" are happy to blame the victims of unscrupulous bigger businesses.

### **Issues for contracts**

The major issues for contracts are those in a position to take advantage of trust, particularly landlords and franchisors, and those that dominate a market place, particularly the biggest retailers. Not all franchisors have a poor and dishonest approach to negotiating contracts and the recently announced code of conduct for franchising may go some way to catching the recalcitrant, however changes to contracts may also assist in alleviating the problem.

The area where there is an entrenched culture of taking advantage of the trust of small business people and their lack of experience and understanding is in the biggest shopping malls.

The business model of the large landlords appears to be based on lack of transparency and "signer beware" practices. One representative of the landlords was posed this scenario "there are landlords who know that a business who is signing a lease will not last for more than a few years yet they go ahead with the lease." His response was 'what can we do they signed the contract?' This is an appalling response that shows the business model is not built on good faith and disclosure; it also shows the complete lack of concern about the effects of business failure on individuals and their families. This must stop and we are not sure changing contracts can change that culture.

The other issue then becomes seeking justice for those that have been wronged. That is another area of difficulty. The history of the landlords and other big businesses is that they will ensure that any legal activity is dragged through courts and other legal processes until the aggrieved small business party runs out of resources or health.

## Solutions

There are various processes in place or being developed that will assist to add good faith to the areas of franchising and to the retail leasing sector. This includes the services of the small business commissioners who are found in NSW, Victoria, South Australia and Western Australia as well as at the national level. These commissioners are being given more and more power to bring businesses together to resolve disputes. This then removes the capacity for bigger businesses to stall legal processes and stone wall activities until the smaller business can no longer participate. The small business commissioner will bring the issue under their jurisdiction and create an environment of openness and transparency.

The other solution is to increase sanctions on those that have misused their power. This is already being addressed through the Franchise Code but also needs to be applied in the leasing area. A large enough sanction will inhibit unacceptable behaviour.

Given that a small business person who is in the supply chain of a large business or in a shopping centre will be ostracised and mistreated if they complain or cause what the large business deems to be trouble, then the sanctions must also include a high compensation to that business person so they can establish a new business in another sector or exit business altogether.

The other solution is to review some of the common clauses found in contracts that create problems. For example a common inclusion in leases is a clause that forces a lessee to conduct a shop fit-out a few months before lease renegotiation. The lessee then find themselves in a position where they have invested a significant amount of funds into the business and the landlord can increase lease costs knowing that the small business person will need to protect their investment. Case studies should be sought to discover other clauses and practices that place the small business person in a contracted position of stress.