

Geoff Bowyer
T 03 9607 9367
F 03 9607 5270
president@liv.asn.au

31 July 2014

Unfair Contract Terms Consultation Paper

Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By Email: AustralianConsumerLaw@treasury.gov.au

Dear Sir/Madam,

**EXTENDING UNFAIR CONTRACT TERM PROTECTION TO SMALL BUSINESS
CONSULTATION PAPER**

The Law Institute of Victoria (LIV) is pleased to have the opportunity to provide feedback in response to the Extending Unfair Contract Term Protection to Small Businesses Consultation Paper ("Consultation Paper"). The LIV would like to commend both the Australian Government and Consumer Affairs Australian and New Zealand (CAANZ) on their ongoing commitment and support of Australia's small business sector.

The LIV publishes standard form contracts including a lease of real estate ("Lease") that is regularly updated by the LIV's Leases Committee which is comprised of experienced leasing lawyers. The Committee includes lawyers who act mainly for landlords and lawyers who act mainly for tenants. The LIV has, through the Leases Committee, considered the Consultation Paper in relation to the Lease. Many of the Consultation Paper's Key Focus Questions were not applicable to the suitability or otherwise of the Lease and accordingly the LIV has not responded directly to each of the Key Focus Questions but offers its comments as a publisher of standard form contracts, including the Lease.

LIV Lease of Real Estate

The LIV, through its Leases Committee, considered the terms of the Lease and in our view it does not contain any unfair contract terms. Victorian tenants of "retail premises" have the benefit of the *Retail Leases Act 2003 (Vic)* which is designed to protect the interests of tenants and the Lease has been drafted after consideration of that Act.

Definition of 'Small Business'

The LIV is interested to understand how the Government intends to implement a test for the definition of "small business". It is noted that there are currently several legislative definitions of "small business" across States and Commonwealth jurisdictions. For example, whether or not a business is classified as a 'small business' depends on various factors, including:

- annual turnover – Privacy Act 1988 (Cth);
- aggregate turnover – Income Tax Assessment Act 1997 (Cth);
- number of employees – Fair Work Act 2009 (Cth); and
- value of goodwill plant equipment and fittings – Estate Agents Act 1980 (Vic)

Some legislation concerning “small business” does not contain a definition of “small business”. See: for example the *Small Business Commissioner Act 2003 (Vic)*, the *Small Business Commissioner Act 2011 (SA)*, the *Small Business Commissioner Act 2013 (NSW)* and the *Small Business Development Corporation Act 1983 (WA)*. We understand that many regulators and agencies have informally adopted the definition of “small business” used by the Australian Bureau of Statistics, being a business that employs fewer than 20 individuals.

In our view care needs to be taken in considering the implications of any legislation and in particular in the drafting of a definition of “small business”. In the context of landlord and tenant, it will be difficult to ascertain at any point in time whether a business is or is not a “small business” without first having expensive and time consuming court proceedings. In most cases a landlord will not have any information about the factors listed in the above bullet points. Also a business may be a “small business” when a lease commences but cease to be a “small business” after the lease commencement date. What will happen if a business that is not a “small business” assigns the lease to a business that is a “small business”? Tenants are likely to make decisions about the operation of a business in order to be caught by the definition of “small business”.

The LIV would like to be consulted further about the Consultation Paper after the Government has prepared options that it is considering and provides more details about a proposed definition of “small business”.

If you would like to discuss any of the above comments in further detail, please contact Prue Long, LIV Property & Environmental Section Lawyer, on 9607 9522 or PLong@liv.asn.au.

Yours sincerely,



Geoff Bowyer
President
Law Institute of Victoria