
Exposure draft of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

The Treasury

18 May 2015

Introduction

1. The Law Council welcomes the opportunity to comment on the extension of unfair contract term protections to small businesses as proposed in the exposure draft of the [Treasury Legislation Amendment \(Small Business and Unfair Contract Terms\) Bill 2015](#) (the Bill).
2. Two Committees in the Law Council's Legal Practice Section prepared this submission: the Australian Consumer Law Committee and the Australian Property Law Committee. Two Committees in the Business Law Section of the Law Council have also prepared a submission. Different issues are highlighted in these submissions but there is no material inconsistency of view, and each supports the proposed reform, provided there is no duplication of, or inconsistency with, protections contained in another law. Comments are also provided on the statutory definition of "small business" and "small business contact".
3. The Law Council is the peak national representative body of the Australian legal profession. It represents over 60,000 legal practitioners nationwide. A profile of the Law Council is at [Attachment A](#).

Extension of consumer law protections

4. The Committees support the extension of unfair contract term protections currently available to consumers, to low-value contracts involving small businesses. The Committees notes that in doing so, the proposed legislation will (with some variations) extend to small businesses protections that are currently available to consumers under:
 - Subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) which regulates most financial products and financial services; and
 - Part 2-3 of the Australian Consumer Law (ACL) regulating standard form consumer contracts, being a schedule to the *Competition and Consumer Act 2010* (Cth) (CCA).
5. The circumstances in which many small businesses enter into contracts with suppliers of goods and services are often characterised by features similar to a consumer's experience. Those features include that:
 - the business is provided the contract on a "take it or leave it" basis – that is, there is no realistic opportunity for the business to negotiate any of the standard form terms and conditions in the contract;
 - the business may be relatively unsophisticated, such that its personnel are inexperienced in entering into contracts, or effectively unable to understand the effect of a contract's terms and conditions;
 - obtaining legal advice about the nature and effect of all the contracts' terms is practically not possible (such as because the business does not have in-house legal counsel or the cost of obtaining legal advice is practically prohibitive).
6. Uniformity in regulatory law and policy is desirable. Among other things, it means that the jurisprudence which has developed to date in respect of similar legislative mechanisms will assist any consideration as to whether a particular term in a standard form small business contract might be unjust.

Evolution of regulatory policy

7. The protections proposed in the Bill form part of the evolutionary trend in the regulation of unfairness in contract terms in Australia. Those evolutionary steps have included:
- the historical recognition of various forms of unfairness by equity and the common law;
 - the enactment of legislation directed towards redressing unfairness in consumer transactions, including what was the *Trade Practices Act 1974* (Cth), and the state-based *Fair Trading Acts*;
 - the enactment of the NSW *Contracts Review Act 1980*;
 - the introduction in 2003 of state-based unfair contract terms protections into the Victorian *Fair Trading Act 1999*;
 - the inclusion in the industry-based *Telecommunications Consumer Protections Code* (2007) of protections against the effects of unfair terms in consumer telecommunications contracts;
 - the enactment of Part 2-3 of the ACL which came into effect on 1 July 2010; and
 - the enactment of Subdivision BA of Division 2 of Part 2 of the ASIC Act which came into effect on 1 July 2010.

Definitions

8. The Committees believe that limiting the extension of the unfair contract terms protection to low-value small business contracts is reasonable.
9. The adoption of the proposed two-tiered criterion for identifying the up-front price for the purposes of determining whether a contract is a “small business contract” is also reasonable.
10. In respect of the definition of a small business:
- It is appropriate and desirable that the same definition be used in respect of both the protections for small businesses under the ASIC Act and the ACL; and
 - The definition, being one which captures a small business if it employs fewer than 20 persons, is reasonable.

Exemptions

11. The Committees note that central to the proposed extension of the protections is that the Australian Government retains the power to exempt from the scope of the ASIC Act and the ACL protections for small businesses, any industry-specific law (of the Commonwealth or a state or territory) that is deemed enforceable and equivalent to the protections in the proposed legislation. Such a mechanism appears to be a useful means of reducing regulatory duplication, without otherwise compromising the scope of the protections.

Retail leasing provisions

12. The *Retail Leases Act* 1994 (NSW) and equivalent legislation in most of the states and territories of Australia appears to warrant careful review in relation to the proposed new legislation¹
13. Civil and administrative tribunals in most states and territories have built up an extensive knowledge and experience in the area of retail tenancies and retail leases.
14. In NSW for example, there is specific protection in place for small business against unfair contract terms in the *Retail Leases Act* 1994 (NSW). Section [62B \(3\)](#) is an extensive provision in relation to unconscionable conduct by lessors against lessees that provides for reviews by the tribunal of contract terms. The clause includes indicia of acting in good faith and unfairness, including whether the lessee was able to understand any documents relating to the lease.
15. The Law Council suggests that relevant parts of the *Retail Leases Act* 1994 and retail lease legislation in the states and territories should be reviewed carefully. It may be for example, that provisions dealing with unconscionable conduct and unfair contracts should be made mutual, as on occasions, retail tenants may be large or sophisticated organizations dealing with small business landlords. It may be also be desirable to extend tribunals' jurisdiction to look at unfair contract terms to protect retail tenants.
16. The potential for duplication with state and territory retail lease legislation should be discussed with state and territory governments before the [Treasury Legislation Amendment \(Small Business and Unfair Contract Terms\) Bill 2015](#) is introduced to Parliament.

Conclusion

17. Committees of the Legal Practice Section are of the view that the extension of the unfair terms protections as proposed is likely to:
 - reduce the incidence of unfair terms appearing in standard form contracts entered into by small businesses; and
 - provide a means of recourse for small businesses that are at risk of those unfair terms being enforced against them.
18. The proposed legislation is supported provided duplication with industry-specific legislation such as retail lease law, is avoided, and those laws are harmonised so that the Commonwealth's objective of extending consumer law protections to small businesses is achieved.

¹ See for example: Neil Crosby, Sandi Murdoch and Eileen Webb, "Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom"(2007) 33 *UWAL REV* 207–250; *Leases (Commercial and Retail) Act 2001* (ACT); *Retail Shop Leases Act 1994* (Qld); *Retail Leases Act 2003* (Vic); *Retail Shop Leases Act 1995* (SA); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (TAS).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.