



Law Council
OF AUSTRALIA

Business Law Section

Consumer Policy Framework Unit
Small Business Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: AustralianConsumerLaw@treasury.gov.au

12 May 2015

Dear Sir or Madam,

Draft Legislation for Extending Unfair Contract Term Protections to Small Businesses

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) makes this submission in response to an email dated 28 April 2015 from The Australian Treasury with regard to an Exposure Draft Consultation: Extending Unfair Contract Term Protections to Small Businesses.

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

The SME Committee made a Submission to Treasury dated 5 August 2014 to the May 2014 Consultation Paper '*Extending Unfair Contract Term Protections to Small Business*' published by Consumer Affairs Australia and New Zealand.

Submissions

The SME Committee agrees that unfair contract term (**UCT**) protections as proposed should apply to 'standard form contracts' and also agrees with the considerations of when a contract is in a standard form.

Definition of 'small business'

The SME Committee does not have any issues with the criteria element that a small business is one employing fewer than 20 persons.

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However, the Committee notes that there are a number of other definitions of 'small business' in a range of legislation, both Commonwealth and State, and that in particular for the purposes of dealing with the Commonwealth Small Business Commissioner, the definition of small business is businesses employing up to 100 persons. The Committee would prefer to see consistency in definitional criteria.

Definition of 'small business contract'

However, the Committee is concerned that the inclusion of price payable criteria in the definition of a 'small business contract' so that the legislation only applies to low value contracts for goods may result in the proposed legislation not achieving its objective to balance the playing field by removing the impact of such unfair terms on small businesses.

The Committee considers that although the price payable criteria may be practicably applicable for small business service providers or recipients, they are not at all practical for small businesses that provide goods. Even micro businesses (with up to 5 employees) will often have a contract for provision of goods to or from a supplier in a 12 month period in excess of \$100,000, and for a period over 12 months under a contract of in excess of \$250,000. \$100,000 is only around \$2,000 per week, whereas many small businesses may have contracts of up to \$20,000 per week.

The SME Committee submits that the price payable criteria, if it is to be used, must differentiate between small business service providers/recipients and those that provide or receive goods under standard form contracts. The price payables for goods needs to be considerably greater than \$100,000 and \$250,000 as proposed, and should, from the Committee's experience, be more like \$1 million for up to 12 months and \$3 million for more than 12 months. This is because small businesses that resell goods, in particular, are required to purchase those goods, and even if they in due course receive a refund for goods not sold, have had to pay for their purchase.

As raised in the SME Committee's earlier Submission, there are clearly many benefits associated with the use of standard form contracts. The use of standard form contracts reduces the time and other transaction costs which small businesses would have to incur when entering into contracts with suppliers and customers.

It is the Committee view that the proposed legislation should apply to standard form contracts that small businesses enter into as a matter of course in carrying out their activities, and for this reason the price payable criteria needs to be increased as suggested for small businesses that supply or receive goods.

The Committee is also of the view that such transaction values should be consistent across the areas that legislation impacting small businesses deal with, particularly to enable small businesses to understand and identify at what point legislation is applicable to the transactions they are party to.

Accordingly, the Committee notes:

- that the Competition and Consumer Act 2010 (Cth) allows for \$3 million per year for each transaction as part of a collective bargaining agreement (which the Howard

government introduced to assist SME's in terms of dealings with larger businesses possessing monopsony power); and

- the government's proposed supermarket code in draft form (designed to assist small businesses in dealing with the supermarkets) does not place limits on transaction amounts, which may result in small businesses that deal with the supermarkets by-passing the unfair contracts route and utilising the proposed arrangements under the Code because there is no transaction value limit.

Although the Explanatory Memorandum indicates that higher value contracts should mean that the small business seeks legal advice on it before entering it, from the SME Committee's experience this is not the case for standard form contracts no matter what their value. A term in a contract that is held to be unfair, will be unfair no matter the defined standing of the parties.

Forum to determine whether a term is 'unfair'

The proposed the application of the extended UCT provisions to cause a term in a standard form small business contract to be declared void and unenforceable is dependent on a determination that the clause is 'unfair' as between the contracting parties, with such determination proposed to be made by a court on the application of either the relevant regulator (ACCC or ASIC) or the aggrieved party.

As raised in its earlier Submission, in the interests of improving small businesses' access to justice, the SME Committee considers that enforcement of the UCT provisions would be enhanced if that private right of action is also available in an alternate forum to court, such as to NCAT and VCAT. Unfortunately that may not be the case throughout Australia (for example the South Australian government has not expressed any interest in terms of establishing one of the super tribunals, so these SME's would be disadvantaged compared to their interstate counterparts). For those jurisdictions where alternative forums to court are available, there may also be a contract value eligibility criteria that would operate to exclude from the forum many standard form contracts that small businesses are party to that have unfair terms.

Further discussion

The SME Committee would be happy to discuss any aspect of this submission.

In the first instance, please contact the Committee Chair, Coralie Kenny, 0409 919 082 if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves, Chairman
Business Law Section