



**Motor Trade Association**

**Of South Australia**

**Email:-**

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**For Attention:**

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**Re: Response to  
Exposure Draft  
Consultation for  
Extending Unfair  
Contract Term  
Protections to Small  
Business**

12 May 2015

Submitted by  
Anna Moeller and Paul Eblen on behalf of  
Paul Unerkov  
Chief Executive Officer



# Response to Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Business

## Submission Contact

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## About the MTA

- Peak body for the retail motor industry in South Australia
- Dedicated to protecting and preserving the interest of the retail motor industry
- Represents and supports over 1100 Members across the State
- Average size of business is less than 10 employees per business
- Membership represents all sectors of the retail motor trades

## What we do

- Actively and effectively represent the interests of our members by focusing on providing the best services, training, employment and advocacy for the industry.
- Member Services that deliver value and exceed expectations
  - Industrial Relations
  - Work Health and Safety (WHS) Advice, consultancy auditing, on line WHS systems, tailored policies with procedures, plant and equipment SOPs ( Standard Operating Procedures), nationally accredited and non-accredited WHS training and representation
  - Environmental Advice
  - Commercial/legal dispute resolution, lobbying and limited civil action assistance
  - Business Training / Workshops
  - Business Partner Programs
  - Industry Networking
  - Print and Stationery services
- Employment and Training – Quality and flexible services by industry, for industry
  - Apprenticeship Employment and Training – over 500 apprentice placements across a number of automotive trades.
  - Post Trade upskilling
- Advocacy – voice of the motor industry

## **Response to Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Business**

### **Introduction**

The MTA SA represents some 1100 plus businesses across all automotive sectors of industry in rural regional and metropolitan areas of SA. These businesses vary considerably in size and employment levels from large multisite operators (up to 1200) employees to sole traders.

The MTA itself is also a significant employer in the state, employing 60 staff - with the majority being directly or indirectly involved in industry skills training. In addition MTA SA directly employs and trains in its Royal Park facility 500 apprentices who are then hosted to approximately 280 host employers.

### **Executive Summary**

The Motor Trade Association of SA fully supports the concept of the Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Business. The final legislation and processes for raising issues for determination should be:- cost effective; capable of reasonably immediate determination; provide for greater accountability in the form of a defacto precedent for changing unfair practice and terms in contracts; establish a more level environment in which to negotiate contracts with small business; improve efficiency and effectiveness of resources through more secure contractual arrangements; and to some extent minimise the risk of business closures and disruption to consumers/business clients who build contractual arrangements with small business..

However MTA SA advocates revisions to the draft in terms of five key issues to provide for both the effective operation of such alleged unfair contract provisions and reasonable protection for small business without hindering the capacity of either the larger business or the one with substantial market power, by way of operating effectively and in a professional manner.

The five primary areas for which changes are recommended are listed below together with recommendations for change and examples as to why such changes are essential. The Fact Sheet with seven key questions - provided as an addendum to the Exposure Draft, was useful in addressing the key concepts.

## **Primary Issues for which changes are recommended**

### **Additional Criteria in determining an imbalance of bargaining power**

As a preliminary point, the MTA SA fully supports the need to address unfair contract terms where there is an imbalance of bargaining power between the parties to the transaction. However the guidelines suggested in the Exposure Draft as to what criteria are used to determine such imbalance, are difficult to define in specific factual circumstances and may well dilute the impact of the proposed legislation and restrict the capacity of the court in assessing whether or not there is an imbalance.

Therefore it is suggested additional guidance on assessing an imbalance of bargaining power should include:-

- whether or not such contract term/s have a similar impact on other businesses in comparable markets or locations or with similar market shares,
- whether the plaintiff seeking to prove the unfair contract term could establish, that in continuing to operate its business it had little or no capacity to reject such term/s
- Whether or not it was induced to enter into such contract through failure of the defendant to make the plaintiff fully aware of such allegedly unfair contract term
- Whether or not other small business have found difficulty financially as a result of the same or similar contract term with similar lack of capacity to reject such term
- Whether or not there is clearly inequitable terms in a contract such as roll over provisions creating automatic renewals and whether these were explained and documented at the time of initial negotiations
- Whether or not copies of such contracts were made available to the plaintiff prior to signing for adequate consideration or available on the defendant's website (without confidential prescriptive data as to costs etc.)
- Whether or not the practices of the defendant's servant or agent involved trickery or some form of deceptive or misleading conduct
- Whether or not the contract involves the small business to invest heavily in products, stock /inventory, specialised equipment and so on with a mandatory requirement to sell back at less than current market value or prevent on selling to reasonable business nominees or to prohibit the small business from seeking a value for goodwill.

### **Assessing what is a Standard form Contract in relation to unfair terms**

As there is a potential risk of extensive litigation about interpreting what is a standard form of contract, MTA SA recommends there be a reverse onus of proof (on the defendant) to show cause why the court should not , prima facie, determine the contract to be in standard form.

### **Recommendations for revising definition and scope of small business contracts**

As a preliminary point, the MTA SA, in the context of protecting all forms of small business against unfair contract terms, recommends revising the definition of small business to include one party who employs "fewer than 20 full time equivalents" otherwise there is potential for abuse in industries or remote/regional areas which are predominate employers of casual or part

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time labour (30 casuals at 3 shifts of 7 hours per week equates to 16.5 full time employees on 38 hours a week). It is noted that the Howard Government also recognised the term “Full Time Equivalents” in determining the size of business to be exempt from unfair dismissals.

A second issue of greater significance is the imbalance of market power in many so called business to business contracts involving single site businesses who employ greater than 20 employees where similar circumstances apply in relation to unfair contract terms. These businesses have more, albeit limited financial capacity to challenge such terms - and the benefits of such extension in definition would be to determine whether or not similar or identical terms are unfair.

A third issue is the value assigned to such contracts. Critically where business to business contracts for supply of retail goods (e.g. cigarettes and food products, credit contracts, plant and machinery sales) are for duration of 12 months or more, and the value of those goods exceeds \$250,000 per annum, one party of less than 20 employees frequently has an imbalance in bargaining power with no capacity to negotiate unfair terms. The value assigned to such contracts is too low – it should be up to \$1million, on an annual basis, to address foreseeable risks.

A fourth issue is the requirement that contracts exceed 12 months duration. To avoid the risk that contracts will be reviewed annually, contain unfair terms and then avoid this legislation, it is recommended the duration be revised so all contracts of greater than 6 months duration be caught by this proposed legislation.

A final issue of serious consequence for small business (well established in the motor industry) is unfair practices in relation to retail marketing which directly impacts on retail supply contracts. Ideally any proposed legislation should, within the “objects” of the Bill, contain both an enabling power in relation to unfair practices and some legislative authority for challenging/reviewing such practices.

For example, in regional and rural areas, retail supply agreements are offered to small business on a periodic basis so the small business is tied to a supplier for such purchases. Thereafter, once small business builds good will/clientele to the point where the range and value of such products sold exceeds a certain figure (e.g. \$250,000 per annum), the national or state distributor moves in to the retail market directly, sets up in retail competition underselling the small business client and destroying the competition during the period of the contract.

### **Assessing the appropriate jurisdiction for legal challenges**

As most small business will be facing a significant imbalance to challenging the alleged unfairness in contract terms, perhaps least cost legal options could be to provide:-

- For class actions
- For courts of competent jurisdiction to include state civil courts (in SA Minor Claims up to \$25,000 without legal representation except by consent – it is a no costs jurisdiction)
- Limiting the capacity of a defendant to seek to have a dispute heard in another jurisdiction simply to take advantage of the less financial capacity of the other party
- Revise access to Federal court determination of challenges for disputes over small business unfair contract terms.

### **Ministerial Discretion**

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As to the Minister's discretion to exempt the application of Unfair Contract Term Protections to Small business where there is industry specific legislation or regulation, it is submitted such exemption be in limited circumstance:-

- Where such industry specific legislation or regulation contains no mandatory right of civil action - as distinct from mediation processes for addressing individual contract terms (e.g. franchising code, credit provisions in ACL etc.), it is recommended the process in relation to this proposed legislation be: first, the parties have the discretion to follow the procedure in such alternative regulatory framework in the first instance; second, if mediation/conciliatory processes fail to achieve an agreed outcome, access to this proposed legislation should then be available
- Where decisions are made in relation to what are Unfair Contract Term Protections, they will form a more affective "defacto" precedent across industry – thereby minimising the risk of continuous tweaking /redrafting minor changes to previously determined Unfair Contract Term Protections
- Where a request is made for the exercise of Ministerial discretion to exempt the application of Unfair Contract Term Protections to Small business, there should be a set period of two months grace, during which time stakeholder input is invited so that the Minister has full particulars before making such assessment of whether or not to exercise such discretion

Should you seek any additional information or clarification in relation to this submission please contact Paul Unerkov [punerkov@mta-sa.asn.au](mailto:punerkov@mta-sa.asn.au) or on 8291 2000.