SHOPPING CENTRE

COUNCIL OF AUSTRALIA

Exposure Draft – Treasury Legislation Amendment

(Small Business and Unfair Contract Terms) Bill 2015

Submission by the

Shopping Centre Council of Australia

12 May 2015

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EXECUTIVE SUMMARY

The Shopping Centre Council of Australia (SCCA) has a significant interest in the Draft Bill. Unless and until the *Competition and Consumer Act* provides an exemption from the new law for those retail leases already regulated by state or territory retail tenancy laws, shopping centre owners face the prospect of 'double regulation' of contracts. The proportion of specialty tenant contracts that will be subject to 'double regulation', on the basis of the thresholds specified in the draft Bill, could be as high as 20% for some shopping centre owners. This is in contrast to most other businesses, whose contracts are currently unregulated by governments, and who will not have an additional layer of regulation imposed on them.

The Draft Bill adopts a 'minimalist' approach by seeking to "extend" the current unfair contract terms (UCT) provisions in the Australian Consumer Law (ACL) to include 'small business contracts'. The word "extend" is used several times in the Explanatory Memorandum (EM) (see pp. 10 and 11). It is our firm view that it is inappropriate to simply extend the provisions in the ACL to small business contracts through minor amendments to the ACL. Many of the existing provisions in the ACL, while sensible in a business-to-consumer context, are not applicable in a business-to-business context. The relationship between business and consumers is quite different to that between business and business. In a competitive market small businesses have a much greater opportunity to negotiate terms than do consumers. Small businesses are much more commercially sophisticated, have a much greater understanding of the goods and services they are contracting and have greater knowledge of contractual terms. Small businesses also have greater access to legal and other specialist advice and, indeed, should be encouraged by governments to seek such advice. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. Passing a law which effectively equates the commercial sophistication of small businesses with that of an ordinary consumer will inevitably be damaging in the long term to the small business sector of the economy.

The Draft Bill must therefore take into account the vastly different circumstances of a business-to-business relationship compared to a business-to-consumer relationship. The SCCA has therefore made a number of recommendations for amendments to the draft Bill and these are listed in section 1. The fact that we have nominated 17 recommendations reflects our view that consequential amendments, some of them complex, need to be made to the ACL in order to make it more relevant to small business contracts.

In this submission we have directed our comments to the relevant provisions of the *Competition and Consumer Act 2010*, as amended by the draft Bill, although many of our comments are equally relevant to equivalent provisions of the *Australian Securities and Investment Commission Act 2001* as amended by the draft Bill. References in this submission to sections of the Act are references only to the *Competition and Consumer Act 2010*.

EXEMPTION OF RETAIL LEASES ALREADY SUBJECT TO REGULATION

Even with the suite of recommendations for amendments we have proposed, we doubt the new law can adequately take into account the complexities of the retail tenancy relationship. A retail lease, unlike most other business contracts, is not a one-off transaction but a contract that is actively on foot seven days a week, for more than 360 days a year, and usually for a minimum of five years.

We are therefore disappointed that the argument we made in our submission on the Consultation Paper released in May 2014 – for the exclusion from the new law of retail leases already regulated by state or territory retail tenancy legislation – has been ignored. We are particularly disappointed by the desultory consideration given to our submission in the Decision Regulation Impact Statement (RIS).

As we noted above the shopping centre industry is one of the few industries which will now be subject to 'double regulation' of its contracts. In addition to the costs which our members presently incur to ensure their retail leases (and associated documents, such as disclosure statements) comply with the requirements of state and territory retail tenancy legislation they will now incur significant costs to ensure they comply with a law which relies heavily on judicial discretion and has no case law for guidance.

We are encouraged, however, that that the legislation will provide a mechanism whereby the Commonwealth Minister may exempt by regulation a law that "*provides enforceable protections for small businesses that are equivalent to those provided by [the unfair contract terms and associated enforcement provisions of the Act]*". We consider, however, this provision sets the bar impossibly high and will only benefit industry-specific laws which contain an 'unfair contract terms' provision (such as those nominated on page 57 of the RIS). The proposed provision, in its current form, will discriminate against laws, such as state and territory retail tenancy legislation, where the emphasis is on 'fairness' rather than on 'unfairness'. This legislation does this by setting out minimum standards which apply in a range of otherwise contentious areas and which are implied in lease terms. If the term of a lease fails to meet these minimum standards, the lease term is void and the legislated provisions prevail. We have noted in section 3 of this submission that, without such an exemption, a Federal Court judge could rule as 'unfair' (and therefore void) a contract term which a State Parliament has considered as 'fair' by implying certain protections into that contract term. This is an outcome which must be avoided.

Retail tenancy legislation is long-standing, is reviewed regularly (four state and territory reviews are underway at present) and retailer associations and retail tenancy officials have sought to ensure the legislation 'covers the field'. (The *Retail Leases Acts*, in NSW and Victoria, have more than quadrupled in size since the original legislation was introduced.) We have therefore recommended (see recommendation 4) that the wording of the proposed new section 139G(2A)(a) of the Act be amended to provide "fair and adequate protections" for small businesses". The Minister would still have to take into account, in considering whether to prescribe a law, the matters specified in section 139G(2A)(b) and, indeed, we have recommended an additional measure in this section to reinforce these matters.

CONSULTATION

The SCCA looks forward to working constructively with the Minister and the Federal Treasury in relation the Exposure Draft Bill.

Please do not hesitate to contact the SCCA on the contact details provided at section 9 on page 19.

1. Summary of recommendations

Definition of standard form contract

1) Section 27(2) of Schedule 2 be amended to provide: "A small business contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract."

2) The present Section 27(2) of Schedule 2 be deleted for small business contracts.

Exemptions from the new law

3) Section 26(1)(c) of Schedule 2 be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, State or a Territory".

4) The proposed section 139G(2A)(a) of the Act be amended to require that "the Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses". In addition a new paragraph (iv) be added to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses".

5) The words "or non-prescription" be inserted after "prescription" in the proposed section 139G(2A)(b)(ii) of the Act.

Calculation of upfront price

6) Section 26(2) of Schedule 2 be amended to provide: "The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, or the formula for its calculation is disclosed, at or before the time the contract is entered into". Alternatively, if the Government is reluctant to remove the words after the semi-colon in the proposed section 26(2), we recommend the following words after our suggested revised section 26(2): "; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event beyond that for which any estimate is provided."

7) Section 25(f) of Schedule 2 be amended to exclude an agreed price escalation term of a contract.

8) The new law should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and not contingent on the occurrence of a particular event.

Meaning of unfair

9) Section 24(4) of Schedule 2 be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b).

10) The word "detriment" in section 24(1)(c) of Schedule 2 be replaced by "material detriment" in the case of small business contracts.

11) The words "having regard to the nature of the contract;" be added after "expressed in reasonably plain language" in section 24(3)(a).

Restore usual onus of proof for small business contracts

12) Restore the usual onus of proof in section 27(1) of Schedule 2 for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract.

Definition of small business

13) Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the thresholds.

14) Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, or any related body corporate, employs fewer than 20 persons".

15) A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs.

Other necessary amendments

16) The new law should not apply to a small business contract renewed after the Commencement Date under an option granted prior to the Commencement Date. The new law should also not apply to a small business contract which is assigned to another party after the Commencement Date.

17) A new section ((5)) should be added to section 28: "This Part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2".

2. Amend the definition of standard form contract

The ACL does not include a definition of a 'standard form contract'. Section 27 of Schedule 2 lists a series of matters which the court "*must take into account*", although the court is also able to take into account "*such matters as it thinks relevant.*" This section will be unchanged by the Draft Bill.

By not defining a standard form contract, the ACL intentionally casts the net as widely as possible. In a business-to-consumer context that is understandable. In a business-to-business context, however, there needs to be defined parameters so that the new law does not substantially increase the cost of doing business in Australia; does not introduce widespread 'moral hazard' in small business decision-making; and also gives some certainty to large businesses.

The RIS does include a definition: "*Standard form contracts are pre-prepared contracts typically offered on a 'take it or leave it' basis by a party with greater bargaining power. Generally, a contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract when agreeing to it.*" (p.1) Similarly the EM notes that "*small businesses, like consumers, are vulnerable to unfair terms in standard form contracts as they are offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate terms.*" (p.3) It is obvious from the RIS and the EM that the market failure that the Draft Bill seeks to correct is one where contracts are offered on a 'take it or leave it' basis.

We propose, therefore, that this definition of a standard form contract which is included in the RIS be the definition to be included in section 27(2) of Schedule 2 in the case of small business contracts and we have recommended this below.

The indicia which are currently listed in Section 27(2) of Schedule 2 have no relevance in a business-to-business context and are unnecessary in the light of the definition of 'standard form contract' we have recommended. To take one example, subsection 2(b) provides that a court must take into account "*whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties*". Preparation of a draft or pro-forma contract, particularly when multiple transactions are to occur, is a sensible and efficient way of doing business. In the case of retail leases, retail tenancy law requires that a draft contract be made available to a prospective tenant even before negotiations commence. For example, section 9(1) of the *Retail Leases Act* (NSW) provides: "*A person must not, as a lessor or on behalf of a lessor, offer to enter into a retail shop lease, invite an offer to enter into a retail shop lease or indicate by written or broadcast advertisement that a retail shop lease is for lease, unless: (a) the person has in his or her possession a copy of the proposed lease . . . for the purpose of making the lease available for inspection by a prospective lessee, and (b) the person makes . . a copy of the proposed lease . . . available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease.*" It would be nonsensical for retail property lessors to be effectively penalised (by section 27(2)(b)) because they are obeying the law of a state or territory. Similarly a business issuing multiple cleaning contracts, for example, should not be penalised because, for efficiency reasons, it issues a copy of a standard contract with the relevant tender documentation.

We recommend that the current section 27(2) be deleted for small business contracts.

Recommendations

1. **Section 27(2) of Schedule 2 be amended to provide: "A small business contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract".**

2. **The present Section 27(2) of Schedule 2 be deleted for small business contracts.**

3. Widen exemptions from the new law

The Bill proposes two areas for exemptions to the proposed new law relating to small business contracts.

The first is the exemption for certain contract terms nominated in section 26(1) of Schedule 2. This already exists for consumer contracts and will now be extended to small business contracts. Section 26(1)(c) provides that the unfair contract terms law does not apply to a contractual term to the extent (and only to the extent) that the term, *"is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory."* State and territory retail tenancy law does not expressly require particular lease terms but it does specify minimum protections which must apply in a whole range of areas of the retail tenancy relationship. Lease terms which do not meet these minimum standards are void. It can be argued, but not with certainty, that state and territory retail tenancy law "expressly permit" certain lease terms, provided that those lease terms conform to the minimum protections specified in the retail tenancy law. This argument should be put beyond doubt by amending section 26(1)(c) to state: "*is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory"* (the words underlined have been added). It would be a bizarre outcome, and one that must be avoided, if a lease term which is expressly permitted by, say, the Parliament of NSW (and is therefore regarded as 'fair' by that Parliament) is deemed to be unfair and declared void by a Federal Court judge. If our recommendation is adopted, the outcome is still the same: if the lease term in question does not meet the standards of fairness laid down by the NSW Parliament it is void.

The second area for exemptions is introduced by the Bill and will become section 28(4) of Schedule 2 of the Act. This will read: "This Part does not apply to a small business contract that is covered by a law of the Commonwealth, a State or a Territory that is a law prescribed by the regulations". A new subsection of the Act (s.139G(2A)) specifies the steps that must be taken by the "Commonwealth Minister" before a regulation is made prescribing such a law. The Minister must be satisfied that the law "*provides enforceable protections for small businesses that are equivalent to [the unfair contract term and associated enforcement provisions.]* In addition, the Minister must take into consideration: (i) any detriment to small businesses resulting from the prescription of the law; and (ii) the impact on business generally resulting from the prescription of the law; and (iii) the public interest. We have addressed this specifically in the Executive Summary on page 4 of this submission. We consider this provision is too restrictive and sets the bar far too high. We doubt any law could be prescribed if these provisions are taken literally. The provision removes any discretion that may be needed by the Minister in making a judgment about whether the provisions of another law are "equivalent" to the unfair contract terms provisions. We suggest that the new subsection 2A(a) of section 139G be amended to require that the Minister must be satisfied that the law under consideration was introduced in order to provide "fair and adequate protections" for small businesses. This could be reinforced by introducing a new paragraph (iv), in section 139G(2A)(b) of the Act, requiring the Commonwealth Minister to take into consideration, when making a regulation, whether the law was introduced to provide fair and adequate protections for small businesses.

One of the other matters which the Commonwealth Minister must take into consideration when making a regulation (under the proposed new section 139G(2A)(b) of the Act) is "the impact on business generally resulting from the prescription of the law". We are concerned this may be read too literally and the harmful consequences of some industries being subjected to 'double regulation', if they remain subject to the UCT provisions, is not taken into account. We believe the words "or non-prescription" must be inserted after "prescription" in the proposed new section 139G(2A)(b)(ii) of the Act.

Recommendations

3. **Section 26(1)(c) of Schedule 2 be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory".**

4. **The proposed section 139G(2A)(a) of the Act be amended to require that "the Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses." In addition a new paragraph (iv) be added to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses".**

5. **The words "or non-prescription" be inserted after "prescription" in the proposed section 139G(2A)(b)(ii) of the Act.**

4. Calculation of 'upfront price'

The Drafdt Bill uses the existing ACL concept of 'upfront price' as the basis for inclusion in the coverage of the new law. The transaction thresholds (of $100,000 single year and $250,000 multiple years) refer to the upfront price payable under the contract. The concept of upfront price is currently used in the ACL (in section 26(1) of Schedule 2) as one of the terms of a consumer contract which cannot be challenged as unfair. A term which sets the 'upfront price' of a 'small business contract' will also be immune from challenge.

While we see the logic of using the 'upfront price' as the basis for defining the thresholds for inclusion in the coverage of the new law, determination of the 'upfront price' in a small business contract will inevitably be more complex than it is for a consumer contract.

Section 26(2), as it will be amended, provides: *"The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event."*

For most consumer contracts the determination of the "consideration" provided under the contract is usually relatively straightforward and often calculated in monthly terms which can be multiplied over the number of months of the contract. For most commercial contracts this is far from straightforward. In the case of a retail lease, for example, the consideration usually comprises:

- Rent
- Rent increases usually escalated annually for each year of the contract. (This increase may be defined as a fixed dollar amount, a fixed percentage amount or an amount based on the CPI. To complicate matters further, some leases provide that at some point during the lease the new rent will be calculated by a valuer as a 'market rent').
- Operating expenses of the shopping centre ("outgoings") allocated according to a legislated formula. (These are the actual costs of the various statutory charges and operating expenses, such as cleaning).
- Promotion and marketing levy (based on a formula agreed by the parties in the lease and usually paid monthly).

In other cases some or all of these separate payments are bundled into a single 'gross rent' lease which has the advantage of providing reasonable certainty for the landlord and tenant but does not have the transparency advantage of the previous example (generally known as a 'net rent' lease). Obviously if some of the items listed above are excluded as consideration in determining the upfront price then an uneven playing field will exist between those operating a 'net rent' lease and those operating a 'gross rent' lease.

The disclosure statement provided to the prospective tenant (required by retail tenancy legislation) will, among many other things, specify: the annual base rent to be paid by the tenant in the first year; the means by which the base rent will be escalated; the estimated promotion and marketing costs in year one; and the estimated outgoings to be paid in year one.

The legislation needs to be more specific in how the "consideration" is to be calculated in the case of commercial contracts, such as retail leases. (All of the items listed above are matters for negotiation between the parties to the lease and are disclosed in advance to the prospective tenant and included in the lease. These are already regulated by state and territory retail tenancy legislation to ensure the tenant is fully aware. This is another reason why those retail leases which are already regulated by state and territory retail tenancy legislation should be excluded from the new law.)

Increases in rent in a retail lease (and prices in other commercial contracts) are usually negotiated between the parties when they enter into multi-year contracts. These provide for increases in rents and prices to occur on particular dates. In such cases the parties have voluntarily entered into a contract which permits the 'consideration' to be unilaterally varied according to an agreed formula. Such contractual terms could be regarded as a term that may be unfair according to section 25(f) of Schedule 2 i.e. "a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract." This subsection must be amended to ensure that such agreed escalation clauses are not inadvertently 'caught' by the sub-section.

The escalation of rents and prices in multi-year contracts is commonly based on the consumer price index and we therefore recommend that there is clarification in the legislation, perhaps by way of a note, that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.

Recommendation

6. **Section 26(2) of Schedule 2 be amended to provide: "The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, <u>or the formula for its calculation is disclosed</u>, at or before the time the contract is entered into." Alternatively, if the Government is reluctant to remove the words after the semi-colon in the proposed section 26(2), we recommend the following words be added after our suggested revised section 26(2): ";but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event <u>beyond that for which any estimate is provided</u>."**
7. **Section 25(f) of Schedule 2 be amended to exclude an agreed price escalation term of a contract.**
8. **The new law should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.**

5. Amend the meaning of unfair

The Productivity Commission warned in 2008: "*Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to . . . potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty.*" Our market economy requires each business party to a commercial transaction to protect its own interests. The subjective concept of 'fairness', therefore, provides no meaningful guide as to how one business is to act in a particular transaction with another business. This needs to be borne in mind when simply 'extending' - from consumer law to business law – the concepts of 'unfairness' and 'examples of terms that may be unfair.'

Section 24(1), once amended by the Bill, will provide that a term of a small business contract is unfair if it:

(a) would cause a significant imbalance in the parties' rights and obligations under the contract; and

(b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Section 24(4) states: "*For the purposes of subsection 1(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless the party proves otherwise.*"

These same provisions currently exist in the ACL.

It makes no sense, in a business-to-business relationship, for the party under challenge to have to prove that the term of a contract is necessary to protect its legitimate interests. This might be justified in a consumer contract but places an onerous burden on the supplier in a small business contract that cannot be justified. In the case of retail leases, for example, particular terms are included in a lease because years of operational and legal experience have found them necessary to protect the lessor's legitimate interests. They are not included simply to make the lease document as thick as possible. If it is to be left to the discretion of judges (most of whom lack commercial experience or expertise) to decide what is in the best interests of the owners or investors in a shopping centre (or any other large complex business), then the usual onus of proof should apply. It should be up to the party challenging the contract term to prove that the term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term. Section 24(4) should therefore be deleted.

We also consider subsection (c) should include a materiality test. As this stands a court could find a term of a contract to be unfair even if the detriment is insignificant and even trivial. The words "material detriment" should be substituted for "detriment" in the case of small business contracts.

Section 24(2) gives extraordinarily wide discretion to the courts. In determining whether a small business contract is unfair a court "*may take into account such matters as it thinks relevant*". This wide discretion conflicts with the separation of powers doctrine which requires that all regulation should set down clear and identifiable standards, which are capable of being interpreted and applied correctly and consistently by the courts, without wide judicial discretion on subjects of subjective merit which require arbitrary or prerogative judgment. This subsection ignores this doctrine by including vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions and personal notions of 'fairness', rather than clear and consistent standards. While this might not be of great concern in the area of consumer law, this is a serious concern in business law.

Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect reasonably clear and confident answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench. The present law, if it is extended to small business contracts, will do exactly that.

This is compounded by the fact that it is not clear that an appeal would lie against a decision of the court in such cases. Appeals normally lie only in matters of law. Decisions by a court on whether a contract term is unfair will be very much a subjective decision, given the vagueness of these concepts. Provided a court does take into account the items listed in s.24(2)(a) and (b), it is difficult to see how an appeal can lie against the court's exercise of its discretion on "*such matters as it thinks relevant*".

We have made no recommendation on this matter but wish to draw the Federal Government's attention to the extraordinarily wide discretion this gives to the courts and the violence this section causes to the separation of powers doctrine.

Section 24(2)(a) also provides that the courts "*must take into account . . . the extent to which the term is transparent*". Section 24(3) provides that a term is transparent if, among other things, it is "*expressed in reasonably plain language*" and "*readily available to any party affected by the term*". These provisions are unexceptional in the case of a business-to-consumer contract. In the case of a business-to-business contract, however, such a provision is naïve. Commercial transactions are usually very complex and it is nonsensical to assume that, say, a lease to rent premises for several years in a major shopping centre, which involves complex infrastructure, is a seven-day-a week operation, has hundreds of tenants and hundreds of millions of dollars in turnover, can be equated to, say, entering into a contract for the purchase of a mobile phone. If these provisions are to remain for small business contracts, the words "*having regard to the nature of the contract*" should be added after "*expressed in reasonably plain language*" in section 24(3)(a).

Recommendations

9. Section 24(4) of Schedule 2 be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b).

10. The word "detriment" in section 24(1)(c) of Schedule 2 be replaced by "material detriment" in the case of small business contracts.

11. The words "having regard to the nature of the contract;" be added after "expressed in reasonably plain language" in section 24(3)(a).

6. Restore the usual onus of proof for standard form contracts

The ACL (section 27(1) of Schedule 2) provides: "*If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise*". This section will not be amended by the draft Bill so this rebuttable presumption will be retained in the new business-to-business regulation. This reversal of the usual onus of proof may be justified in a business-to-consumer contract where a reasonable assumption can be made that a business would have greater resources than an ordinary consumer to prove a contract was not a standard form contract. Given the large volume of standard form contracts that exist in business-to-consumer relationships (such as mobile phone contracts) this rebuttable presumption is unlikely to be an onerous provision for such businesses since there is little doubt such contracts are standard form.

The business-to-business contract, unlike the business-to-consumer contract, is obviously commercial in nature and one on which both parties should be expected and encouraged to seek legal and other advice before concluding. Small businesses, unlike consumers, already have sufficient knowledge of the subject matter in respect of which they are contracting. They have ready access to legal and other specialist advice. Even if legal advice is not obtained, small businesses have greater knowledge of the impact and effect of contractual terms than ordinary consumers and have greater resources to enforce legal and contractual remedies than ordinary consumers. (The Government must also be alert to the possibility that the Draft Bill, including retention of this rebuttable presumption, may introduce greater 'moral hazard' in small business decision-making by discouraging small businesses from seeking specialist advice.)

Determination of whether or not a contact is a standard form contract is unlikely to be as straightforward in a business-to-business context. As well as leaving some businesses vulnerable to vexatious or whimsical litigation, fairness requires that the onus should be on the party challenging the term to prove that a contract is a standard form contract. If not, businesses will undoubtedly be involved in unnecessary litigation which will result in significant costs being incurred. These costs will inevitably have to be recovered from customers, thereby leading to higher prices for goods and services. It is also possible that some small businesses will 'game' the new law by not negotiating any of the terms of a contract (other than the upfront price). There is no justification therefore for retaining this rebuttable presumption when both parties to the contract are businesses.

As we noted in section 5, the Bill includes another dubious rebuttable presumption – that a term of a contract is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term – and we have addressed this in recommendation 9 of this submission.

Recommendation

12. Restore the usual onus of proof in section 27(1) of Schedule 2 for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract.

7. Clarify the definition of small business

We support the transaction thresholds contained in the Draft Bill. We note, however, that it would be possible for a small business to have multiple contracts, each of which is below the transaction thresholds, with one business and still receive the benefit of the new law for each contract. This is obviously not the intention of the Government and we suggest there should be an aggregation provision included in the proposed new section 23(4) of Schedule 2 of the Act.

When calculating the number of employees of a business to determine if it is a small business there is a need to add in related bodies corporate. Often the subdiary of a large company, or even a large company which operates businesses through a related service entity, may employ no employees or very few employees. Some large retailers, for example, undertake their leasing through a separate service company which often employs fewer than 20 persons. Similarly incorporated joint ventures often do not employ any employees. It would obviously be nonsensical if such entities were able to seek relief under the new law. The new section 3A of Schedule 2 needs to be amended to include any related body corporate. The Act already contains (in section 4A) an explanation of a related body corporate and this is already used in sections of the Act (see section 45(8) and section 6 of Schedule 2).

Considerable time and expense will be involved for large businesses (and also small businesses unless recommendation 17 in section 8B of this submission is adopted) in determining the number of employees of a party with which they are contracting. This is in addition to the other additional costs imposed by the new law. Businesses could be placed in a position where a counter party seeks relief under the unfair contracts terms provision even though the contractor had been told the counter party had more than 20 employees. A safe harbour arrangement needs to be included in the legislation to allow businesses to rely on what they are told by the other business about the number of people they employ.

Recommendations

13. **Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the thresholds.**

14. **Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, and any related body corporate, employs fewer than 20 persons".**

15. **A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs.**

8. Other necessary amendments

A. Application Provisions

The new proposed new section 294 of the Act refers to contracts that are "renewed" after the commencement of the Bill, once it is enacted. We accept that contracts that are renewed (in the sense that an earlier contract comes to an end and a new contract is negotiated and entered into), after the Commencement Date, should be subject to the amendments. However these contracts should be distinguished from contracts that are renewed pursuant to an option which was granted prior to the Commencement Date. In such cases the decision to renew the contract can only be made by one party to the contract and this party has made a decision to renew the contract on the existing terms and conditions. In the case of a retail lease, for example, only the lessee can make the decision to renew the lease under an option previously negotiated and the lessee, if it decides to exercise the option, knowingly renews the lease under the terms and conditions that have previously applied.

Similarly the new law should not apply to a contract which was entered into before the Commencement Date and which is assigned after the Commencement Date since this is also not a new contract (in the sense of an earlier contract coming to an end and a new contract being entered into).

Recommendation

16. **The new law should not apply to a small business contract renewed after the Commencement Date under an option granted prior to the Commencement Date. The new law should also not apply to a small business contract which is assigned to another party after the Commencement Date.**

B. Small business-to-small business contracts

We are puzzled why the new law will apply even when both parties are small businesses. This is contrary to the justification for the new unfair contract terms law which is supposedly to protect small businesses from large businesses, which might have much greater bargaining power, exercising that power in an unfair manner. Inclusion of small business-to-small business contracts will increase costs for every small business in Australia since they will all be required to undertake the costly legal examination and review of their standard form contracts. This also has the potential to introduce 'moral hazard' on a widespread scale among Australia's small businesses. It also opens the possibility that some small businesses will 'game' the new law by deliberately challenging contractual terms in the knowledge that their supplier, another small business, will (unless our recommendation 12 is adopted) have to go to the time and expense of proving that the contract is not a standard form contract.

Recommendation

17. **A new section ((5)) should be added to section 28: "This Part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2".**

9. Contact details

The Shopping Centre Council of Australia (SCCA) represents Australia's major shopping centre owners, managers and developers. Our members own and manage shopping centres from the very largest ('super-regional') centres to the smallest ('neighbourhood') centres in cities and towns in every state and territory.

Our members are AMP Capital Investors, Blackstone Group (Australia), Brookfield Office Properties, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lancini Group, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Novion Property Group, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group (owner and operator of Westfield shopping centres in Australia and New Zealand) and Stockland.

The SCCA would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

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