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Driving business success for consulting firms in the built and natural environment

12 March 2020

Consumer Policy Unit Manager
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted via The Treasury website consultation page

Dear Manager,

Unfair Contract Term Protections

Thank you for the opportunity to submit to the *Consultation Regulatory Impact Statement: Unfair Contract Term Protections* ('the CRIS') on behalf of Consult Australia.

Consult Australia is the industry association that represents the business interests of professional services firms within the built and natural environment. These services include design, planning, civil engineering, architecture, technology solutions and project management. Our industry is estimated to employ over 240,000 people and generates a combined revenue of over \$40 billion per year. Our member businesses include sole operators and small businesses up to multinationals. Therefore, we are interested in both ensuring appropriate protections for small business but also ensuring there are no undue impact on larger businesses.

We support the policy of enhancing protections for consumers and small business from onerous and unfair contract terms. We note with disappointment however that the CRIS explicitly does not address government contracts – which is a major issue for all our members as we often see in these contracts terms that:

- allow government clients to unilaterally cancel or terminate an agreement without cause;
- broadly limit a government client's liability, or which require a business to indemnify the government client in an unreasonably broad range of circumstances;
- require consultants to pay significant performance bonds or security deposits, unrelated to the potential loss the government client would face if the consultancy service was not completed;
- contract out of proportionate liability, despite the fact that the introduction of proportionate liability was to address pressure in the professional indemnity market faced by consultants;
- demonstrate a clear lack of understanding of the distinction between constructors and consultants.

Members have also advised that government clients have unfairly withheld payment at the conclusion of the work because consultants rely on the agreement reached during negotiation, rather than additional terms requested by the client at the end of the project. Unfortunately it is no surprise that public sector agencies include unfair contract terms in their contracts – evidenced by Table 1 within the CRIS that lists ACCC action on unfair contract term protections in November 2017 involving Australia Post.

Consult Australia advocates for appropriate risk identification and assessment with genuine negotiations around allocation based on the role of the parties, because as pointed out in the CRIS, unfair terms allow the business issuing the contract to allocate risk to small businesses who are less able to manage such risk.

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When these terms are enforced or relied upon by the issuing business, this can result in significant financial loss to the detriment of small business.

When it comes to government contracts, the fact that governments hold significantly more market power cannot be ignored. When it comes to government contracts, we would argue that all businesses need unfair contract term protections. But small businesses are undeniably more vulnerable than larger businesses, as larger businesses might be more able to walk away from work. Our small business members are involved with the public sector from local municipal councils, state and territory governments and even federal agencies.

Given that the rest of the market takes its lead from government actions, it is vital that government agencies at all levels act ethically, fairly, and honestly in their dealings with the private sector. Consult Australia has published the [Model Client Policy](#) that sets out how government clients can act fairly in engaging with the market. We call on all government agencies to sign up to the Model Client Policy and lead the way.

We urge The Treasury to tackle the issue of government contracts sooner rather than later, we look forward to submitting to such a review in the future.

If you would like to discuss this submission, please contact Kristy Eulenstein, Policy Advisor (Legal and Regulatory) on (02) 8252 6710 or at kristy@consultaaustralia.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Nicola Grayson", with a long horizontal flourish extending to the right.

Nicola Grayson
Chief Executive