



Ai GROUP SUBMISSION

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Extending Unfair Contract Term Protections to Small Businesses

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia alone and directly manages a number of those organisations.

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Extending Unfair Contract Term Protections to Small Business

The Australian Industry Group welcomes the Consultation Paper *Extending Unfair Contract Terms to Small Business* which addresses, with particular reference to impacts on small businesses, potential unfairness that can arise from the use of standard contracts.

Policy Options

Ai Group favours a light touch, non-regulatory response (Option 2) to the issues raised in the Discussion Paper. We consider that, if well-designed and backed by existing legal and market arrangements (effectively Option 1 in the Consultation Paper), a non-regulatory approach could achieve at least as effective results at lower cost than the more intrusive regulatory options such as those discussed under Option 3 and Option 4.

While the Consultation Paper clearly favours Option 3, there are benefits of a light touch, non-regulatory approach that have not been thoroughly explored. This includes benefits that are rightly attributed to Option 3 in the Consultation Paper that could just as readily be associated with a light touch, non-regulatory approach. Further, a well-designed non-regulatory approach can avoid many of the boundary issues that would inevitably be associated with the regulatory approaches.

A well-designed light touch non-regulatory approach could have the following features:

- Voluntary use of a “fair contract” mark for standard contracts;
- A “fair contract” would be a contract that aligned with and/or did not infringe a set of principles – “fair contract principles”;
- The application of adequate resources by the relevant regulatory authorities to pursuing cases of false representations about adherence to “fair contract principles” or inappropriate use of the “fair contract mark”;
- The “fair contract principles” could be developed through a consensus process managed by a reputable standards organisation with a committee made up of representatives that included legal experts, relevant federal, state and territory agencies and small and large businesses;
- The development of the standard could be financed either within the budgets of the standards organisation and/or with public and private sector funds;
- A small quantity of private and/or public sector funds could also be allocated to publicising the “fair contract mark” and its benefits.

The “fair contract mark” would be an inexpensive signalling device assuring parties that a standard contract met appropriate standards. It would directly address the information asymmetries at the heart of the identified problems.

Ai Group believes that an approach along these lines could have a number of advantages over the more intrusive regulatory approaches while being at least as effective as the regulatory options and involving less cost.

In particular there would be no need to specify in legislation which businesses qualified as small businesses. More importantly, nor would there be the associated confusion around who was protected by the relevant legislation.

While Ai Group notes that intention of the regulatory models in Options 3 and 4 is to protect small business, the complexities in defining who is eligible for protection and over what transaction (which could inadvertently include an employment relationship) should not be underestimated. Ai Group is concerned that the regulatory models described in Options 3 and 4 could extend such confusion for businesses engaging independent contractors or employees.

Protections already exists for employees and independent contractors under the *Fair Work Act 2009 (Cth)* and the *Independent Contractors Act 2006 (Cth)*. Furthermore in the transport industry, the commercial engagement of owner-drivers as independent business operators is already heavily regulated through specific state-based legislation and the *Road Safety Remuneration Act 2012 (Cth)*.

The *Industrial Relations Act 1996 (NSW)* includes an unfair contracts jurisdiction which, prior to the Workchoices amendments to the *Workplace Relations Act 1996*, applied relatively broadly in NSW. Over time it became a de facto unfair dismissal jurisdiction for senior managers and fell into disrepute. The jurisdiction was overridden for constitutional corporations by the Workchoices legislation and remains overridden by the *Fair Work Act 2009*. It is essential that it is not reinstated and that similarly problematic legislation is not introduced.

Section 106 of the *Industrial Relations Act 1996* is broad; it covers any contract or arrangement, or any related condition or collateral arrangement, excepting an industrial instrument. It further defines an "**unfair contract**" as a contract:

- (a) that is unfair, harsh or unconscionable, or
- (b) that is against the public interest, or
- (c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or
- (d) that is designed to, or does, avoid the provisions of an industrial instrument.

The NSW Industrial Relations Commission (NSW IRC) sitting Court Session has expansive powers to not only declare contracts as unfair and void, but to:

- Vary any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract;
- find that it is an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason;

- declare a contract wholly or partly void, or to vary the contract either from the commencement of the contract or from some other time; and
- order compensation to the aggrieved party as the Commission considered just in the circumstances of the case.

Many employers and businesses found these s.106 unfair contract claims to be extremely costly, frequently speculative and regulatory onerous. It further provided disincentives for business to terminate engagements that were no longer working in the interests of the business. Ai Group would strongly oppose any regulatory regime that could, even unintentionally, replicate the scope of the NSW unfair contracts jurisdiction.

The costs and uncertainties to business of crafting a regulatory regime that extends existing consumer unfair contract term provisions to small business, could, in Ai Group's view, detract from the benefits and protections sought by such proposals.