

30 July 2014

Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

We write to you in relation to the proposed extension of unfair contract term (UCT) protections to small business.

Executive Summary

Business SA supports the sentiment of the Federal Government's proposed changes as an important step in supporting small business to drive economic growth. However, we have some concerns about the unintended consequences of any legislative change on business to business contracts at large, including for contracts between small businesses.

In May 2014, Business SA provided in-principle support for the Federal Government's move to extend UCT protections to small business via a press release on the day of the Minister's announcement. We have not retracted from the sentiment of our position, but after a period of consultation and considering all the detail of the proposed changes, we have some concerns should legislative change not be carefully crafted to ensure it helps rather than hinders small business.

Furthermore, the Federal Government needs to ensure there is adequate evidence to support legislative change and that all options for 'lighter touch regulation', such as through industry codes, have been exhausted. If legislative change is required, it must be defined such that its impact is limited to where it is required, that being to protect small businesses from UCTs in standard form contracts where there is a major imbalance between the bargaining powers of contracting parties.

Background

We provide further comment as follows:

1. Business SA is concerned about the potential implications for all business to business contracts including land and business sales and construction contracts just to name a few. Will the Federal Government be able to ensure that the extension of UCT protections to small business will not result in contracts for other business falling outside the proposed changes' intended coverage being subject to any additional compliance burden? An additional compliance burden may even result from businesses perceiving the need to engage legal practitioners to review contracts for compliance reasons which may not be necessary.
2. We understand that for the purposes of the proposed changes, a clear definition of small business must be reached. Although the number of employees is the most commonly used definition of small business, this would appear to be an impractical definition for the purposes of legal enforcement, particularly as small businesses may oscillate between being included or excluded from this definition. However, while contract value may be more suitable for reasons of legal practicality, it is also difficult to determine a contract value threshold which will capture the vast majority of small businesses' contracts.

No matter which definition of small business is eventually agreed upon, the Federal Government must ensure that it does not encapsulate businesses outside the intended coverage of the proposed changes.

3. Should the UCT protections be extended to small business, the new laws will have to cover small business as both the acquirer and supplier. On this point, considering the move to extend UCT protections to small business has been in a large part driven by issues in the grocery supply chain, has the Federal Government considered just remedying the shortfalls here rather than extending UCT protections economy wide?

Further to this point, given that the voluntary code of conduct for major supermarkets has already been agreed to, is there any need to extend UCT protections for small business without evidence that the voluntary code does not work or that it requires UCT protections as well (acknowledging at present that it only covers unconscionable conduct)?

4. When the Australian Consumer Law was introduced with UCT protections for consumers, there was a considerable cost to business in terms of ensuring compliance with the new laws. It is likely that extending the UCT protections to small business will again impose a cost on the economy in terms of ensuring compliance. While this additional cost may well be justified, it is important that a net benefit is established before any legislative change is enacted. In that context a regulatory impact statement (RIS) may be warranted.

Who we are

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

Should you require any further information or have any questions, please contact Rick Cairney, Director of Policy, Business SA on (08) 8300 0060 or rickc@business-sa.com.

Yours sincerely

Nigel McBride
Chief Executive Officer