Franchisees Association of Australia Incorporated

SUBMISSIONS

Extending Unfair Contract Term Protections to Small Business: Consultation Paper – May 2014

Mail to: Unfair Contract Terms Consultation Paper
Small Business, Competition & Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Updated to: Australian Treasury: Consultations Page

Submission

Franchisees Association of Australia Inc

The Franchisees Association of Australia Incorporated (ARBN 119 802 489) (**FAA**) is a not for profit peak body representing the interests of franchisees principally in the area of policy development and law reform.

Expressed broadly, franchisees are typically small business including by reference to the definitional options referred to in the Consultation Paper.

Further, franchisees, legally if not always practicably, have the benefit of the Franchising Code of Conduct enacted in consequence of the law reform brought by the *Trade Practices Act 1974* and now part of the Australian Consumer Law.

FAA has made submissions, including in the more recent past, into the review of the Franchising Code of Conduct and with respect to the consultation on draft provisions of unfair contract terms in the Australian Consumer Law and welcomes the reforms presently sponsored by the Commonwealth Government. The FAA's most recent submissions were with respect to the *Competition & Consumer (Industry Codes – Franchising) Regulation 2014* concerning the obligation to act in good faith.

It is pleasing to note that the law reform, under present consideration, proceeds on the foundation that standard form contracts should similarly be predicated upon obligations of good faith and a legal regime which proscribes unconscionable conducting, including business to business relationships engaged in by small business, so called.

FAA's present submission is brief, and can be briefly put.

Submission

FAA favours option 3 referred to at page 21 and more particularly at page 33 and following of the Consultation Paper. That option being:

> *"Legislative amendment to extend the existing unfair contract terms provisions to standard form contracts involving small businesses."*

FAA notes that this option is the Commonwealth Government's preferred option and accords with pre-election policy commitments. Expressed broadly, FAA respectfully supports the Commonwealth Government's reasons for preferring this option which option, as does 3 of the 4 options, begs the questions as to the definition of "small business"?

Definition

The question of protecting *small business* arose in unfair contracts under other Commonwealth legislation. Interestingly, under the unfair contracts provisions of the Independent *Contractors Act 2006 (Cth)* in which an *independent contractor* is not limited to a natural person; the definitional questions concern the *performance of work* by the *independent contractor* and where that *independent contractor* is a corporation:

> *"The work to which the contract relates (must) wholly or mainly (be) performed by a director of the (company) or a member of the family of a director of the (company)."* – see section 11(1) of the *Independent Contractors Act 2006*.

FAA agrees that the legislative approach underpinning access to the jurisdiction under the *Independent Contractors Act* is, including for reasons which are identified in the Consultation Paper, too limiting in the circumstances under present consideration.

Of the definitional options considered at attachment A (page 59 of the Consultation Paper and following) FAA favours, subject to some reservation, a definition of small *business* by reference to the number of employees. (See option A.4 of the Consultation Paper at page 62 and following).

FAA favours the definition of a small business as a business which employs the full time equivalent of 20 persons or less.

In this context the following is noted:

(a) such a definition would pick up approximately 97%, or more, of total businesses in Australia – see paragraph 34 at page 63 of the Consultation Paper and the reference to the Australian Bureau of Statistics at footnote number 69;

(b) the criteria are certain, or can be rendered so;

(c) the criteria are familiar and have some pedigree (albeit by reference to 15 employees) under the *Fair Work Act 2009 (Cth)* and under the *Corporations Act 2001 (Cth)* (see section 45A of the *Corporations Act 2001 (Cth)*).

The demurrer FAA has raised is by reference to *full time equivalent*. This is a concept well understood in the industrial law. A full time employee is a person who works 38 hours per week. The definition which countenances 20 *full time equivalent* employees might include businesses employing more than 20 persons, with certain of those persons working casually or in part time employment. For example, a business might employ 30 persons with a number of them working part time. The definitional question would involve the aggregating of the hours of work performed

by all employees on a weekly basis and dividing the aggregated figure by 38 to arrive at the number of full time equivalent employees.

On first blush, the determination of *full time equivalent* employees might appear complicated: it is not. The definition of *equivalence* which operates under the *Fair Work Act 2009* causes no confusion or ambiguity. Such a definition engenders certainty.

Inherent in such a definition is the delimitation of the size of the business. Expressed broadly a business employing 20 *full time equivalent* employees or less (including in this respect businesses in which the proprietors are the only, so to speak, *employees*) is a business unlikely to include the resources sufficient to enable the negotiation of *take it or leave it* contracts which is the focus, or an important aspect of the focus of the law reform under consideration.

FAA respectfully submits that the Commonwealth Government proceed with Option 3, based upon the definition of a small business as indicated above.

FAA appreciates the opportunity of making a submission.

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Chairman, Franchisees Association of Australia Inc