



Restaurant
& Catering

SAVOUR
AUSTRALIA



15 July 2014

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

Dear Sir/Madam

**RE: Extending unfair contract term protections to small businesses –
Consultation Paper**

Restaurant & Catering Australia (R&CA) welcomes the opportunity to provide comment on the extension of unfair contract term protections to small business.

R&CA is the peak national industry association representing the interests of 35,000 restaurant, café, and catering businesses across Australia. The café, restaurant and catering sector is the largest employer across all tourism-related sectors, employing 517,000 Australians. This number is expected to increase by 8.5 per cent to 560,800 by 2018¹.

The tourism and hospitality sector is dominated by small business, with approximately 81.3 per cent of total employing businesses in the café, restaurant and catering sector employing 19 people or less². Like many consumers, small businesses in the sector can often find themselves victims of unfair contract provisions which have dire consequences for their businesses. The extension of unfair contract terms to small business will go some way in providing these operators with greater protection when entering into agreements with producers and suppliers.

A restaurant and catering perspective: the need for greater protection

The consultation paper appropriately identifies that like consumers, most small businesses lack the time and legal expertise to critically analyse and negotiate favourable terms of agreement in contracts they are party to. In addition, small businesses may believe the proposed contract is the only avenue available to pursue a commercial opportunity they seek, and enter into arrangements hoping a more mutually accommodating attitude will operate between parties in practice.

¹ Department of Employment (2014) *Employment Projections by Industry, Occupation and Region*
<http://lmip.gov.au/default.aspx?LMIP/EmploymentProjections>

² Tourism Research Australia (2013) *Tourism Businesses in Australia June 2010 to June 2012*, p 6

DIAMOND PARTNER



RESTAURANT & CATERING INDUSTRY ASSOCIATION

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Most small businesses in the tourism and hospitality sector have minimal understanding of their rights with regards to competition policy, or the mechanisms in place to provide businesses with support and assistance. Small businesses in the sector find it extremely difficult to ascertain whether unconscionable conduct has indeed occurred, and whether there are grounds to take action. The advisory system is hard to navigate, advice varied, and the cost of taking action often exceeds the value of the business owner's time and resources required to mount a case.

Areas of greatest grievance

Landlord to tenant unconscionable conduct is one of the most common issues raised by members of the association as areas of concern, in addition to disputes arising from the provision of goods and services to a business.

R&CA members perceive a significant imbalance in the bargaining power between landlord and tenant, particularly with larger shopping centres. The imbalance often results from the additional investment restaurant owners make above and beyond rent paid, including funds contributed to fit out, marketing, and the generation of goodwill. This means that at the time of lease renegotiation, it can sometimes be more critical for the operator to re-secure the lease than the landlord.

Turnover data is an area of considerable contention for restaurant owners. The ability of landlords to request turnover data and make decisions based on this information results in inequity for operators in the decision making process. There is no transparency in how this information is used across multiple tenant arrangements, particularly in larger shopping centres.

R&CA understands issues pertaining to lease arrangements are subject to the respective Acts in each state, to which R&CA has made submission (notably the 2013 Review of the NSW Retail Leases Act 1994). However, the association believes there is a role in competition policy to address the abuse of market power in determining rent arrangements with small businesses, to which the extension of unfair contract term protections would be welcomed by the sector.

Regulatory powers of the Australian Competition and Consumer Commission (ACCC)

R&CA welcomes the announcement of an additional \$1.4 million to the ACCC to support the extension of unfair contract term provisions to small business. However, the extension of these provisions must be met with the appropriate agency structures and resources to prosecute and investigate misconduct. The ACCC is often seen as inaccessible to small business. Whether it be in relation to unconscionable conduct or other matters in which small businesses experience duress at the hands of larger businesses, operators report finding it difficult to deal with the ACCC. General experience indicates navigating the myriad of departments internally to find an appropriate person to speak to is a frustrating and time-consuming task.

Conclusion

R&CA welcomes the extension of unfair contract term protections to small businesses, providing an avenue to address arrangements which place small business at a disadvantage. In particular, avenues to address unfair contract terms in relation to lease arrangements and contracts with producers and suppliers is of critical importance to the tourism and hospitality sector. However, the ACCC must be appropriately structured and adequately resourced to ensure small businesses can prosecute cases of misconduct.

Finally, R&CA appreciates the opportunity to provide comment on this important initiative, and looks forward to ongoing consultation regarding structures and reforms that may result as part of this program.

If you require further information, please contact me on (02) 9966 0055 or jhart@restaurantcater.asn.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'J Hart', with a long horizontal stroke extending to the right.

John Hart
Chief Executive Officer