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**Submission in relation to the extension of Unfair Contract Terms legislation in business to business contracts.**

**THE POLICY**

As a person who regularly represents small businesses and small business groups I strongly support the Government's policy of regulation of unfair contract terms (UCT) and conduct related to such contract terms.

There was an unsuccessful attempt in 2009 to legislate for UCT in business to business contracts and I am pleased that the issue is being pursued once more with apparent vigour.

It will be important as to what the law will cover and how it is to be enforced including self-enforcement.

UCT law should not seek to punish businesses as such but for the UCT law to condition market behaviour and to create a more balanced commercial contracting environment.

Small businesses are constantly required to enter into standard form contracts with no or little negotiation. Most small businesses have many suppliers who often are also competitors and as such wish to dictate terms of operation of their customers business. Many small businesses have entered into collective bargaining arrangements with some suppliers but with limited success.

A list of terms that might be considered "unfair" is at **Appendix A**.

There is some concern expressed about inter action between the Harper Review and the proposals in the Discussion Paper. That should not be of concern. The UCT can

precede Harper as any outcome from Harper may take a while. It is hoped that the business to business UCT will become law in January 2015.

The Discussion paper lists 4 Options for a policy response to the UCT issue, namely

- Option 1-the status quo.
- Option 2 - light touch or non-regulatory responses.
- Option 3- legislative amendment to extend the existing UCT provisions to standard form contracts involving small businesses.
- Option 4-legislation to require small business standard form contracts to be negotiated on request

I favour **Option 3**.

However, later in this submission we set out some concerns about the existing consumer focused UCT law and in particular exclusions.

### **DEFINITION OF "SMALL BUSINESS"**

There have long been difficulties in trying to define "small business". This was an issue in relation to the fast track collective bargaining provisions of the CCA and section 20-21 of the CCA.

The *NSW Motor Dealers and Repairers Act 2013* has unfair conduct provisions, as has the *Commonwealth Independent Contractors Act*. Neither defines small business as such but rely on the characteristics of the weaker party.

Further there is the importance of transparency so that contracting parties know when they need to comply with the UCT provisions.

Some of the options include:

- **A definition based on transaction value.** The difficulty here is what value? Also with all such thresholds there will be sterile arguments whether the UCT law applies or not and who is in and who is out. Some will fall just in, others just out. The 2009 proposals had a monetary threshold of \$2 million contract value. The collective bargaining notification law has a suite of thresholds starting at \$3 million annual transactions.
- **A definition based on the characteristics of the "small business"** (for example, annual turnover or number of employees). For example, the Privacy Act defines a small business as being one that has less than \$3 million annual turnover. The difficulty here is transparency – how does a contracting party know the annual turnover, etc. of the party it is contracting with? Also the in and out issue arises as well.
- **An "opt in" approach.** The concept here was that if a business meets the defined characteristics (as per (b)), that they can then inform a party that they are contracting with that they are a small business, and that they wish to invoke the UCT protections; if they don't expressly opt in, then the UCT

provisions don't apply. However, there are difficulties such as: how do you avoid a large business refusing to deal with a business that seeks to opt in? How do you ensure small businesses are aware of the need to opt in?

- **No definition but exclude publicly listed companies** from being a claimant. This has some attraction as it will exclude most large companies and is easily identifiable.
- **No definition** as such and rely on the criteria for UCT to exclude those who do not warrant UCT protection. This was the initial approach in the 2009 proposals.

I would favour either of the last two options.

### **WHAT IS A "STANDARD FORM" CONTRACT**

The primary focus will be on just how much needs to be negotiable before it ceases to be a standard form contract?

I agree with what is in the current consumer focused UCT law and in particular the rebuttable presumption.

### **WHAT MIGHT CONSTITUTE AN 'UNFAIR "PROVISION OF A STANDARD FORM CONTRACT**

I generally agree with what is in the current UCT law but see later comments. Again the rebuttable presumption in relation to the "protection of legitimate interests" is important.

### **SCOPE OF THE APPLICATION OF ANY NEW LAW**

The questions to be addressed are as follows:

- *Should the extension of the UCT provisions apply to contracts involving the supply or acquisition of goods or services, or only contracts involving the acquisition of goods or services by a small business?*

Whilst this may be against the narrow interest some small businesses I am of the view that all contracts should be covered. Too many anomalies arise if there is not universal operation.

- *Should the extension of the UCT provisions apply to contracts between two small businesses, or just contracts where only one party is a small business (however defined)?*

See comments above.

- *Should the extension of the UCT provisions also cover financial products and services provided to small business so that the ASIC Act provisions remain*

*consistent with equivalent ACL provisions, or should the ASIC Act provisions continue to apply only to standard form consumer contracts?*

Yes, most definitely. Again see comments above. It is also suggested that there should be no exemptions but there be a defence if a mandatory code or contract terms are being followed.

- *Should the upfront price of the good or service be excluded?*

This is an important issues for business, especially small business. Whilst at the outset of a contract when there has been a choice whether to enter into the contract or not such exclusion is understandable the exclusion should not apply to the ability to change the upfront price during the period of the contract and particularly upon renewal of a contract where one partly is in a captive situation.

- *Should the "main subject matter" of the contract be excluded?*

Same comments as those above.

- *Should contracts prescribed by law or contracts that mirror a mandatory Code be excluded?*

There should be no exclusions but the above should be a defence. Having said that once the new law comes into effect contracts prescribed by law or those that mirror mandatory codes should be reviewed.

## **ENFORCEMENT**

It would be important to move quickly to clean up unfair contract terms, some that apply to both consumers and business have been cleaned up but more is needed.

This can only be done by some dedicated process. Both the ACCC and ASIC should do that. In fact the ACCC's predecessor (the TPC) in about 1984/5 undertook a concerted campaign to check and alter warranty documents, something similar should be done now.

I note that the ACCC has been allocated some funds for an education programme but is that enough to get quick results?

If the ACCC and ASIC cannot or will not actively police the new law once it is in force I suggest a short term alternative.

I suggest that a Standard Form Contract Term Advisory Committee be established to advise the users of standard form contracts and Governments on possible prohibited terms.

Its views would not be binding at law but persuasive.

The Committee would be chaired by a lawyer and have members with big business, small business and consumer background and both ACCC and ASIC.

Its role in relation to contracts review to be, say, for a year.

This might avoid a complaints surge at the time of introduction of the new law.

I also suggest that for the longer term that the ACCC/ASIC be expressly empowered to clear/approve/disapprove terms/contracts but such powers should not come into effect until the Committee has ended its review role or once ACCC/ASIC have formulated views on what is unfair in a business to business context.

I would also suggest that where a UCT matter is referred to the ACCC/ASIC by a trade association that issue must be investigated at least for the first two years of the new law.

On the issue of private enforcement- hopefully any initial campaign will get rid of most offensive contract terms, but there will need to be some appropriate ADR avenue for action including damages.

Finally it is suggested for say 12 months there is a moratorium on action in the courts unless a company has been warned by ACCC/ASIC and refuses to act.

#### **APPENDIX A-unfair contract terms.**

Contract terms that might be considered to be "unfair" in a small business context include;

- Permit the supplier but not the customer to avoid or limit the performance of the contract, terminate it, vary its terms or renew or not renew the contract.
- Permit the supplier to:
  - change prices without the customer's right to terminate the contract (lock in terms);
  - unilaterally determine when the contract has been breached;
  - unilaterally vary the characteristics of the goods or services to be supplied; and
  - assign the contract to the customer's detriment without the customer's consent.
- Penalise the customer but not the supplier, for breach or termination of contract.
- Limit the customer's right to sue the supplier.
- Limit the supplier's explicit liability for its agents.
- Limit the evidence the consumer can lead in proceedings on the contract.
- Impose the evidentiary burden on the customer in proceedings on the contract.
- Demand entry to business premise and seize goods owned by the business
- Deem the contract to be an agency relationship yet force the property in the goods to pass to the so called agent.

- Supplier to push the full costs of meeting warranty obligations onto the other party.
  - Where there is third line forcing or full line forcing without the consent of the other party.
  - A term that allows a party to demand to see the business accounts of another.
  - A term that demands access to a party's bank account for the payment of moneys claimed to be owed.
  - A term that allows one party to supply as much product as it decides and the other party must accept that product and pay for that product.
  - A term that transfers costs from one party to another, without the agreement of the other party.
  - A term where the sanctions for termination voluntary or otherwise are disproportionate.
  - A terms where the fees payable are based on extraneous issues e.g. broadcast fees are based on the liquor sales of the whole venue and not on the areas where the broad can be viewed.
  - Disproportionate security demanded in the case of non-payment of accounts.
  - Where a small business is credited for unsold product the payment of the credits is unduly delayed or simply continually rolled over to pay for new product.
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(Hank Spira)