acla australian corporate lawyers association.

Extending Unfair Contract Term Protections to Small Businesses

Exposure Draft Legislation

Consumer Affairs Australia and New Zealand (CAANZ)

Submission by Australian Corporate Lawyers Association

12 May 2015

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Consumer Policy Framework Unit
Small Business Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Thank you for the opportunity to present this submission in response to the *Extending Unfair Contract Terms to Small Business – Exposure Draft Legislation*, released by Consumer Affairs Australian and New Zealand (CAANZ) on 28 April 2015. ACLA congratulates you on the thoroughness of the review and the materials accompanying the Exposure Draft Legislation.

ACLA is the peak national association representing the interests of lawyers working for corporations and government in Australia (**"in-house lawyers"**). As a membership association ACLA provides support, tools and resources for in-house lawyers, catering for all members including those new to in-house through to general counsel working in ASX 200 companies and government departments. ACLA plays an important role advocating on matters of interest to the in-house profession to shape our nation's corporate legal environment and promote the understanding of the law within the business and legal communities.

Should you have any questions about our submission please contact Tanya Khan our Chief Legal Officer, on 03 9248 5500 or tanyakhan@acla.com.au.

Kind regards

Trish Hyde
Chief Executive Officer

12 May 2015

SCOPE OF APPLICATION

ACLA's key concern with the scope of the draft legislation is that its provisions will apply to renewals and variations as well as new contracts. Our interpretation of the legislation is that the assessment of whether a contracting party is a small business will need to be made at the time of any renewal or variation, as well as an assessment of whether the original contract is a "standard form" contract that falls within the monetary threshold. After that, it is not clear from the daft legislation whether, if only the contract period is extended, the entire original contract then becomes subject to the regime and additional variations therefore become necessary to make the contract compliant with the new regime. For any business dealing with standard form contracts, any of these extra steps will represent a significant cost and process change. If this proceeds, ACLA recommends the regime apply only to any varied terms and not the original contract as a whole where, for example, a contract period is extended on exactly the same terms and conditions for a further period.

We also note the new regime will apply to contracts where both parties are small businesses. This can lead to both increased compliance costs for small businesses which use standard form contracts of their own, and increased contractual uncertainty (and therefore risk) for small businesses in trying to determine whether a provision is "unfair". As previously raised, whether something is unfair in a B2B context is subject to many factors, and differs greatly from such considerations in a B2C context.

In both cases, the increased costs associated with uncertainty and additional compliance obligations could ultimately be borne by the small businesses the regime is trying to protect.

Recommendation:

- *The regime should apply to new contracts only, not renewals or variations.*

DEFINITION OF "SMALL BUSINESS"

We note under the draft legislation that a business is a small business if it employs fewer than 20 persons (excluding casual employees or are not employed on a regular and systematic basis).

The size of a business measured by the number of staff is not an exclusive indicator of its market power. There are certainly cases where an organisation which falls within any of the statutory definitions actually has a superior bargaining position to its larger counterpart through favourable supply and demand conditions. Nevertheless, as the legislation is currently drafted, the onus of and risk associated with determining whether or not the party they are transacting with is a "small business" always falls on the "larger" business, regardless of market power. Additionally, the source of this information will generally be the counterparty itself; but in the absence of safe harbour provisions, prudent businesses will still need to conduct due diligence on their counterparty, and such compliance costs may also be passed on to small businesses by way of higher prices.

There may also be unintended consequences of the proposed definition of small business – for example, it could capture large companies' incorporated joint ventures which often have a small number of employees, but which clearly do not need to avail themselves of the legislative protections.

In our previous submission, we noted that small business are likely to have a high degree of commerciality, and that a small business may elect to accept a standard form contract that purportedly has onerous terms, not because it does not have the capability or resources to protect itself, but because there is a commercial advantage to doing so – this could be first mover advantage, the low risk not warranting delaying the transaction or the risk being compensated for through better commercial terms such as pricing. We again suggest that consideration be given to including exceptions to the application of the new regime including, for example, where a small business has its own in-house or external legal representation or chooses to opt out of receiving the benefit of the provisions.

Recommendation:

- *Consider including safe harbour provisions for parties relying on information provided by small businesses regarding their size*
- *Consider including exceptions to the application of the UCT provisions including, for example, where a small business has its own in-house or external legal representation or chooses to opt out of receiving the benefit of the provisions.*

TRANSITION PERIOD

We note the transition period of six months and suggest a period of 12 months would be a more reasonable timeframe for organisations to achieve compliance.

Recommendation:

- *Consider a 12 month transition period instead of six months.*