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Extended Unfair Contract Terms Protections Draft Exposure
Small Business, Competition and Consumer Policy Division
The Treasury
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Via email: AustralianConsumerLaw@TREASURY.GOV.AU
Attention: [REDACTED]

Dear [REDACTED]

Thank you for the opportunity to provide a submission in relation to the Exposure Draft legislation to extend unfair contract term protections to small business. As Treasury is aware, this issue is of considerable interest to the Australian Industry Federation (AMIF) and Motor Trades Association of Australia (MTAA) Limited, and State and Territory Motor Trade and Automobile Chamber of Commerce Member Organisations.

AMIF / MTAA represent the interests of around 100,000 retail motor trades businesses, employing over 320,000 people. Those figures, combined with the industry's scope and size, make the retail motor trades the largest stand-alone small business sector in Australia.

This submission generally reflects the views and concerns of member organisations and their constituents, who may have chosen to also make submissions in addition to AMIF.

AMIF Position:

- AMIF continues to support the concept of extending unfair contract term provisions to small business contracts and believes the Exposure Draft generally reflects the intent of Option 3 of the Treasury discussion paper and welcomes the initiative.
- However, AMIF remains vitally concerned that the definition that has been applied to small business for the purposes of the Exposure Draft, will limit or compromise the effectiveness of the legislation.

- AMIF suggests the Exposure Draft limits the application of the proposal by defining small business and contracts in such a way as to exclude many contracts that genuine small businesses in the retail, service, repair, recycling and associated sectors of the automotive industry have or will enter into.
- AMIF maintains its previously stated position that any 'definition' of 'small business' be conceptually based, or expressed in terms of relative power relationship, as even larger retail motor trade businesses can, in relative power relationship terms, be substantially smaller than the entities with which they form contractual arrangements.
- AMIF understands provisions within the Franchising Code of Conduct, the Competition and Consumer Act and other equivalent enforceable mechanisms are intended to provide further protections to small business. However AMIF strongly suggests that the protection needs of small business from unfair terms can be enhanced through the proposed amendments.

AMIF Recommendations

AMIF makes the following recommendations:

1. The definitions of small business in the context of the Exposure Draft be revisited and that:
 - a. any 'definition' of 'small business' be conceptually based, or expressed in terms of relative power relationship;
 - b. small business not be defined by a number;
 - c. the value of the small business contract not be a determining factor. All small business contracts should be included. Unfair terms should not have a place in any contract that a small business owner agrees to.
2. If the recommendation to revisit the definition of small business in the Exposure Draft is not accepted, then consideration should be given to revising the definition to include a small business that employs "20 full time equivalents or less", to address some small business reliance on casual or part time employees.
3. If the recommendation to remove the value of the small business contract as a determining factor is not accepted, then the value assigned to such contracts should be up to \$1million, on an annual basis.

4. The duration is revised to include contracts of greater than 6 months duration due to the nature of some business-to-business contracts for the supply of retail goods.
5. Franchise agreements and related documents should be recodified to be in the scope of the proposed legislation.
6. Recognition within the legislation that the size of the small business is not as important as the treatment being applied by the unfair clauses in contracts. The primary concern should be to eliminate unfair terms.
7. The proposed legislation should be inclusive of as many small businesses and contracts as possible. It should not be the intent of the legislation that extended protections to unfair terms only applies to contracts covered by the proposed definitions.
8. Disputes which arise under any new small business and unfair contract terms law should be notifiable to the Australian Small Business Commissioner and / or the yet to be formed Australian Small Business and Family Enterprise Ombudsman.

Specific comments on the Exposure Draft:

AMIF's intent in making the above recommendations is to ensure that a "Small Business Unfair Contracts Law" is meaningful, meets the intent, applies to small business and does not exclude small business.

AMIF does not agree with the definitions of "meaning of small business" or "small business contract" as described in the Exposure Draft.

AMIF suggests the two primary definitions in the Exposure Draft are inadequate to properly provide for coverage of small businesses sectors of the Australian automotive industry. Defining small businesses with the 20-employee definition is arbitrary and does not consider the differential in bargaining power between a small business and a big business, even for smaller contracts. This has been recently evidenced in terms of supply chain contracts between producers and major supermarket companies.

If there is no scope to address the vexed issue of defining small business in the context of the Exposure Draft, then consideration must be afforded to ensuring the definition adequately takes into account the meaning of Full Time Equivalents and the sometime role of casual and part time positions in the mix of full time equivalents.

AMIF also suggests the monetary thresholds of \$100,000 or \$250,000 are inadequate to cover many small business contractual arrangements.

Even smaller franchise agreements in say; automotive parts supply or retailing of powered equipment or farm machinery are likely to exceed these values if all aspects of consideration due under the contract are included in the definition of "upfront price". Similarly AMIF is aware of other shorter term (6 month contracts) for the supply of retail goods (cigarettes, food and beverages, foodstuffs etc.).

In regional and rural areas, retail supply agreements are often offered to small business on a periodic basis so the small business is tied to a supplier for such purchases. Thereafter, once the small business builds good will/clientele to the point where the range and value of such products sold exceeds a certain figure (e.g. \$250,000 per annum), the national or state distributor moves in to the retail market directly, sets up in retail competition underselling the small business client and altering the market during the period of the contract.

Therefore the value of the contract over time is not a determinant of the relative powers of the parties or the contents of the contract and should not be used to define reach of the proposed legislation.

AMIF suggests the efficacy of the legislation will be considerably diluted by the definitions provided in the Exposure Draft. In our view these definitional limitations diminish the impact of the legislation to the point where it no longer meets the stated purpose of clauses 1.2 to 1.6.

Ministerial Discretion

AMIF is concerned in regard to the transparency and process of Ministerial discretion to exempt the application of Unfair Contract Term Protections to Small business. AMIF believes provisions for such exemption should be better enunciated in the Exposure Draft; limited in their nature; and include a period of 90 days consultation to ensure the Minister is fully informed before exercising such discretion.

Agreements attached to franchises

AMIF is regularly alerted by its members to significant disadvantage endured by small business constituents by the way that terms and conditions of contracts have been written and in many cases with a bias against the small business owner / operator. The reach of unfair terms goes beyond day-to-day business-to-business contracts and includes franchise agreements and franchise terms and conditions.

Often a franchise agreement is the most important contract that a small business owner has signed. All small business agreements should be set down in fair terms and applied with fairness.

Franchise agreements are often accompanied by other agreements for operating procedures, marketing, advertising, prime market areas, sales targets, financial arrangements and other business matters. It is our experience that these agreements, which are referred to in the franchise agreement, are written by the franchisor so they can be changed at will, often with a detrimental impact upon the franchisee. There is an inherent unfairness that should be challenged when one party can amend terms and conditions of a contract to the detriment of the other party without the consent of the other.

While AMIF understands many concerns have been addressed in the recent revisions to the Franchising Code of Conduct, it sees no harm and only benefits in this proposed legislation also covering elements of those franchising arrangements and agreements within them.

Summary

To small businesses in automotive industry sectors, unfair contractual arrangements often manifest as 'take it or leave it' propositions, upon which the ongoing viability that small business may depend. For some small businesses there are little alternative for them, other than accept the contract, if they are to remain in business.

As Treasury would be aware, AMIF (and its predecessor bodies) has been, and remains, a vociferous advocate of a fair business-to-business contracts regime. AMIF sees the intent of the proposed legislation as a very positive step.

AMIF remains convinced that to achieve the requirement of enhanced protections the legislation has a basis founded on the concept of relative size of parties and their respective market and financial power as opposed to the definitions provided.

AMIF again thanks the Treasury for the opportunity to provide comments on the proposals outlined in the Exposure Draft and remains at its disposal should further clarity or additional information or assistance be required.

Yours Sincerely

AMIF National Secretariat

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