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CONSULT AUSTRALIA

Driving Business Success for Consulting Firms in the Built and Natural Environment

12 May 2015

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

[redacted]

Re: Extending Unfair Contract Term Protections to Small Businesses

Thank you for the opportunity to comment on the exposure draft Bill and explanatory material to extend unfair contract protections to small businesses.

Given the short timeframe to comment, this response will focus on the issues associated with this proposal, without going into greater detail. While our earlier submission in response to the initial discussion paper focused on high level policy settings, this submission will focus on the proposed legislation and what it means for our industry.

We are particularly disappointed that there has not been a longer timeframe made available for stakeholder input into this proposed legislation, which has the potential to drastically impact on how industry manages its contracting practices.

To summarise our submission, our concerns are as follows:

1) Parties contracting with small businesses will be required to undertake additional and potentially costly "due diligence" to ascertain the nature of the party they are contracting with, and whether their existing practices fall within this legislation;
2) There is uncertainty as to whether standard contracting practices in our industry are "reasonably necessary to protect (the) legitimate interests" of those businesses engaging small businesses as sub-contractors;
3) The proposed legislation may actually have the opposite outcome to that intended, in that it will likely create additional red tape for small businesses, as well as larger businesses contracting with them. This will arise as businesses move away from standard form contracts to individual negotiations on a wider range of contracts, which may also require additional legal advice. This outcome in particular runs contrary to the Government's stated aim of reducing red tape;
4) The threshold contract values of $100,000 and $250,000 are inappropriate as complex commercial transactions may still fall within the scope of the legislation; and
5) These laws will create a disincentive to contracting small businesses to provide goods or services, as their clients move to seek certainty and ensure they are protected.

Improvements could be made to the legislation by:

1) Changing the new legislation so that it only applies to small businesses as acquirers of goods and services, and not as providers of goods and services. This is a more appropriate distinction than the monetary threshold, and better aligns with the existing consumer protection; and
2) Clarifying the meaning of what is "reasonably necessary to protect legitimate interests" to give certainty to businesses of all sizes.

In particular, the Government should consider "lighter touch" alternatives to legislation, such as increasing business support to small business. We note that a similar proposal to this one was abandoned in 2009, and the underlying issues with that proposal remain the case today.

About Us

Consult Australia is the industry association that represents professional services and consulting firms operating in the built and natural environment sector. Our member firms' services include, but are not limited to design, architecture, technology, engineering, surveying, legal, and project management solutions.

We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms. Collectively, our industry is estimated to employ over 240,000 people, and generate combined revenue exceeding $40 billion a year. Approximately 93% of firms in our industry fall within the definition of small business included in this proposal.

Consult Australia is concerned with the proposed legislation being implemented, as well as with some specific aspects of the draft Bill. Our rationale for this position is set out below.

Unfair Contracts

Unfair contracts are a significant challenge to our industry. Contracts are presented to businesses on a "take it or leave it" basis, with risk and other potentially onerous terms allocated according to bargaining power, rather than which party might be best placed to manage a particular risk.

In our industry, the inclusion of these terms in contracts may result in a range of highly problematic outcomes, including the possibility that professional indemnity insurance might no longer respond to a claim, higher costs, more delays, and less desirable project outcomes.

It is also a challenge to our industry, and the broader construction sector, that contracts are often not simple bilateral transactions, as is generally the case with consumer contracts, but they may be complex arrangements with multiple parties involved. Accordingly, our industry may be in the situation of either offering or receiving a contract, and indeed individual firms will have experience in both situations.

A common practice for our industry is that where a chain of contracts exist (for example, a head contractor engages a consultant, who in turn hires a sub-consultant), that the terms of the head contract are passed on with limited opportunity to negotiate terms. This proposal simply moves the risk up that chain, while creating an additional red tape burden for all parties.

While unfair contracts are a problem, we do not believe that this proposal is the best solution.

We note that our submission in response to the initial consultation paper recommended that better protections for small businesses could be achieved through strengthening Small Business Commissioners or equivalent offices, and through a conciliation and education based approach rather than through legislative based prohibitions. In particular, our earlier submission warned of the risk that new legislation to this effect could create a massive red tape burden for business. We are not yet satisfied that these concerns have been addressed through this proposal.

In our industry, the solution to unfair contracts lie with a combination of reforming civil liability laws to remove the ability to contract out of proportionate liability, and ensuring that all parties are aware of the impact of terms they include or receive in contracts.

While it may be appropriate in some transactions to apply the kind of protections included in this draft legislation, greater care needs to be given to how this impacts on other transactions where that

protection is less appropriate. We believe this point is acknowledged by Government through the inclusion of a contract value threshold in addition to the size threshold for the small business.

We submit that the legislation should make the distinction between small business acting as supplier of goods and services, and those acting as acquirer of goods and services. By having the legislation only apply to the latter category and not the former, the unintended consequences could be minimised.

Concerns with the Proposed Legislation

Consult Australia has a number of specific concerns that we believe must be addressed if this legislation is to be enacted. They are set out as follows:

Application of the Legislation

The first is that the threshold size of a contract value is problematic for several reasons. The background documents make it clear that this threshold value is included to set aside more complex transactions from those basic transactions where a small business may be harmed by unfair contract terms.

In our industry, small businesses are most likely to be engaged for either small scale work (such as in the residential sector) or as sub-consultants with specialised offerings on larger and more complicated projects. The latter category can include a range of sophisticated transactions, where it would be more appropriate that a business undertake their own due diligence. We are aware that many such transactions fall well under the proposed threshold value, and would therefore be captured by this legislation.

This in turn creates a significant challenge for those larger firms engaging the small business as a sub-contractor. They would have to undertake extensive due diligence to ascertain the size and nature of the firms they are subcontracting to (which is not always easily available information), and the contracts being offered. Given that larger firms in our industry are often the recipient of contracts they then pass on to sub-contractors, there is generally limited scope for them to vary the terms of agreement. The likely outcome would therefore be one or both of the following:

i) That small businesses are not awarded sub-contracting work, as the risks for the larger firms are simply too great; or
ii) A significant red tape burden is created for the larger firms offering the work, as they undertake additional work to find out the size of the firm they're awarding a contract to

These outcomes are in addition to those explained below, in terms of greater uncertainty for business, and additional red tape also arising for small businesses.

A better solution to draw a distinction between those transactions that should be covered by this protection and those that should not, would be to have the proposed legislation only apply to small businesses acquiring goods or services, and not suppliers. This would also better align the proposal with the existing consumer protection.

Uncertainty Regarding the Definition of an Unfair Contract

As this submission has already indicated, business contracts are not as simple as the bilateral contracts generally entered into by consumers, and it is a common business practice to pass on contractual terms received from a client to a sub-contractor to ensure (for example) that the appropriate party is responsible for liabilities that may arise owing to their actions or omissions.

In our industry, a large consultant may be forced to accept terms from a client or head contractor, and then engage sub-consultant. It's standard practice for them to then pass those terms on.

While the definition of an unfair contract includes that a term is excluded if it is "reasonably necessary to protect their legitimate interests," there is significant uncertainty for business that this would be sufficient to protect them from passing on contract terms as they currently do.

Consult Australia submits that greater clarification is needed around this element of the definition, including providing those parties that pass on terms specific comfort that they will not be at risk. While it may be that this is appropriately included in the Minister's Second Reading speech, industry needs this uncertainty to be addressed as a matter of urgency and before the legislation proceeds to Parliament.

Standard Form Contracts

In our industry smaller contracts are most likely to be standard form. As the policy paper recognised, this is a good thing, as it protects smaller businesses from continually requiring costly legal advice. Many of the contracts used in our industry for such engagements were developed by Consult Australia or Standards Australia, specifically to ensure that each party's interests are balanced, and to remove the need for costly legal advice.

One effect of these laws is that small businesses will be required to negotiate a greater proportion of their contracts as larger firms offering contracts move away from standard contracts to avoid falling foul of the law. The additional negotiating required will likely be burdensome for all parties, and create a significant amount of red tape. Small businesses would also be required to obtain legal advice that may be beyond their means. This outcome directly undermines one of the legislation's stated aims.

Conclusion and Next Steps

We would be pleased to discuss further the issues raised in this submission, and to work with the Government to achieve a better outcome to the benefit of all parties. To do so, please contact Robin Schuck, Senior Advisor, Policy & Government Relations on robin@consultaustralia.com.au or phone 02 9922 4711.

Yours sincerely,

Megan Motto
Chief Executive