SCENTRE GROUP

12 May 2015

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

By email: AustralianConsumerLaw@treasury.gov.au

Dear Sir / Madam

Submission regarding Exposure Draft – Treasury Legislation Amendment (Small Businesses and Unfair Contract Terms Bill 2015

This is the Scentre Group submission to the Commonwealth Department of Treasury on the Exposure Draft – Treasury Legislation Amendment (Small Businesses and Unfair Contract Terms Bill 2015 (**Exposure Draft**) extending unfair contract term protections to small businesses (**UCT proposal**).

Background to Scentre Group

Scentre Group was created following a merger of Westfield Group's Australia and New Zealand business and Westfield Retail Trust in June 2014. Scentre Group manages, develops and has an ownership interest in 47 Westfield branded shopping centres, with over 12,500 retail outlets, in Australia and New Zealand.

Scentre Group is a member of the Shopping Centre Council of Australia (**SCCA**) and has had the advantage of reading the submission of the SCCA in relation to the Exposure Draft. Scentre Group endorses and supports the views expressed in the SCCA submission. Given the significant implications of the UCT proposal, Scentre Group considers it necessary to highlight some key concerns it has with the Exposure Draft.

Comments on the Exposure Draft

We refer to the submission from the Shopping Centre Council of Australia, which we endorse in its entirety.

We draw your attention to what we believe are five critical issues under the Exposure Draft and add emphasis to the comments made in the SCCA submission as set out below.

1. Exemption for retail leases

We strongly recommend that retail leases (contracts) which are regulated by State and Territory retail tenancy legislation should be exempted from the proposed legislation (either at the outset or through subsequent regulation by the Minister – see our comments below on subsection 139G(2A) of the Competition and Consumer Act 2010 (**CCA**)).

As a shopping centre owner, manager and developer, Scentre Group is already subject to well-established and comprehensive State and Territory retail tenancy legislation. Retail tenancy legislation covers a broad range of issues between landlords and retail tenants including minimum conditions which must apply in any lease entered into by the landlord and tenant, detailed rules on key aspects of the retail tenancy relationship, and an easily-accessible and cost effective mediation regime. The legislation in effect operates to ensure there is certainty and fairness of retail leasing arrangements between landlords and small (and even medium sized) tenants. The preferred approach of such legislation in each State and Territory is through the inclusion of prescriptive provisions to ensure a minimum standard is met in retail leases.

In light of the substantial regulatory protections already in place with regard to retail tenancies, we consider adding another layer of regulation is unnecessary and would create uncertainty for landlord and tenant arrangements and increase the cost and complexity of such arrangements.

The Exposure Draft currently introduces two areas for exemption.

The first area is an exemption for small business contracts that are covered by a law of the Commonwealth, a State or Territory that is a law prescribed by the Regulations (new section 28(4) of Schedule 2). Each of the States and Territories has introduced retail leases laws to ensure adequate and fair contracting between landlords and retail tenants. We believe this should be acknowledged in the new unfair contract laws and these State and Territory laws should be prescribed under section 28(4).

The second area relates to certain contract terms nominated in section 26(1) of Schedule 2. In particular, section 26(1)(c) provides that the unfair contract terms law does not apply to a contractual term to the extent that the term *"is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory*".

We agree with and support the SCCA submission that section 26(1)(c) should be amended to put beyond doubt that a retail lease term regulated by State or Territory retail lease legislation is covered by this exemption. In particular, s26(1)(c) should be amended to read:

> *"is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory."*

2. Definition of Standard Form Contract

Scentre Group supports SCCA's recommendation to include a definition of standard form contract by amending section 27(2) of Schedule 2 to the following:

> *"A small business contract is considered to be a standard form contract if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract."*

We also support the SCCA recommendation to delete the present section 27(2) including the six indicia which are irrelevant in a business to business context and in some instances are simply unworkable in the retail leasing context.

These changes are required to address current uncertainty under the provisions contained in the Exposure Draft as to what level of negotiation would be required to exclude a contract from the definition of standard form contract. The adoption of these two recommendations would simplify the relevant test as to what is a standard form contract.

As noted in this submission at paragraph 3 below, a legislative presumption that a contract is a standard form contract will lead to increased uncertainty for the parties and an outcome that is inconsistent with the usual principles of business to business contracting.

Business to business transactions often involve the use of pro-forma contracts to ensure business can achieve efficiencies in the contracting process, particularly where there are multiple transactions and parties have broadly agreed commercial terms. This is not to say that such contracts are not negotiated, or that a contracting party does not have an opportunity to negotiate the contract if it so desires.

3. Removal of rebuttable presumptions

The 'rebuttable presumption' in section 27 of Schedule 2 (that a contract is presumed to be a standard form contract) and in section 24 (that a term of a contract is presumed not to be reasonably necessary to protect the legitimate interests of the party) should be deleted so that the usual onus of proof is restored.

This is consistent with, and appropriate in the context of, business to business contracts where there is widespread acceptance of the importance of the role of standard form contracts to streamline business relationships and minimise costs.

Restoring the usual onus of proof will mean that where a party to a contract seeks relief under the new laws, the Courts have the freedom to appropriately determine the matter having regard to the relevant circumstances in each case, by reference to the guidelines provided under the legislation.

4. Definition of small business

There should be an amendment to the new section 3A of Schedule 2 to include a related body corporate of a party to a contract.

The extension to businesses should only apply to genuine small businesses that need legislative protection. The proposed section 3A would permit subsidiaries of large corporations (both public and private), or even service companies engaged by large corporations to seek the benefit of the protections under the unfair contract legislation simply because the contracting entity is structured to have few or no employees.

In a retail leasing context, this would mean substantial and sophisticated retailers, in many cases with more bargaining power than a landlord, being able to seek relief under the new laws simply because the persons employed within their business are not employed by the contracting entity that is the lessee of a retail lease and instead, as is common practice, are employed by a subsidiary or related body corporate.

5. Definition of Upfront Contract Price

We support the SCCA's recommendations in relation to amendments to the existing concept of 'upfront price' in the new law.

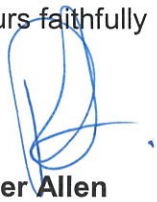
We agree that, while the current definition of 'upfront price' is suitable for a consumer contract, it is too simplistic in the context of business to business contracts where the parties often negotiate and agree different pricing structures and mechanisms to meet their specific commercial requirements. For example, in the retail leasing context, the "price" a tenant pays for the premises includes a number of components such as rent (generally increased annually

by an agreed mechanism such as CPI), outgoings and marketing levies. All of these forms of payments are regulated by the existing retail leases legislation including the requirement to specify such amounts (or estimates and the basis for calculation) at the outset of the relationship in a prescribed form disclosure statement.

Similar concerns apply to other business contracts (in particular multi-year services agreements) where the parties negotiate and agree a mechanism such as CPI to set the contract price and annual escalations. We support the SCCA recommendation that section 26(2) of Schedule 2, be amended to clarify and put beyond doubt that the upfront price payable under a contract includes consideration that is disclosed, or an estimate or formula for the calculation of such consideration is disclosed, at or before the time the contract is entered into.

If you would like to discuss any of the matters set out in this submission please do not hesitate to contact me.

Yours faithfully



Peter Allen
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