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PROPOSED BUSINESS TO BUSINESS UNFAIR CONTRACT TERMS LEGISLATION

The following are comments on the Exposure Draft issued by the Minister for Small Business.

The Government is to be commended in proceeding with business to business unfair contracts legislation but there are some real concerns in the detail and as a result the objectives of the proposed legislation are compromised.

The thresholds issue.

It appears that in very many cases small business contracts will fall well outside the thresholds proposed. See examples below.

The **employee** number is low and I am told by small business clients that will for instance exclude most hotels. Further any employee threshold would be better if it was based on FTE's.

The **monetary** thresholds are of great concern, especially in relation to contracts involving the main suppliers/customers of many small businesses.

The larger suppliers will often be the most difficult and use market power to impose what might be unfair contract terms/customers yet might fall outside the threshold. On the other hand small suppliers/customers with less clout will fall within the threshold.

Consequently if the two categories use the same UCT, which is quite possible, one will be struck out, the other will not.

It is very damaging to say to small business that their contracts with suppliers fall outside the threshold. It may be that ultimately the contract terms they complain about will not be found unfair. Most will accept that, but not being cut off at the pass.

There is no accommodation for the difference between goods and services. There should be.

Why are people scarred of a higher threshold? The threshold does not deem any wrong doing, it simply determines what can be scrutinised. how can it be justified that unfair contract terms can in any way be protected. To say as some do that higher value contracts should involve legal advice is a naïve argument. The fact is that standard form contracts are usually on a take it or leave it basis no matter how big the contracting parties might be.

Legal advice or no legal advice, parties will often have to cop it in our monopolistic or oligopolistic markets. This is especially so where contracts are being renewed and the small business is captive.

It is said that the law is to focus on low value contracts. What is low value is a judgement call but it is suggested that the proposed monetary threshold is very low value in today's market place, especially where goods are acquired for resale.

I might add the threshold is at odds with other thresholds in the CCA and external to the CCA but having an object to assist small business. See examples below.

Some industry examples of impact of thresholds.

Grocery stores. A medium size independent grocery store will have many suppliers but there will be one main one, Metcash, a grocery wholesaler. Purchases from Metcash in groceries will be many millions annually, no matter the size of the store. In addition in many States Metcash subsidiary will supply liquor products, and again in the millions annually.

Other major suppliers to grocers will be poultry suppliers, dairy products, bakers, all will in most cases be in the millions annually, not to mention rent and utilities.

Many of the supply contracts will be for more than one year. Metcash for instance is 5 years.

All this assumes less than 20 employees.

Newsagencies. A small suburban newsagency might spend some \$250,000 on magazines, spread over three suppliers but two dominate. Gambling products, \$1.1 million annually with one supplier. Newspapers and phone cards will be around the \$100,000. As will rent.

Most of the supply contracts will be for more than one year and normally between 3 - 5.

Hotels. Most hotels will have more than 20 staff.

Also annual purchases by a medium sized hotel are likely to be;

- Brewer 1- \$200,000
- Brewer 2- \$130,000
- Liquor wholesaler
\$131,000

Mortgage brokers. Many brokers would get over \$1 million dollars annually in commissions, many would get less but very few would get below \$100,000. The contracts between brokers and aggregators and even lender should be subject to UCT.

Petrol resellers where the service station operator buys the fuel the annual amount will in most cases be many millions.

This issue is complicated by oil code but UCT is still an issue.

Dairy Farmers Employee number ok but monetary threshold is too low. Contracts normally for about 5 years with processor and about \$600,000 in value.

New car dealers Again dealers buy the cars for resale, annual amounts will be many millions.

Again complicated by Franchise Code and NSW Motor Dealers and Repairers legislation.

Other small business thresholds in the CCA or involving the ACCC

Consumer guarantees- \$40,000 but excludes goods or services used up or purchased for resale. Essentially this applies to individual transaction and not just contracts. Business vehicles and trailers are also covered, irrespective of cost, provided they are used mainly to transport goods.

Collective bargaining groups- notification

- Basic threshold of \$3 mill annual dealings with the target.
- Primary producers- \$5 mill
- Agricultural machinery - \$10 mill
- Fuel resellers - \$15 mill
- New car dealers- \$20 mill

This scale takes into account the impact of the high value resale transaction.

Unconscionable conduct- nil

Collective bargaining general authorisation- nil

Food and Grocery Industry Code- nil

Some other small business thresholds

Small Business and Family Enterprise Ombudsman- 100 employees;

Small business tax cuts- \$2 million turnover

Privacy Act- \$3 million annual turnover

ATO - \$2 million turnover

Other issues.

The “upfront price” of the good or service is exempt.

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.

The renewal issue is one of critical concern.

The “main subject matter” of the contract is exempt.

Same comments as those above and what if the supplier /Customer changes the main subject matter

Contracts prescribed by law or contracts that mirror a mandatory Code may exempted by the Minister.

Are there exemptions in mind?

There should be no such exemptions, but contracts prescribed by law or mirroring a mandatory code should be a defence.

The problem is that Codes do not prescribe an entire contract and to exclude a sector e g Franchising causes anomalies.



Hank Spier

