

# Exposure Draft – Small business and unfair contract terms Bill

VACC submission May 2015



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## VACC Submission

### Exposure Draft - Small business and unfair contract terms Bill

#### VACC submission summary

The opportunity to comment on the draft is appreciated by VACC.

Our intent in submitting the following recommendations is to ensure that a 'Small Business Unfair Contracts Law' is meaningful, meets the intent, applies to and does not exclude small business.

VACC supports the proposed extension of existing consumer unfair contracts to apply to small business contracts.

However, the Exposure draft limits the application of the proposal by defining small business and contracts in such a way that excludes many contracts that genuine small businesses have or will enter into.

Extending the definition of small business beyond simple employee numbers or the monetary thresholds of a contract's value means more small businesses will be protected.

Further, VACC believes these contracts should include franchise agreements and terms and conditions

#### Recommendations

1. Instead of small business being narrowly defined by a number, small business should be defined by the relative position power of the parties to the contract.
2. The value of the small business contract not be a determining factor. All relevant small business contracts should be included and protected from unfair terms.
3. The size of the small business is less important than the treatment being applied by the unfair clauses in contracts. The primary concern should be to eliminate unfair clauses, not limit protections caused by narrow small business definitions.
4. The proposed legislation should be inclusive of as many small businesses and contracts as possible. Unfair terms shouldn't be allowed to apply to contracts which will not be covered by arbitrary small business definitions.
5. Disputes which arise under any new small business and unfair contract terms law should be notified to the Australian Small Business Commissioner or the proposed Australian Family Business Ombudsman.

## VACC Submission Exposure Draft - Small business and unfair contract terms Bill

### VACC introduction

VACC welcomes the opportunity to submit comments on the Exposure Draft, Treasury Legislation Amendment (Small Business and unfair Contract Terms) Bill 2015 on behalf of our 5000 members operating retail automotive businesses in Victoria and Tasmania.

The use of unfair contract terms to capture or release small businesses in business contracts has been a long standing issue that VACC has pursued on behalf of members.

### VACC policy position

VACC supports the proposed extension of the existing consumer unfair contracts provisions of the ASIC Act and the Australian Consumer Law (ACL) of the Competition and Consumer Act to apply to small business contracts.

However, we are concerned with the limitations of small business definitions which will exclude some businesses.

VACC and our National Peak body, the Australian Motor Industry Federation (AMIF) supported extension of unfair contract term provisions to small business contracts in a submission made last year to the Unfair Contract Terms Consultation Paper.

On many occasions, VACC has observed that small business owners are placed at a distinct disadvantage by the way that terms and conditions of contracts have been written and the bias contained in them.

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 will sign. All small business agreements should be set down in fair terms and applied with fairness.

We know that small business owners are often 'consumers' required to sign 'take it leave it' standard term contracts which are controlled by a substantially larger and more powerful big business. For instance, contracts for utilities, telecommunications, tenancy, agency agreements, supply agreements, contracts for service, advertising contracts, service agreements, franchise agreements and many more which have been prepared by one party for agreement of the other are often complex and sometimes confusing and unfair.

It has been our experience that such contracts also contain unfair terms which place the one side at a disadvantage because unfair clauses lock in one party, yet allows the other party to unilaterally vary the terms or even terminate the contract "at their convenience". The same opportunities are not made available to the small business party to the contract.

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Disputes that arise over unfair clauses in contracts are often most difficult to resolve. The larger, dominant party will not readily give up the advantage of a clause deliberately written for it and in its favour. A benefit of the proposal to introduce unfair contract term legislation would be a contractual clause deemed to be unfair would be void, but the agreement in total continues to operate.

This is an appropriate outcome that small business supports, however it relies upon the small business actually recognising the unfairness as being unfair and acting upon it. In the past, small business owners have found it difficult to argue against the application of the unfair clauses because they had agreed to the contract in the first place. Others are intimidated by the whole contractual process and don't dispute these clauses for fear of retribution.

Even in the future, under a new unfair contracts regime, which aims to ensure fairness, there is no assurance that small business contracts will improve. Unfair clauses are not prohibited as such, but void upon identification and challenge; some will never be challenged.

VACC agrees it is necessary to legislate to prevent unfair clauses being applied and we trust that in the future, such clauses will not be forced upon small business owners. However there are concerns about the content of the Exposure Draft.

#### Commentary on the Exposure Draft

VACC does not agree with the definitions of 'meaning of small business' or 'small business contact' as described in the Exposure Draft.

It appears the two primary definitions in the Exposure Draft are inadequate to properly provide for coverage of small businesses in the retail automotive industry. First of all, the 20 employee number definition is arbitrary and does not consider the differential in bargaining power between a small business and a big business.

For example, a fuel retailing business of 21 employees (including regular casuals) would be excluded. The other party to their supply contract may be a multi-national oil company. Somehow, and this may be difficult, the people who own and operate small businesses need to be considered as people in business, not a number of employees; a definition of small business should not exclude small businesses.

The prescriptive 20 employees does not recognise at all the vast difference in position power that exists between big businesses and small businesses.

Secondly, the monetary thresholds of \$100,000 or \$250,000 are also 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'. The value of the contract over time is not a determinant of

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the relative powers of the parties or the contents of the contract and should not be used as to define access to the proposed legislation.

The legislation proposed should answer the following questions:

- How can we assist small business to avoid unfair contract terms and be treated with fairness?
- Why is it necessary to limit the definitions to numbers when our real concern should be about the unfair terms?
- How can we actually recognise the people involved, and the personal predicaments that unfair contract clauses create?

In our view, the legislation should not exclude small business if they don't fit arbitrary definitions. The Australian consumer law does not discriminate on the basis of numbers or definitions of numbers.

VACC submits the proposed legislation should be inclusive of as many small businesses and contracts as possible. It should not be that unfair terms are allowed to apply to many contracts which will not be covered.

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.

VACC does not agree with the decision taken in clause 1.7 on page 4 of the exposure draft.

#### **Agreements attached to franchises**

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.

### **VACC Recommendations**

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 business have or will enter into.

Franchise agreements and related documents in particular are unlikely to meet the definitions. This is a deficiency's that should be recodified by changes to the definitions.

### **Recommendations**

1. Instead of small business being defined by a number, small business should be defined by the relative position power of the parties to the contract. Using just numbers to define a small business is unimaginative and lazy.
2. The value of the small business contract not be a determining factor. All small business contracts should be included. Unfair terms should not be part of any contract that small business owner agrees to.
3. The size of the small business is less important than the treatment being applied by the unfair clauses in contracts. The primary concern of Government should be to eliminate unfair clauses, not to narrowly define small businesses.
4. The proposed legislation should be inclusive of as many small businesses and contracts as possible. Unfair terms shouldn't be allowed to apply to contracts which will not be covered by arbitrary small business definitions.
5. Disputes which arise under any new small business and unfair contract terms law should be notified to the Australian Small Business Commissioner or the proposed Australian Small Business and Family Enterprise Ombudsman.