

14 September 2021

Director  
Consumer Policy and Currency Unit  
Market Conduct Division  
Treasury  
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Dear Sir/Madam

**Strengthening protections against unfair contract terms  
Consultation on the exposure draft legislation**

I thank you for the opportunity to comment on the exposure draft legislation. I make this submission as the founder of Small Company, Big Business. I am the author of [\*Small Company, Big Business: How to get your small business ready to do business with big business\*](#), and [\*Small Company, Big Crisis: How to prepare for, respond to, and recover from a business crisis\*](#).

I am a small business educator and mentor, with a particular interest in regional SMEs. My speaking engagements, workshops and writing centre on the relationship between small and big business.

**General Comments**

The proposed amendments have captured the majority of the changes advocated by Small Business since the initial legislation was introduced. It addresses some critical omissions that rendered the original legislation largely ineffective.

**Will It Work?**

Unfair Contract Terms are still widely used in spite of the current legislation. From my own experience as a small business owner who regularly enters contracts with national and international resources companies, industry, and government, I can attest that the majority of contracts presented to us would fall foul of the existing legislation. It is impossible to tell whether the clause has been included because:

- (a) the large company knows about the unfair clause, but still tries to take advantage of the weaker bargaining power of the SME to 'get away with it', or

- (b) despite having ready access to contract lawyers, they are not aware of the Unfair Contracts legislation. (An example of where this occurred is attached with this submission).

In each case, our approach has been:

1. Review the proposed contract for offending clauses.
2. If an unfair clause is present, we request that the clause be deleted, or at least changed to give our company the equivalent right under the contract.
3. If the company refuses to change or delete the clause, we make a determination as to whether our small company is prepared to accept the risk and sign the contract. What are the odds of this happening with that particular client? What will the consequences be if they do cancel?

In our experience, around 50% of companies would accept the change. For one sizeable contract with a Government Owned Corporation, we assessed there would be no risk (being a GOC) and proceeded. That proved to be an error. Some months later after encountering significant difficulties with the contract that were not as a result of our actions, we received a phone call informing us that our contract was to be ‘terminated for convenience’. The contract had been fully resourced, and the sudden termination obviously created problems. As far as we are aware, that clause is still in the contract.

#### **Recommendation:**

These observations make me conclude that the new legislation will require substantial education of the large organisations that typically issue standard form contracts if it is to be embraced.

#### **Large organisations can help their smaller suppliers.**

The majority of small business owners were not aware of the Unfair Contracts legislation. I have trained myself, with the help of friendly lawyers, to identify the clauses that are most probably unfair, then seek legal advice if I am unsure. I periodically write social media posts and blog posts on this topic. Invariably, I receive comments such as:

- “I know, have been there....”
- “Great advice - I wasn't aware of this! We had to take a very unfair contract a few years ago, it's very common. Especially dealing with aggressive corporate counsel!”
- “Thanks for spreading awareness on this.”

The majority of small business owners do not have the time, the skills nor the money to review (or have reviewed) every single potential contract. While it was welcomed at the time, the current legislation has proven to be ineffective. The buyers are not helpful either. In 25 years of operating a successful small business, only 1 Procurement Officer has ever taken the time to sit with us, review the proposed contract, and explain potential conflict points and difficulties.

### **Recommendation:**

It is in the interest of large buyers to help educate their smaller suppliers on the changes. Taking a longer-term view helps to create reliable and competent supply chains. COVID 19 has disrupted and exposed the risk inherent in long Australian supply chains. The Federal Government has recognized this with the [Security Legislation Amendment \(Critical Infrastructure\) Bill 2020](#).

Materials published to educate business on the Unfair Contracts legislation should make the connection between strong supply chains and a robust small business sector. This will help the business community see the bigger picture, and that Unfair Contracts legislation is not a punitive measure on large business.

### **A positive effect on Regional Australia**

One additional consideration is the effect of Unfair Contract Terms on regional businesses. In many regional areas, the economy is dominated by one industry with large participants, or even just one large company. Small suppliers therefore have no opportunity to turn down work as they do not have multiple potential customers. I submit that an additional benefit of this legislation (even if it was not intended), is to strengthen SMEs in regional Australia – a long-time goal professed by all political parties.

### **Conclusion**

The path to this current consultation has been long, drawn-out, and unnecessary. Between 2015, when the first Unfair Contracts legislation was introduced to the Parliament, and 2021 when we are considering these enhancements, hundreds or possibly thousands of small business owners have suffered as a consequence of unfair contract terms. Such suffering was unnecessary. Had the path of making such terms illegal been taken back in 2015, there would undoubtedly be more of those SMEs still trading. It is hoped that this new legislation will improve the relationship between small and big businesses – something that is critical in a post-COVID 19 economy.

I thank you for the opportunity to make this submission.

Yours sincerely

**Bronwyn M Reid**  
Small Company, Big Business