SHOPPING CENTRE COUNCIL OF AUSTRALIA

REVIEW OF THE UNFAIR CONTRACT TERM PROTECTIONS FOR SMALL BUSINESS: SUBMISSION TO THE TREASURY – 27 MARCH 2020

BACKGROUND

Thank you for the opportunity to comment on the *Enhancements to Unfair Contract Term Protections Consultation Regulation Impact Statement* (the RIS). It is pleasing that some of the issues we've raised in previous submissions are expressly referenced in the RIS, including in Section 6.6 *'related bodies corporate'* and Section 9 *'minimum standards'*.

As the Treasury is aware, the Shopping Centre Council of Australia (SCCA) has a longstanding engagement on unfair contract terms (UCT) policy and legislation. As illustrated below, the SCCA has engaged in every key stage of the development of the current UCT regime including the policy process relating to the current legislation in 2014; the preparation of the Exposure Draft in 2015; consideration of the Bill in Parliament (including appearing before the Senate inquiry) in 2015; the separate Australian Consumer Law (ACL) review in 2016; and the review led by Treasury in 2018 which forms the basis of this current consultation.

We also undertook formal pre-compliance with the Australian Competition and Consumer Commission (ACCC) in 2015-16 before the commencement of the legislation on 12 November 2016. This engagement was specific to retail leases regulated by State and Territory retail lease legislation.

Then Deputy Chair of the ACCC, Dr Michael Schaper, publicly commented positively about our industry, as follows: *"Some industries have responded swiftly to understand their new obligations when dealing with small business. Notably, the ACCC has engaged with the retail leasing industry, including the major shopping centre landlords, to review their standard form contracts…The quick steps that have been taken by the retail leasing industry are a guide for other sectors…"*

In the spirit of the above, we hope the Government will take a proactive approach in resolving our key issues.

KEY ISSUE – Minimum Standards

Currently, Section 26(1)(c) of the ACL does not adequately address all types of provisions under Commonwealth, State and Territory laws, principally minimum standards, including where Parliaments have created laws to address fairness. Throughout our engagement, the SCCA has outlined how this issue creates risk and uncertainty with retail leases made under State and Territory legislation, whose basis is to provide for fair leases. This legislation is also subject to regular review, and in the past two years alone, the SCCA has been engaged in reviews in South Australia, Victoria, Western Australia and Tasmania.

Our primary recommendation, aligns with the spirit and intent of Section 26(1) as outlined by the 2015 UCT Bill's Explanatory Memorandum which deferred to the explanation given by Minister Craig Emerson when introducing the *Trade Practices Amendment (ACL) Bill* in 2010, and which clearly noted the need to adequately address all types of provisions under a Commonwealth, State or Territory law.

We strongly urge the Treasury to implement the SCCA's recommendation to ameliorate the regulatory duplication, uncertainty and risk under the current Act.

RECOMMENDATIONS

Primary

1. *That the Government adopt a policy and introduce a legislative amendment to Section 26(1)(c) of the ACL to extend its current application to include 'minimum standards'.*
    a. *If adopted this would result in Section 26(1)(c) of the ACL reading: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, state or a territory."*

Secondary

2. *Amend Section 23(4)(b) of the ACL to include related bodies corporate*
3. *The current up-front contract value threshold should remain the same with an upfront price payable not exceeding $300,000, or if the contract runs longer than 12 months, $1 million.*
4. *Include in Section 27(2) of the ACL, that a court must take into account whether both parties to a contract have received legal advice/representation.*
    a. *If adopted this would amend Section 27(2) to include: "whether both parties to the contract consulted with legal representation regarding that particular transaction."*
5. *The UCT law is not amended to make UCTs illegal or to attach penalties.*
    a. *Should the Government move ahead with these measures, the relevant language in Section 24(4) and Section 27(1) of the UCT law should be amended to ensure the usual onus of proof.*
6. *In the event that UCTs are made illegal and the Government introduces penalties, an exemption should be provided for businesses that have proven that they've taken proactive actions to remove UCTs from their contracts.*

MINIMUM STANDARDS (RIS – Section 9)

In the SCCA's ongoing engagement with Treasury, we have consistently raised the issue that the current language provided for at Section 26(1) does not adequately address all types of provisions under Commonwealth, State and Territory laws, principally minimum standards. The exclusion of minimum standards in Section 26(1)(c) creates regulatory duplication and risk between the UCT law and State and Territory retail lease legislation.

What are minimum standards? / Application of Section 26(1)

As noted in the RIS, minimum standards are "*industry specific requirements included in State and Territory laws...commonly adopted by businesses and inserted into standard form contracts*." The RIS also recognises that State and Territory Parliaments have "*already considered and consulted on any minimum standards before including them in state legislation, including the fairness of those standards*."

Within a retail lease, some terms may not be 'required' or 'expressly permitted' by retail lease legislation but are minimum standards in relation to certain leasing practices such as timeframes for notification periods.

This raises the possibility that a provision in a retail lease which has been contemplated by and consulted on by a Parliament in NSW (including in relation to fairness), and is considered satisfactory by that Parliament, could subsequently be declared void by a Federal court judge.

To illustrate this, in our submission to Treasury for its 2018 Review we provided the example of the 'demolition clause' of a retail lease. This clause allows a landlord to terminate a lease in order to conduct repairs, renovations or reconstruction of a shopping centre. A 'demolition clause' is neither 'required' or 'expressly permitted', however the retail lease legislation outlines the minimum standards required if the clause is included in a lease. Across various jurisdictions these minimum standards include: ensuring that the demolition is a 'genuine proposal'; the proposed demolition cannot take place without vacant possession of the premises; the landlord must pay the tenant compensation for the value of the tenant's fitout; that the lease cannot be terminated without at least 6 months written notice and the tenant has the right to terminate at any time within those 6 months provided they give the landlord 7 days written notice; and if the proposed demolition is not carried out within a reasonable practicable time after the termination date, the lessor is liable to pay the lessee reasonable compensation for damage suffered by the lessee as a consequence of the early termination of the lease unless the lessor establishes that at the time of notice of termination there was a genuine proposal to demolish within that time.

In this example, it is possible that a tenant:

- has entered into a retail lease which qualifies as a small business contract (and which meets the 'minimum standards' of prevailing State or Territory retailing leasing legislation);
- has undertaken commercial negotiations with a landlord;
- has agreed to the inclusion of, for example, a 'demolition clause' in their lease; and
- has had their landlord invoke the 'demolition clause';
- could take action through the courts to seek to have the 'demolition clause' deemed unfair and, consequently, declared void.

In developing the minimum standards for a 'demolition clause' in retail lease legislation, the NSW Parliament (and the other State and Territory Parliaments who have passed similar legislation) considered a range of factors, including the 'fairness' of those standards; the economic benefits of investment activity; and the importance of shopping centres reinventing themselves to stay relevant to attract customers.

The failure to safeguard against a 'demolition clause' (which meets the minimum standards of State or Territory legislation) from being challenged as unfair may result in a significant delay of a proposed redevelopment, put thousands of jobs 'on-hold', cause considerable disruption and uncertainty for other affected tenants, and, potentially, make the redevelopment unviable. This risk is substantial and creates uncertainty for business and, as noted on page 41 of the RIS, if such a challenge were to occur, it could result in "*a legal paradox whereby a court declares a standard by a State or Territory as unfair.*" Certainty is particularly important now when the Government is encouraging investment, our members National development pipeline over 2020-2022 is approximately 500,000 square metres and totalling $7.4 billion.

Fairness in Retail Lease legislation

As the 'demolition clause' example demonstrates, the contents of a retail lease (i.e. contract) are already regulated by all State and Territory governments with the aim of ensuring that lease terms strict a fair balance between tenant and landlord. This legislation is also highly 'active', being subject to regular reviews that often result in amendments to ensure this balance is maintained. The SCCA is actively engaged in all of these processes and as previously stated, in the past two years has been involved in reviews in South Australia, Victoria, Western Australia and Tasmania.

The general approach of retail lease legislation across jurisdictions is to outline minimum conditions which must apply in the lease entered into by the landlord and tenant; to lay down detailed rules on key aspects of the retail tenancy relationship; and to seek to resolve retail tenancy disputes by easily-accessible and cost-efficient mediation.

In this sense, retail lease legislation and minimum standards align with the purpose of Section 26 as outlined by Mr Bruce Bilson in the second reading speech of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill* on 24 June 2015:

> *"… (Section 26) the mechanism that will allow the government to exempt laws that it deems are equivalent to the unfair contract terms law. This mechanism recognises the importance of avoiding regulatory duplication and unnecessary compliance costs in sectors where there are equivalent and enforceable protections against unfair contract terms. In designing this regulation-making power the government has taken care to ensure the power is not broader than is necessary to achieve this objective."*

Specific instances where these 'equivalent protections' are demonstrated are referenced below:

- **NSW:** In the 1994 second reading speech of the *Retail Leases Act 1994*, then Minister for Small Business Raymond Chappell outlined, *"(the Act) seeks to ensure that retail leasing agreements are explicit as to the requirements of both parties and that they are entered into from a position of reasonable equal negotiating strength."*
- **VIC:** In 2003, on the second reading of the *Retail Leases Bill,* then Minister for Small Business Marsha Thomson said, *"The purpose of the bill is to establish a new regulatory framework for retail tenancies that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants of retail premises."*
- **QLD:** In the *Retail Shop Leases Bill 1994* Explanatory Note, it states *"The objective of this Bill is to promote efficiency and equity in the conduct of certain retail businesses in Queensland through the provision of mandatory minimum standards for retail shop leases and a low-cost dispute resolution process for retail tenancy disputes."*
- **WA:** In the Explanatory memorandum for the *Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011*, it states that *"The Commercial Tenancy (Retail Shops) Agreements Act 1985 regulates the relationship between landlords and tenants in retail shop premises in Western Australia. The primary objective of the Act is to facilitate equitable leasing arrangements and provide access to low cost dispute resolution mechanisms. The Act focuses on the need for transparency of information and fairness in retail tenancy lease contracts."*

Spirit and Intent of Section 26(1)

It is worth noting that our recommendation is entirely consistent with the spirit and intent of Section 26(1)(c) as spelled out by Minister Billson when introducing the 2015 UCT Bill, whereby the 2015 Explanatory Memorandum deferred to the explanation given by Minister Craig Emerson when the *Trade Practices Act (ACL) Bill* was introduced in 2010.

> *"The exclusion of terms 'required or expressly permitted, by a law of the Commonwealth or a State or Territory' ensures that a Court is not required to determine the fairness of terms that are required to be included, or expressly permitted to be included, in consumer contracts as a matter of public policy. There are many examples of mandated consumer contracts or terms that are required to be used or are expressly permitted to be used in order to ensure validity of specific transactions, which apply in the laws of the Commonwealth, the States or the Territories."*[1]

The key principles underlying the intent of this sub-section are clearly noted to: (1) exclude certain terms under a Commonwealth, State or Territory law; (2) ensure a Court is not required to determine the fairness of certain terms; and (3) are used to ensure the 'validity' of specific transactions under such laws (in our case, a retail lease).

In this regard, our recommendation is to ensure Section 26(1)(c) adequately addresses all types of provisions under such laws which are needed to ensure 'validity'. This includes ensuring this subsection is expanded to include 'minimum standards' under such laws, which in the case of retail lease legislation can also include particular terms that are not 'required or expressly permitted'.

Recommendation 1 aligns with RIS **Section 9.4. Option 2** – exempt minimum standards under state and territory laws.

Recommendation 1

That the Government adopt a policy and introduce a legislative amendment to Section 26(1)(c) of the ACL to extend its current application to include 'minimum standards'.

a. *If adopted this would result in Section 26(1)(c) of the ACL reading: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, state or a territory."*

THRESHOLDS

Definition of a small business contract (RIS - Section 6.6)

The definition of what constitutes a small business contract currently applies if at least one party to the contract employs fewer than 20 persons at the time the contract is entered into, however current law does not clarify whether employees of 'related bodies corporate' are included in this headcount.

This is highly problematic as it is quite possible that the subsidiary of a large company may employ no employees or very few employees. For example, some large retailers undertake their leasing through a separate service company which often employs fewer than 20 people.

As the RIS has noted, this allows for the protections offered by the UCT law to extend to potentially 'large' companies with few/no employees, at complete opposition to the intentions of the UCT regime.

Recommendation 2 aligns with RIS **Section 6.6.2 Option 2 – aggregation**, to *'consider any related bodies corporate relevant in determining employee numbers and annual turnover'.*

Recommendation 2

Amend Section 23(4)(b) of the ACL to include related bodies corporate.

Value threshold - Contract value (RIS - Section 7)

As the law currently stands, UCT protections currently apply to contracts that have an upfront price payable not exceeding $300,000, or if the contract runs longer than 12 months, $1 million.

We note that the contract value thresholds proposed when the UCT law was introduced in 2015 were $100,000 for a one-year contract, and $250,000 for a multi-year contract. These thresholds were the result of substantial consultation and endorsed by State and Territory Governments. The Senate Economics Legislation Committee also examined the Bill and none of the Committee members recommended a contract value increase.

[1] Trade Practices Amendment (Australian Consumer Law) Bill 2009, Explanatory Memorandum

The threefold and fourfold increase that raised the originally proposed thresholds to their current level were the result of amendments moved by the Greens that passed the Senate in September 2015. At the time, the SCCA wrote to relevant officials to outline our concerns that this increase was in opposition to the extensive consultation that occurred in the development of the UCT Bill and that this would dramatically increase the coverage of the UCT law across Australian businesses.

As such, the SCCA does not support a further increase to the contract value threshold because: 1) to our knowledge there has not been any analysis to understand the coverage of businesses covered by the thresholds as they currently stand, or under the proposed threshold and; 2) an additional increase to the UCT thresholds would defeat the purpose of the UCT protections to specifically target 'small businesses'.

It is also alarming that the RIS is proposing 'Option 3', which removes the contract value threshold entirely. We note that the original intention of the law was that protections were to *"…apply when small businesses engage in day-to-day transactions, while encouraging them to conduct due diligence on large contracts fundamental to the success of their business."* (Second reading Speech, 24 June 2015). A contract value threshold also provides certainty between businesses entering into contracts as to whether that contract meets the legislated threshold.

Recommendation 3 aligns with RIS **Section 7.3 Option 1 – status quo**, to maintain the current contract value thresholds.

Recommendation 3

The current up-front contract value threshold should remain the same with an upfront price payable not exceeding $300,000, or if the contract runs longer than 12 months, $1 million.

Clarity on standard form contracts (RIS – Section 8)

In our submission to the 2018 UCT Review, we noted that while small businesses have been provided with certainty through defined parameters for staff headcount and contract value, large businesses also deserve equivalent certainty.

We outlined the need for a distinction between a small business contract which:

- is a standard form contract which provides a basis for the commencement of negotiations between the parties (as is the case in regard to retail leases, where there is often a legal obligation on landlords to provide a 'proposed' lease to a prospective lessee when negotiations are entered into), and
- is a standard form contract offered on a 'take it or leave it' basis.

As the RIS notes, the current UCT law provides several factors a court must take into account in determining whether a contract is a standard form contract including, amongst other things: whether one of the parties has all or most of the bargaining power relating to the transaction; and whether another party was given an effective opportunity to negotiate.

The SCCA would submit an addition to this list, to include '*whether both parties engaged legal representation relating to the transaction*'.

We would put forward that a contract that has included lawyers on both sides would not be a standard form contract as both parties have proven they have had opportunity to review the contract, consult legal advice as to its terms and negotiate (if desired) on those terms. As such, the initial contract serves as the basis of the transaction however is not offered on a 'take it or leave it' basis.

Our recommendation below (4) does not fit into the Options provided in the RIS, however we believe such an amendment would be beneficial in providing increased clarity to businesses as to what constitutes a standard form contract.

Recommendation 4

Include in Section 27(2) of the ACL, that a court must take into account whether both parties to a contract have received legal advice/representation.

a. *If adopted this would amend Section 27 (2) to include: "whether both parties to the contract consulted with legal representation regarding that particular transaction."*

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LEGALITIES AND PENALTIES (RIS – Section 4)

The discussion paper has outlined a number of ways in which the UCT regime could be 'strengthened', including through making UCTs illegal and introducing a penalty regime to provide stronger deterrence. The SCCA remains opposed to these measures, in particular as there are inherent issues with the UCT law as it currently stands including in relation to the subjective nature of 'unfair' and the reverse onus of proof currently required by UCT law.

Firstly, given the vagueness and uncertainty involved in the definition of 'unfair', and how subjective any such Court judgment could inevitably be, there can be no justification for illegality or penalties beyond the voiding of relevant term/s. The drafting of Section 24 and Section 25 of the UCT law, outlining the meaning of unfair and examples of unfair terms respectively, include vague terms that give a considerable degree of discretion to the Courts to make determinations on the basis of their own perceptions. Further, Section 24(2) of the UCT law allows a court to *"take into account such matters as it thinks relevant"* when determining whether a contract term is unfair.

Our view on this is supported by the comprehensive review of the Australian Consumer Law (ACL) that occurred across 2016-17, in which the interim report noted that the absence of monetary penalties *"recognises that penalties are not generally imposed on businesses where their upfront obligations are uncertain.*" (page 128.)

Secondly, the ACL Review did not recommend making UCTs illegal, and provided the following commentary:

> *"The review found that a broad prohibition of terms previously declared unfair would undermine the nature and intent of the provisions. Importantly, the provisions establish when a term is unfair in the context of the contract and parties on a case-by-case basis, acknowledging that what may be unfair in one context is not necessarily unfair in another." P.56*

The Review recognises that a broad approach would not necessarily be the most effective strategy in eliminating UCTs, and it could be more effective to conduct an industry targeted approach which addresses the problems faced by different sectors e.g. smash repairers, franchising.

The ACL Review's Final Report made two recommendations in relation to UCTs, one being the broadening of the application of the ACCC's and ASIC's existing powers, detailing this would "*…constitute a more proportionate and effective response to concerns about systemic unfair contract terms."*

As a consequence of this recommendation, in October 2018 the Australian Parliament passed the *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018*, which, among other things, broadened the application of the ACCC's investigative powers to include possible UCTs, including possible UCTs in small business contracts, without making UCTs illegal.

The RIS has suggested that the UCT regime "did not provide strong deterrence against businesses using UCTs in their standard form contracts." It is reasonable to considered that this 'strengthening' of UCT law should be monitored and reviewed following a sufficient period prior to any further changes, as well as ensuring that regulators are enabled and empowered to fulfil this mandate with sufficient resources.

Thirdly, as mentioned in our submission to the 2018 UCT Review, the current drafting of the UCT law places a reverse onus of proof on businesses challenged with having UCTs in their contracts. Requiring a business under challenge to disprove an element of the information (i.e. prove their innocence).

Section 24(4) of the ACL, which relates directly to Section 24(1)(b) of the UCT law (the second of three limbs that must be considered by the Court when determining whether a contract term is unfair), states:

> *"For the purposes of subsection 1(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term,* ***unless the party proves otherwise****."*

This Section presents a risk should UCTs be made illegal and a penalty regime introduced as a business may be considered to have broken the law until such time as they prove that the term of a contract in question is necessary to protect its legitimate interests.

Further, Section 27(1) of the UCT law states: *"If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract* ***unless another party to the proceeding proves otherwise****."*

Similar to Section 24(4), a business may be considered to have broken the law until such time as they prove that the contract in question is not a standard form contract and, therefore, not covered by the UCT law.

In effect, these clauses require one party to 'prove otherwise' and may see respondents as 'guilty' until they prove their 'innocence'. We cannot think of another law where the legal principle of 'innocent until proven guilty' has been abandoned as has been proposed regarding the UCT law.

The SCCA discussed our concerns in relation to the drafting of these Sections in 2015 and 2016, and put forward that they were inappropriate for the business-to-business contracts and should be reversed to the usual onus of proof.

Recommendation 5 aligns with **4.3 Option 1 – status quo** of the RIS, with the addition of a correction for Section 27(1) of the UCT law.

Recommendation 5

The UCT law is not amended to make UCT illegal or to attach penalties.

a. Should the Government move ahead with these measures, the relevant language in Section 24(4) and Section 27(1) of the UCT law should be amended to ensure the usual onus of proof.

We note that other stakeholders, including the ACCC and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) have made comments regarding the need for the UCT law to be 'strengthened', including via making UCTs illegal. If the Treasury decides to make UCTs illegal, we submit that they should consequently grant an exemption for those parties that take proactive measures to remove UCTs from their contracts.

The SCCA undertook a proactive approach with Treasury in the development of the UCT policy and law, and undertook engagement with the ACCC in the context of pre-compliance activities. This engagement was specific to contracts (leases) regulated by state and territory retail tenancy legislation.

The purpose of this engagement was to ensure that our members were well prepared for the introduction of the UCT law in November 2016 and that, to the best possible extent, had reasonable confidence that their contracts (leases) did not raise concerns under the UCT law.

At the beginning of our submission we highlighted commentary by then Deputy Chair of the ACCC, Dr Michael Schaper, who publicly commented positively about our industry's engagement by stating, *"...the quick steps that have been taken by the retail leasing industry are a guide for other sectors…"*

While the RIS has outlined concerns regarding 'lack of deterrence', it has failed to include incentives for industries/businesses that take proactive measures to ensure compliance with UCT law and remove potential UCTs from their contracts.

To provide businesses with certainty, we would propose the following, where a business has:

- taken proactive measures to remove UCTs from their contracts; or
- undergone compliance activities with the ACCC; or
- demonstrated this engagement to the Treasury;

The Treasury could place a relevant business, or collection of businesses, on an 'exemption register' (or similar) to acknowledge these measures and provide a period of exemption.

It is insufficient to suggest that businesses that have been proactive and undertaken activities to remove UCTs from their contracts should be content that they are 'doing nothing wrong', particularly in light of the highly subjective nature of the definition of 'unfair'. Businesses deserve certainty and providing this through an exemption that acknowledges proven measures to remove UCTs would provide additional incentive.

Recommendation 6

In the event that UCTs are made illegal and the Government introduces penalties, an exemption should be provided for companies that have proven that they've taken proactive actions to remove UCTs from their contracts.

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