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Submission to the Treasury
Consultation Regulation Impact Statement (RIS)
https://consult.treasury.gov.au/consumer-and-corporations-policy-division/enhancements-to-unfair-contract-term-protections/consultation/download
on
Enhancements to Unfair Contract Term Protections
16 March 2020

"We'll do what we're made to do"

Summary
Self-Employed Australia strongly supports significant strengthening of the unfair contract protections for small business available under the *Small Business and Unfair Contract Terms Act 2015.*

We support and seek to have the following measures enacted:

- Making unfair contracts **illegal** – to date, an unfair clause is simply 'null and void'.
- Introducing **civil penalties for breaches** – to date, there are no penalties.
- The ACCC should be able to apply **infringement notices** for contract terms that are likely to be unfair.
- 'Small business' to be defined as one with **up to 100 employees**.
- **No contract value threshold** – to date, the law only applies to contracts up to $300,000 in value.
- Fully apply to **government contracts** – to date, government is not covered by the laws.

"We'll do what we're made to do"

1. Background: Why is it necessary to 'beef up' the unfair contract laws?

In 2009 Self-Employed Australia started a campaign for fair contracts for self-employed, small business people. In March 2010 the *Trade Practices Act* was amended, creating protections from unfair contracts for consumers.

In July 2010 we launched our '*Charter of Contractual Fairness'* in which we called for the unfair contract protections to be extended to self-employed, small business people.

In our campaigning we wrote to a significant number of large companies asking them to support the cause. We followed up with meetings with senior executives of many companies.

In a meeting with the Senior Counsel for one of the major banks, the head corporate lawyer stared at us and delivered a short response…

"It's like this. We'll do what we're made to do."

After seven years of advocacy and campaigning we were pleased that, on 12 November 2015, the *Small Business and Unfair Contract Terms Act* passed into law. The Act was/is comparatively 'light touch' regulation applying unfair contract protections to small business. The 'light touch' design was based on an assumption by Parliament that large businesses would see the new laws and seek to comply voluntarily.

In March 2019 the government announced that it would strengthen the unfair contract protections. This was a result of considerable evidence that large businesses were ignoring the laws. In December 2019 Treasury released a Consultation Regulation Impact Statement (RIS) to which we respond in this submission, canvassing options for strengthening the laws.

The RIS provides significant evidence that the assumption of voluntarily compliance has not occurred. In fact, the expressed frustration of the regulator, the Australian Competition and Consumer Commission, as to persistent non-compliance, is public, loud, clear and reflected in the RIS.

There are some notable individual company exceptions, but overall the evidence is that large firms persist with unfair contract terms for small business people. It's unfortunate but it seems that

… 'they will only do what they are made to do'.

(Nb: The record of our historic and current campaign for small business unfair contract laws is here.)

2. What the unfair contract protections do and why they are important

In responding to the RIS it's important to keep basic facts at the forefront of considerations.

The current unfair contract laws:

a) Only applies to standard form contracts.
b) Are limited to contracts involving small businesses.
c) Currently have a ceiling on the value of contracts to which the law applies.
d) Effectively codifies the basic elements of what, at common law, identifies the commercial contract.

These four key elements should be entirely uncontroversial and something to which all larger businesses would readily comply if such businesses have interest in the integrity of a market economy. For example, on point (d) above, a 'contract' that enables one party to change the terms of the contract without the agreement of the other party is hardly a 'contract'. It is instead, in our view, a commercial and legal 'con'.

Common law holds that a commercial contract is something to which each party has willingly agreed. To have a 'contract' that enables one party to change the terms of the contract without the other party's agreement breaches the key common law element of all parties willingly entering a contract. Common sense holds the same thing.

This is evidenced in the explanations of the unfair contract law requirements as detailed below at (3). The elements of the unfair contract laws are a matter of common sense. And it's this commercial common sense, embedded in common law, that is the very nature and structure of commercial contracts. And it is this contract structure that underpins the very functioning of successful market economies in which all persons have an opportunity to participate.

In other words, the unfair contract laws are an embodiment, in statute law, of basic common law and common sense principles that engender trust in commercial transactions. Without 'trust', economic activity will gravitate towards a 'dog eat dog' world.' An economy where 'dog eat dog' is tolerated is certainly an 'economy', but is it an economy in all which everyone has the opportunity to participate and succeed? We say 'no!'

Securing fair contract arrangements in standard form contracts by way of statute strengthens the Australian economy.

We have made this point repeatedly in public as well as in submissions to government enquiries:

- Federal Treasury July 2014.
- Senate Economics Legislation Committee August 2015.
- Submission to Treasury Review of the laws December 2018.

3. The specific unfair contract provisions

The following list is taken (and edited for meaning) from the Australian Consumer Law.

A term of a contract is unfair if it:

- Would cause a significant imbalance in the parties' rights and obligations arising under the contract.
- Is not necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- Would cause financial or other detriment to one party if it were applied or relied on.

More particularly, a contract term is unfair if it gives one party, but not the other, the ability to:

a) Avoid or limit the performance of the contract.
b) Terminate the contract.
c) Apply penalties against the other party for a breach or termination of the contract.
d) Vary the terms of the contract.
e) Renew or not renew the contract.
f) Vary the price payable under the contract without the right of the other party to terminate the contract.
g) Unilaterally vary the characteristics of the goods or service to be supplied under the contract.
h) Unilaterally determine whether the contract has been breached or to interpret its meaning.
i) Limit one party's vicarious liability for its agents.
j) Permit one party to assign the contract to the other party's detriment without their consent.
k) Limit one party's right to sue the other party.
l) Limit the evidence one party can adduce in legal proceedings in respect to the contract.
m) Impose the evidential burden on one party in legal proceedings in respect to the contract.

We reiterate that these specific elements above [(a) to (m)] are common sense. We cannot see why any large, ethical organisation—business or government—would want to breach these provisions in their standard form contracts. The only motivation we can see for breaching these is that a large organisation seeks special privilege to avoid its obligations and responsibilities in its transactions.

4. Why the need to 'beef up the laws'?

In 2015, when the unfair contract laws were passed, the debate in the Parliament was robust. This was particularly so in the Senate. But there was a hope and belief in Parliament that, by not making the laws too prescriptive, large businesses would take the message of intent from the laws and willingly comply. With some few exceptions this has proven not to be the case.

The ACCC (mentioned above) and the Small Business Ombudsman have both expressed frustration at the continued evidence of large businesses ignoring the laws and both have sought changes to the law. We express the same frustration.

The reason for persistent non-compliance, we suspect, relates directly to the statement from a bank's senior counsel that we cite in the title to this submission—namely, "we'll do what we're made to do".

That is, the need to 'beef up' the laws is a direct result of the intentional ignoring of the laws by many large businesses.

And this attitude of 'make us do it' is evidenced in the RIS itself, where it asks a list of questions around the fine detail of the application of the laws. The RIS asks some 34 question. We respond to some of those questions below at (6). The questions, in our view,

reflect the type of legal 'outs' which large businesses use to argue that their standard form contract/s are not subject to unfair contract provisions.

The RIS itself demonstrates, to our mind, the sort of technical game-playing undertaken by 'smart' lawyers for many large businesses seeking to avoid the laws, and thus to avoid fairness in their dealings with small businesses. It reflects the lawyers' technical skill at facilitating a 'dog eat dog' economy where the bigger dog prevails.

It is this failure by many large businesses to accept and comply with the spirit and intent of the unfair contract laws that has resulted in the need to 'beef them up.' Such businesses care not for the economic damage that they do or can do, but are instead entirely motivated by self-interest.

5. What should the strengthening look like?

Because the refusal to apply the spirit of the existing law is so clearly evident, we strongly recommend that the enhancement of the existing laws should draw as wide an ambit of coverage as possible.

The capacity for smart lawyers to play technical 'out' games should be so narrowed that the effort to 'get out' does not deliver a commercial reward.

Our responses to a selection of the RIS questions (below) reflects our recommendation to draw a wide ambit in the reforms.

As an overview, we support and seek to have the following measures enacted:

- Make unfair contracts **illegal** – to date, an unfair clause is simply 'null and void'.
- Introduce **civil penalties for breaches** – to date, there are no penalties.
- The ACCC should be able to apply **infringement notices** for contract terms that are likely to be unfair.
- 'Small business' to be defined as one with **up to 100 employees**.
- **No contract value threshold** – to date, the law only applies to contracts up to $300,000 in value
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Government: On the issue of government contracts with small businesses we find it somewhat outrageous that government bodies are not subject to the unfair contract laws. The government 'out', we understand, is facilitated by legal technicalities to do with government obligations—or rather non-obligations—under competition law. This is a case of glaring double standards. Government expects the community to hold to a standard to which government is itself not prepared to be held. This must be corrected as a matter of priority.

At a minimum, the unfair contract laws should be extended by statute to apply to the Commonwealth government and all its related entities. State governments should be encouraged to do likewise.

6. Response to specific RIS questions

Below we respond to a range of the 'key questions' asked in the RIS Section 3. (Note the numbers below are the question numbers used in the RIS https://consult.treasury.gov.au/consumer-and-corporations-policy-division/enhancements-to-unfair-contract-term-protections/consultation/download)

Legality and Penalties

1. Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.
2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.
3. Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).

SEA Response: We endorse the research conducted by the ACCC and the Small Business Ombudsman. Their research reflects our experiences and knowledge.

4. As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.

SEA Response: SEA is a membership-based, not-for-profit association. We advise our members not to enter standard form contracts with unfair clauses.

5. Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.

SEA Response: The guidance and education provided by the ACCC is already comprehensive and of high quality. There can be no excuse, such as a lack of knowledge, for large firms to not comply with UCT requirements.

6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.

SEA Response: Yes. See discussion above. A wide ambit needs to be drawn to limit the ability of lawyers for large firms to argue that the UCTs do not apply to them. Making breaches illegal would assist in drawing that larger ambit. It would also aid the ACCC's ability to enforce the laws.

7. Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.

SEA Response: Small businesses cannot afford legal action to enforce their rights under the UCT. There is heavy reliance on the ACCC to do this.

8. What do you consider are the additional costs and benefits for each of the proposed options?

SEA Response: There are undoubtably large businesses that would argue along the lines of 'but how can we ever operate!' if they must comply with UCTs. But such large businesses are usually seeking to transfer cost, responsibility and risk from themselves to small businesses. The cost to small businesses is substantial under such arrangements. Fuller application of the UCTs will ensure that risk and cost are allocated to the parties in the way that they should.

Flexible remedies

9. Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?

SEA Response: As a consequence of the ACCC's actions in seeking to enforce the UCTs the ACCC have negotiated changes to some standard form contracts. Where this has occurred the benefit has been delivered to small businesses engaging with firms under those contracts.

10. If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.

SEA Response: Yes. A court should be to apply sanctions. This will help ensure that businesses that might contemplate ignoring the laws will be less inclined to do so for fear of also being subject to sanctions.

11. Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.

SEA Response: Yes, this is essential. Small businesses do not have the money or organizational capacity to undertake court proceedings.

Definition of a small business

12. What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc.
13. If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.
14. If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?
15. Do you consider $10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.
16. If the annual turnover threshold were to be adopted, how might this impact your business? Include any estimates of potential costs and savings.
17. In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.

SEA Response: In the United States the definition of small business extends to businesses with fewer than 200 employees. (This applies for the purposes of the jurisdiction of the Federal Governments agency Small Business Administration.)

For the purposes of the UCT we support extending the definition to businesses of at least 100 employees. By extending the definition it narrows the ability of large businesses to argue that the UCTs do not apply to their standard form contracts. The extension will create a focus on compliance with the spirit of the law, not just a technical legal interpretation.

Value threshold

18. Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?
19. Please provide information on how the current contract value threshold has impacted your business.
20. Are there likely to be any negative impacts if the current contract value threshold were to be increased to $5 million? Please provide details.
21. Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.

SEA Response: We recommend that no value limit be applied to the value of the standard form contracts. Fairness in contracting has equal application to all contracts no matter what size. If a small business lands a big contract under a standard form arrangement it is no less entitled to presumption of fairness of contract terms than a small business that lands a small contract.

Clarity on standard form contracts

22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.

23. If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?
24. In addition to the types of actions outlined in option 4, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?
25. Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.

SEA Response: One of the useful features of the existing Act is practical examples of what constitute unfair contract terms. (see section 3 above). These legislated examples create considerable clarity as to what is an unfair term. It narrows the ability of large firms to argue that a term may be 'fair' when it is actually unfair. In a similar vein, clarity would be greatly assisted if the proposed statute law gave practical examples of what constitutes or does not constitute a 'negotiation'.