13 March 2020

Australian Furniture Removers Association

Manager, Consumer Policy Unit
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/madam

Re: Enhancements to Unfair Contract Terms Review

Overview – Who is AFRA?

The Australian Furniture Removers Association (AFRA) is the peak body for the furniture removal industry in Australia. Its member base covers the major national and international removalists, as well as many small family businesses. The majority of its members are comprised of small and medium family businesses.

The furniture removal industry would be considered seasonal, with the majority of relocation work being undertaken through the months of November to February. During this period, our members, between them, would employ more than twelve thousand staff.

Due to the seasonality of the industry, many removalists have moved to a sub-contractor arrangement, engaging owner drivers or family companies to undertake work, especially during the peak season.

Member enterprises also undertake government relocation work for both federal and state/territory government staff. Government relocations work includes, but is not limited to staff postings for:

- Australian Defence Force
- Department of Foreign Affairs
- State/territory police
- Education
- Departments of Health
- Medical Staff
- State and Federal employees

These government contracts are managed by a few large main suppliers who then subcontract these services to providers, many of which are small/family enterprises. The work generated from these contracts can represent anywhere from 5% to over 85% of revenue and the majority of work is concentrated over the peak period from November to February. This affords the main suppliers with a substantial amount of commercial influence.

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It is the contracts between our members and these main suppliers that generate most of AFRA's issues with unfair contract terms (UCTs).

AFRA itself has spent a substantial amount of time with the ACCC representing its members and challenging UCTs within these contracts and AFRA is very familiar with the challenges that small businesses face with regard to UCTs.

We see several issues with regard to enforcement of the current UCT regime:

1. Whilst some terms in contracts may be viewed as fair or unfair at a cursory level, the intent and impact of the terms are subjective and require legal consideration on a case-by-case basis.

2. ACCC investigations and mediations are not considered binding precedents, meaning that any changes that an enterprise agrees to effect, after a review or investigation by the ACCC, have no further application to any other supplier contracts. Accordingly, the same or similar contract terms need to be challenged repeatedly by various small businesses and a full, time consuming investigation must be undertaken each time.

3. The real commercial impact and balance of power in some contracts deters many small businesses from initiating an enquiry regarding an UCT. Many of these service contracts do not guarantee any work, permitting the main supplier to "turn off the tap" if challenged.

Despite ACCC comments that it will protect small businesses that complain to the ACCC about UCTs, the investigation process offers no protection whatsoever and leaves a small business exposed to denial of further work, which can be commercially destructive.

Also, considering the investigation process may take several years, there are substantial commercial risks that need to be considered and often small enterprise will simply "roll over" and accept the UCTs.

AFRA believes that there are now sufficient examples of UCTs to enable creation of clear and concise guidelines as to what is and is not acceptable.

AFRA acknowledges that the ACCC has previously published guidelines on unfair terms in removal contracts, in a consumer/removalist scenario. However, these guidelines are not relevant to the 'up stream' contract between a small removalist subcontracted to a large supplier.

In recent years, AFRA has had substantial involvement with UCTs through the ACCC and the application of one-sided clauses that afford significant discretionary rights to large suppliers.

Despite clauses being challenged by members, many times the commercial reality of possibly being denied work under the terms of the contract decides the member's actions. In many cases, the issue is not the intent behind the clause, but the broadness of the clause wording. For example, we have seen clauses where the primary contractor (the large supplier) can, in the exercise of its discretion and without giving reasons, request the removal of an employee of the small business from the provision of any services. Whilst there is legitimate and proper intent in the clause, the broadness of the wording means that the small business may not be able to utilise the services of a particular employee, but at the

same time may not be able to dismiss that employee, without risking an unfair dismissal action.

We do not believe that there is any industry that is immune to UCTs within individual contracts. Broad/reflexive indemnity clauses are a major cause of concern. Too many contracts still have broad indemnity clauses which may result in the small business accepting responsibility for liability that arises because of the negligence of another party. The vast majority of liability insurance policies do not respond to claims/circumstances where the liability of the small business only arises as the result of a contractual indemnity.

When challenged, some enterprises will amend the indemnity clauses to reflect a proportionate liability position (i.e. where the small business is only liable to the extent that its negligence caused the loss or damage). When challenged about the inclusion of such clauses, some suppliers advise that their clients demand such indemnities and the supplier is just passing on the risk to the small business. Others just suggest that the contract "is what it is" and no amendments will be considered.

The small business has no opportunity to insure against or transfer such risk which can easily place them into financial distress in the event of an incident. The commercial/financial risk and impact can be substantial and extend beyond the business entity itself and to also directors/owners of small businesses. Further, some of the indemnity clauses are extremely broad and apply to claims 'directly or indirectly connected with' services. This has the result that the small business does not have to be a direct party or even present at the incident giving rise to the claim.

We do not see any reason why indemnity clauses that require a small business to accept liability/claims regardless of fault and in circumstances where the other party caused or contributed to any claim, are not automatically considered to be UTCs.

We suggest that the legislation should contain a presumption that such broad/reflexive indemnity clauses are UCTs. The party requiring the indemnity would then need to justify the inclusion of such a clause.

The basis of this premise is already established and identified in the ACCC's its own guide on Preventing Unfair Terms in Furniture Removal Agreements 2012.

https://www.commerce.wa.gov.au/sites/default/files/atoms/files/aclpreventingunfairtermsinfurnitureremoval.pdf

As remedies to UCTs, we would suggest that the ACCC be given similar powers that other regulators have within other industries. Again we would suggest that there are sufficient precedents already established to define specific inclusions in clauses that would determine whether they are unfair or otherwise.

Such being the case, the ACCC should also have the power to impose penalties or to take disciplinary action in respect of the term. Such penalties could include:

- Corrective action notices
- Infringements notices
- Court enforceable undertakings
- Court imposed pecuniary penalties
- Reimbursement of losses by primary contractors to small businesses who have been subject to UCTs, including possible future damages under the contract (with appropriate safeguards to protect primary contractors from spurious claims).

The ACCC already imposes certain penalties and notices without the need for court proceedings for some breaches of competition and consumer legislation, compliance with which may not necessary require admission of guilt. Regulators should be able to escalate enforcement action in the event of persistent misconduct for inclusion of UCTs. This should not be limited to a single term being repeated but should also apply to any additional UCTs being added over time.

The principle of the prohibition on UCTs is to protect small business and ensure that unreasonable financial or operational risks are not passed to small businesses. Further, it is considered that larger enterprises have the financial capacity to undertake proper due diligence of contracts in order to ensure that UCTs are not included. Ultimately, small enterprises are likely to accept UCTs because they require the contract to remain on foot. The situation is one of commercial and financial risk. As all businesses should apply a risk-based approach to contracts, the impact of an UCTs should be also risk based.

It would be unreasonable to suggest a broad, all-encompassing indemnity clause is an acceptable risk for a small business when it is unable to insure or mitigate that risk. Considering the purpose of the UCT legislation, such a financial risk is not a reasonable risk for a small enterprise to bear.

Definition of small business and small business contract.

In 2016 the ATO increased the threshold for a small business from an aggregated turnover of less than $2M to an aggregated turnover (net of GST) of less than $10M. A combined test of having a maximum of 100 staff and no more than $10M aggregated turnover would be more equitable. This would provide a net for many small businesses that are labour intensive and are currently not captured.

With regard to aggregation of turnover, section 50AAA of the Corporations Act should be applied.

Clarity on standard form contracts

AFRA agrees that the UCT regime should be broadened and the definition of 'standard form contract' clarified. As explained above, negotiations should have the intent of balancing the needs of both parties. However, where one party is in a much stronger bargaining position than another, any 'negotiation' is likely to be notional only. In reality, the small business that lacks bargaining power cannot and will not risk insisting on the removal of UCTs.

A concern is that a primary contractor/large supplier may allow some clauses to be amended even if these clauses are not considered as UCTs, simply to support an argument that the contract is not 'standard form'. This may negate the small business' ability to challenge any UCTs.

AFRA agrees that it would be very helpful if ACCC issued a regulatory guide for larger and smaller enterprises. This would clarify some current ACCC or court precedents.

Flexible remedies

Whilst this is a difficult matter to address, the underlying challenge is that an UCT determination only applies to that specific contract and it may not be the term that is unfair but its application in particular circumstances.

Both points may be overcome under Option 5.6: Similar wording and application of an UCT that has already been through the court process would create a legal precedent. The process of considering a UCT or the scope of what may constitute an UCT could be delegated to the regulator as is the case with other legislation.

Closing

The issues of unawareness in small business is more related to an inability to navigate the multitude of legislation and to operate the business itself. Coupled with the negotiating power difference between the parties, it will be difficult to make small businesses aware of the inherent risks in the wording of any contracts. Contracts are usually viewed with an operational mind set rather than risk mind set. Often contracts produced by large businesses run to 50 plus pages and are not able to be easily understood by small businesses.

Education monies may be best spent creating industry contract UCT guides not dissimilar to the Financial Services Regulatory Guides and industry codes of practice. This may help bring awareness of the risks associated with some types of clauses.

In AFRA's view, it would be helpful if primary contractors/large suppliers were required to provide a simply worded guide on the terms of any standard form contracts (similar to a PDS or FSG).

Small business should:

- have the opportunity to be sustainable;
- be given an appropriate, mutually acceptable, risk-based contract to provide goods or services;
- have sufficient information to understand the issues associated with certain clauses (such as indemnity clauses); and
- have an escalation/mediation options to enforce those principles that do not involve substantial cost, time or risk to the business.

UCT legislation will never achieve its objective of protecting small business unless a small business is able to achieve the removal of any UCTs without risking the loss of the work it needs in order to stay in business.

Joe Lopino

Executive Director