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Dear Mr Robinson

Enhancements to Unfair Contract Term Protections

Thank you for the opportunity to provide a submission to the *Enhancements to Unfair Contract Term Protections* Consultation Regulation Impact Statement (RIS) dated December 2019.

Background

The Office of the Small Business Commissioner (OSBC) is an independent statutory office established under the *Small Business Commissioner Act 2011* (SA). The OSBC receives and investigates complaints made by South Australian small businesses arising from their commercial dealings with other businesses or State or Local Government. The OSBC aims to resolve these disputes in a timely manner through the use of alternative dispute resolution processes such as mediation.

Experience of the OSBC

My office deals with small businesses experiencing issues relating to unfair contract terms on a regular basis. These small business owners do not have the time or the resources to go through the court process, and are worried about damaging their relationship with the contract-issuing party, which they fear will lead to a loss of business.

Legality and penalties

I agree that there is a lack of deterrence under the current framework. In my opinion unfair contract terms should be illegal and should attract appropriate penalties (option 3 at paragraph 4.5 of the RIS).

I also agree that regulators should have strengthened powers to issue infringement notices (option 4a at paragraph 4.6 of the RIS) and to make determinations as to whether a contractual term is unfair (option 4b at paragraph 4.6 of the RIS).



Under the present construct of unfair contract terms legislation, it is nigh on impossible in terms of time and cost for a small business to seek to have an unfair contract term struck out by a court.

There appears to have been an assumption (incorrectly) that small businesses can easily agitate matters through the courts. My experience is that this not so, and as a result, the existing legislation has been less than effective in my view.

In order to expedite the decision making process, it would be appropriate to transfer the decision making powers from the courts to the appropriate regulator, including the powers to strike out unfair contract clauses and impose penalties, with the option of referring the most egregious cases to courts where a higher penalty level should apply.

The regulator should have the power to void the contract if the unfair contract term is of such significance that it makes the continued operation of the contract unworkable and that this is endorsed by the complainant.

There should also be consideration of where such a finding that a contract is no longer workable as a result of the strike out of a clause/s, then the parties should be required, if requested by the complainant, to negotiate a new contract and report back to the court. This would provide the small business with a safety net and hopefully ensure that a vital contract can continue in a new and fairer form.

The regulator should also have the power to determine if a contract is a "Standard Form Contract".

It is important that the regulator is then appropriately resourced to deal with unfair contract matters expeditiously.

The imposition of significant penalties for those who seek to include unfair contract terms is essential, in my view, to provide a deterrent to behaviour which undermines fairness in business and commerce.

Definition of a small business contract

As noted in the RIS at page 27, the current requirement that at least one party to the contract employs fewer than 20 persons at the time when the contract is entered into means that some businesses are unintentionally excluded from coverage of the protections.

In my view, the most effective and appropriate definition of a small business for the purpose of unfair contract term protections would be a business that employs less than 100 employees or has an annual turnover of less than \$10 million, as contemplated under option 3 at paragraph 6.5 of the RIS.

Value threshold

I am of the firm view that the current value threshold for unfair contract term protections is too low for many industry sectors. Further to this, as noted at page 33 of the RIS, the current value threshold gives large businesses the opportunity to avoid the protections by deliberately increasing the contract value.

In my view the value threshold should be removed altogether, as suggested under option 3 at paragraph 7.5 of the RIS, in order to broaden the coverage of small business contracts.

Clarity on standard form contracts

To further clarify the definition of a standard form contract, I support option 2 at paragraph 8.4 of the RIS to make 'repeat usage' a factor that a court must consider in determining whether a contract is a standard form contract.

I also support option 3 at paragraph 8.5 of the RIS to further clarify the types of actions which do not constitute an 'effective opportunity to negotiate'.

I agree that these two options will assist in reducing potential confusion for contracting parties.

Insurance Sector to be included

The UCT legislation should be expanded to include the insurance sector to provide greater protections for small business to deal with one sided exclusionary clauses for example.

Minimum standards

I am of the view that minimum standards prescribed by state and territory laws should be exempted from the unfair contract term regime in order to remove uncertainty for businesses. In light of this, I support option 2 at paragraph 9.4 of the RIS that minimum standards under state and territory laws would not be able to be declared unfair.

Notwithstanding this, State and Local Governments should set a good example by adhering to the requirements under the unfair contract terms regime with their own contracts.

They should review any precedent contracts used to engage small businesses for the supply of goods and services to identify any potential risk areas, and consider whether certain provisions might be considered unfair under the legislation.

General comments

I am very disappointed in the length of time that the review of unfair contract terms has taken, as both the Government and Opposition committed to strengthen protections for small business prior to the federal election in May 2019.

In relation to the RIS, I would like to highlight the absurdity of suggesting the status quo as the first option for each of the unfair contract term elements discussed within the paper. It is quite clear that the status quo has failed small business and should not be considered as an option.

Finally, I note that consultation sessions were offered in Melbourne, Sydney and Canberra. I take this opportunity to express my disappointment that a consultation session was not offered in Adelaide.

Summary

I fully support the Government's intention to strengthen unfair contract term protections for small businesses.

It is time for significant change to stop large businesses using unfair contract terms to the detriment of small business. In my view this change is required urgently given I deal with matters relating to unfair contract terms on a regular basis, particularly in the building and construction sector.

If you have any queries or wish to discuss to discuss my submission in further detail, please contact me on 08 8303 0927 or john.chapman@sa.gov.au.

Yours sincerely



John Chapman
SMALL BUSINESS COMMISSIONER

17th March 2020