



Council of **Small Business**
of Australia

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Committee Secretary
Senate Standing Committee on Economics
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Dear Senators

Trade Practices Amendment (Australian Consumer Law) Bill 2009

We write in relation to the issue of 'unfair contracts,'(UFC) as per the new national Consumer Law. In particular, our interest is in relation to coverage of business to business (B2B) transactions.

The third exposure draft of the legislation contained provisions that protected small businesses from bearing the brunt of unfair contractual terms that sometimes arise when a small business deals with a large business who is a key customer or supplier. Issues arise when the large business forces 'unfair' terms upon the small business (either through standard-form contracts, or other contracts with excessively onerous clauses).

We were surprised and disappointed when, after extensive consultation on the matter of B2B transactions, and the numerous examples of unfair practice that were exposed, that the coverage against unfair contracts for small businesses was unilaterally removed by the Government at the 11th hour prior to the introduction of the legislation into the Parliament.

Since that time, we have spent time thinking about the most appropriate way forward on this matter in the interests of small businesses. We have had discussions with the relevant Minister, as well as member organisations and other small business-minded groups.

We have concluded that:

- The issue of unfair contracts in B2B transactions remains a 'live' one, small businesses from many different parts of the economy are affected by UFC on a daily basis.
- Small businesses could easily be considered as 'consumers' for the purposes of national Consumer Law, as many UFC affecting small businesses arise when small business is engaged in consumption. Many small businesses, at least one third, are sole traders.

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- The matter of UFC must be treated carefully, so as not to 'drive a knife through the heart' of contract law in Australia.
- The ACCC, and existing TPA provisions (misuse of market power & unconscionable conduct) have failed to protect small businesses from UFC in a broad-reaching or meaningful way.
- It would be insufficient to introduce B2B coverage in relation to UFC and ignore the 'business to government' (B2G) transactions, which can just as adversely impact on small businesses.

In light of our deliberation and the conclusions reached above, we submit to the Senate Inquiry that we can accept the removal of B2B transactions from the national Consumer Law (ie and not lobby for the reintroduction of the clauses through the Senate and its processes), on the basis that:

1. s50 TPA should be amended and extended to include B2G transactions
2. All Government procurement and general contracting should allow their suppliers to negotiate contract terms, without this being viewed as a non-conforming contract and thus creating ineligibility for the Government work.
3. The Government must implement its commitment on "fresh ideas for small businesses on Government procurement" as presented by the Prime Minister at the National Small Business Summit in Sydney (2007). This included a commitment to order an immediate external audit on government procurement processes.
4. Consideration is given to a "Fair Contracts Bill" (or a relevant legislative amendment) to cover the myriad of instances where small business does not have an even hand in its own commercial negotiations.

There is a strong opportunity for the Australian Government to act as a leader on the issue of "fair contracting." This is especially the case, given that the issues of UFC facing small businesses are just as harsh whether the UFC is presented by a more powerful business, or Government.

We appreciate your consideration of these issues, and are prepared to attend a formal hearing of the Committee to elaborate on the matter and provide examples of harsh and unfair treatment for you edification.

Yours sincerely

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