



Council of **Small Business**
of Australia

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Committee Secretary
Senate Standing Committee on Economics
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Dear Senators

Inquiry into the Trade Practices Act (Australian Consumer Law) Amendment Bill (No.2)

The Council of Small Business of Australia expresses its disappointment that an opportunity to thoroughly address the distinction between unconscionable conduct and unfairness pertaining to contract terms was not taken up by the Expert Panel on Unconscionable Conduct and Franchising.

The report of the Senate Economic Legislation Committee on the primary bill noted the Australian Newsagents Federation's acknowledgement that unfair contract terms would form part of the terms of reference of the Expert Panel, but did not explicitly correct that misinterpretation. Instead, the view of the Committee with respect to unfair contract terms in business-to-business contractual arrangements deferred making a decision until after the report of the Expert Panel, and may have reinforced the misapprehension that unfair contract terms would form part of that Panel's deliberations.

This inquiry has indeed gathered considerable evidence supporting the application of unfair contract terms laws to protect small businesses in their dealings with businesses with greater bargaining power and market power. The committee believes it is important that the government responds to these concerns after completing its reviews of this committee's December 2008 inquiry into section 51AC of the Trade Practices Act and the Joint Committee on Corporations and Financial Services' inquiry into the Franchising Code of Conduct.



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However, the issue of unfair contract terms in business-to-business contracts did not specifically form part of the terms of reference for that Expert Panel except in so far as the issue was conflated into the issues of concern to the franchise sector. This has meant that no comprehensive review has taken place into such matters as unfairness of terms in retail tenancy contracts, effectively bypassing a legal provision that is crucial for the wider small business sector.

It seems peculiar that the interests of one particular form of business model, in this case franchising, should prove decisive on an issue that has such wide-ranging potential implications. In particular, COSBOA would suggest that the circumstances that require provision of protection to consumers regarding unfair contract terms as distinct from unconscionable conduct apply in exactly the same way for business consumers, and require that similar protection be extended. The Expert Panel alludes to the basis for the distinction when it says that 'what may be unconscionable in one industry may not be unconscionable in another, depending for example on the expectations of industry participants or the reasonableness of certain business models'. This adverts precisely to the necessity for an additional 'unfairness' provision, not only for consumers but for business consumers as well.

It is not sufficient to retort that the Panel favours an expansive, non-list-based approach to unconscionable conduct that might form an umbrella for many types of unfair contract terms. Were that to be the case it would be an argument for a rejection of an unfairness provision for either business consumers or consumers at large. The fact that the legislation still includes provision for unfair contract term protection for consumers merely serves to highlight the fact that there is a distinction between unconscionable and unfair that requires statutory elucidation.

COSBOA notes with some concern the views of some contributors to the consultative process for the primary Bill which appear to suggest that businesses may seek to cast contract terms as unfair merely to avoid being bound by terms that they no longer wish to accept. There appears to be some concern that to include unfair contract term protection for business-to-business arrangements will lead to what could quite rightly be characterized as vexatious claims. Quite apart from the vast disparity in scale of capacity to conduct legal proceedings between corporations and small businesses which would preclude much of this type of claim, to deny small business consumers the full gamut of legislative protections on the basis of indeterminate future litigation would appear to be an example of the worst cases of jumping at shadows.



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COSBOA strongly entreats the Committee to recommend the insertion of clauses into the Bill which replicate the provisions of the unfair contract terms protections for consumers in terms appropriate for business consumers, prospectively with provision for exceptions for specific industry sectors. While this may be somewhat more untidy than the current all-or-nothing approach favoured by the Government, it would at least have the benefit of not depriving a large number of small businesses of an appropriate and necessary protection on the basis of select and unrepresentative interests.

Thank you for your consideration of these matters.

Yours sincerely

(...)

Jaye Radisich
CEO