Business Council of Australia

Submission to the Inquiry into the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

The Business Council welcomes the opportunity to provide a submission to the Senate Economics References Committee's Inquiry into the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015*.

Introduction

The Bill extends the existing consumer protections for unfair contract terms in standard contracts to small businesses.

As outlined in our previous submissions, the Business Council's view is that the Bill is not the preferred way to meet the stated policy objective of giving small businesses confidence that standard contracts they enter into are fair and reasonable, and risks are allocated efficiently.[1]

The Business Council would prefer that the government pursue light touch or non-regulatory options that are more efficient and consistent with the government's deregulation agenda.

This costly new legislation comes at a time when businesses are facing a number of proposals or new pieces of legislation that could adversely impact on productivity and competitiveness. These include possible changes to misuse of market power provisions supported by the Minister for Small Business and proposed or implemented sectoral regulation affecting foreign investment, food labelling, telecommunications and financial sectors.

At a time when businesses are dealing with challenging global economic conditions, the cumulative burden of ill-conceived regulations works against business investment and innovation that is critical for lifting growth and job creation.

The Business Council's previous submissions on unfair contract terms raised a number of costs and risks associated with the legislation that we consider were not fully explored in the Regulation Impact Statement (RIS) for the Bill. These include:

- a significant increase in the regulatory burden on businesses that enter into contracts with small businesses
- regulatory uncertainty through the interaction of the Bill with existing initiatives, like industry codes
- the risk that small businesses will undertake less due diligence before signing contracts
- disincentives to use standard form contracts.

[1] Business Council of Australia (BCA), *Submission to the Department of the Treasury on the Exposure Draft Legislation for Extending Unfair Contract Term Protections to Small Businesses*, BCA, Melbourne, May 2015; BCA, *Submission to the Department of the Treasury Consultation Paper on Extending Unfair Contract Terms to Small Businesses*, BCA, Melbourne, August 2014.

In our view, the RIS did not make a compelling case that the benefits of legislating for the extension of unfair contract terms outweighed the costs. Furthermore, the approach taken in the RIS to share the estimated $50 million in additional compliance costs across all Commonwealth, state and territory jurisdictions means that there will not be a full deregulatory offset from the Commonwealth.

Notwithstanding our preference for an alternative policy approach, there is room to improve the certainty and clarity of the current Bill, and address the regulatory overreach in the current Bill, which goes beyond the government's pre-election commitment on unfair contract terms.[2]

This submission restates the Business Council's recommendations for clarifying provisions of the Bill, and bringing it into better alignment with the government's pre-election commitment.

Key recommendations

The Business Council recommends the following amendments to the Bill:

1. In line with the government's pre-election commitment, the Bill should be limited to extending unfair contract term protections to contracts for goods and services where small businesses are *purchasers*, not where they are *suppliers.*

2. To avoid regulatory duplication or confusion, the Bill should state that the minister can exempt businesses or sectors from the legislation where they operate under existing legislation or self-regulatory and co-regulatory schemes that already include protections for small businesses (currently limited to legislation that is 'equivalent').

3. The definition of the contract threshold (currently an upfront price payable of up to $100,000 or $250,000 for contracts of more than 12 months' duration) should be amended to include payments based on the number and type of services used during the contract period, to ensure the genuine value of the contract is considered. The monetary thresholds should not be increased.

4. The definition of a small business should be limited to small businesses that are vulnerable or in a comparable position to consumers. There should be a specific exclusion from the unfair contract term protections for public companies or special purpose vehicles.

5. A post-implementation review should be conducted within three years, rather than the currently recommended five years.

[2] Liberal Party of Australia; The Nationals, *The Coalition's Policy for Small Business*, Liberal Party of Australia, Canberra, August 2013.

Key issues

Protections should not extend to instances when small businesses are suppliers

The Bill goes beyond the government's pre-election commitment to extend unfair contract term protections, not only to instances where a small business is *purchasing* a good or service, but also where they are *supplying* a good or service.

The policy case for the Bill, as outlined in the Explanatory Memorandum, is based on the view that there is a potential imbalance in resources, understanding or bargaining power when a small business is presented with a standard form contract by another party.

The Explanatory Memorandum aims to support this view by citing survey results that say small businesses are less likely to have legal expertise, generally have less understanding of common contract terms and conditions, and are more likely to feel that they do not have the resources to negotiate a better deal.[3]

Even if this view is taken to be the case for contracts where a small business *purchases* a good or service, the arguments are unlikely to apply when a small business is a *supplier*.

There has been no evidence presented during the development of this Bill to suggest that contracts involving supply from small businesses entail any imbalance of resources, understanding or bargaining power that would leave small businesses vulnerable.

Extending the provision, however, is not harmless. It could lead to a reduced use of standard form contracts and higher transaction costs for both parties.

This increase in cost could perversely harm small businesses by encouraging businesses to seek suppliers who are not subject to unfair contract term provisions, to eliminate the complexities of dealing with small suppliers.

Limiting the protections to instances where small businesses are purchasers would be interdependent with our recommendation to exclude public companies and special purpose vehicles (discussed further in this submission). Adoption of this recommendation alone could cause regulatory confusion and complication, particularly for special purpose vehicles that may be a supplier and purchaser of goods or services in the same contract.

Possible exemptions should be expanded

The Bill allows the minister to exempt businesses or sectors from compliance with unfair contract term protections, where they are subject to 'equivalent' Commonwealth, state or territory legislation.

The exemption power sensibly seeks to reduce duplication and regulatory confusion for businesses that could be covered by two regimes.

The current drafting of the provision, however, should be expanded to:

[3] Parliament of the Commonwealth of Australia, *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 Explanatory Memorandum*, Commonwealth of Australia, Canberra, June 2015.

- exempt businesses where they are subject to any Commonwealth, state or territory legislation that provides protections for small businesses, as 'equivalence' may be overly narrow and subjective

- include enforceable self- and co-regulatory schemes.

Under the current drafting, the assessment of whether legislative protections are 'equivalent' may be unduly narrow and overly dependent on a subjective view of whether state or territory protections are sufficient (for example, in relation to retail leases).

It is not appropriate for the Commonwealth to make a subjective assessment of whether state and territory unfair contract term protections for small business are sufficient, and aim to supersede them if jurisdictional regimes are deemed to fall short. This would result in businesses operating under two different regulatory regimes, undermining the original policy intention of allowing exemptions.

We suggest removing the reference to 'equivalence'. A suggested alternative wording for subsection 129G(2)(2A)(a) that would set a more achievable standard for determining whether existing legislation should result in exemptions could be:

> "The Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses."

As outlined in the Business Council's previous submission, the Bill should also allow exemptions for businesses subject to enforceable self- or co-regulatory schemes, to avoid duplication.

The Explanatory Memorandum argues that exemptions should not be given for businesses subject to self- or co-regulatory schemes because these schemes are not deemed to be enforceable.[4]

On the contrary, many self- or co-regulatory schemes are enforceable, particularly where regulatory certification is required. For example:

- the Australian Competition and Consumer Commission (ACCC) regulates five mandatory industry codes – the Franchising Code, Horticulture Code, Oil Code, Wheat Port Code and Unit Pricing Code – and a range of voluntary industry codes, including the Casual Mall Licensing Code of Practice, and the Food and Grocery Code of Conduct. The ACCC has a host of enforcement powers available in relation to industry codes, including issuance of penalties.[5]

- the Telecommunications Consumer Protection Code, which is registered with the Australian Communications and Media Authority (ACMA). The ACMA has a range of enforcement powers legislated for registered codes, including civil penalties.[6]

[4] Paragraphs 1.29 and 3.139.

[5] The ACCC's powers in relation to codes are conferred by Part IVB of the *Competition and Consumer Act 2010*.

[6] The ACMA's powers in relation to codes are conferred by sections 117 to 122 (Division 4) of the *Telecommunications Act 1997*.

Self- or co-regulatory schemes that are enforceable operate in much the same way as legislation. They should be subject to exemptions just like legislation, to avoid duplication and regulatory confusion.

The 'upfront price' should include contingent payments to avoid capturing high-value contracts

The Business Council supports the Bill's provision to limit unfair contract term protections to low-value contracts, on the basis that there are sufficiently strong incentives for all parties to carefully consider or seek legal advice on high-value contracts.

The current design of the contract threshold definition could inadvertently capture high-value contracts.

The Bill uses the upfront price payable as the method of determining the contract value ($100,000 or less for contracts of 12 months or under; $250,000 or less for contracts of more than 12 months).

Many high-value contracts will include fees and commissions paid contingent upon certain events occurring (for example, mortgage brokerage arrangements) or regular payments based on the number and type of services used within the contract period (for example, telecommunications services).

In these instances, the contract could involve an upfront price payable that would result in the contract being captured under this legislation, but an overall cost sufficiently high to warrant careful consideration or additional legal advice.

The contract threshold definition should be amended to avoid capturing high-value contracts of this nature.

Some stakeholders have also claimed that the monetary component of the contract threshold definition should be increased beyond $100,000 or $250,000.[7]

There is no strong policy case for increasing the threshold: any transactions over these amounts are sufficiently high to warrant seeking additional legal or financial advice by small businesses. Increasing the threshold further would also add to the regulatory costs associated with the Bill.

The small business definition should be limited to genuinely vulnerable businesses

The policy case on which the Bill is based, as outlined in the Explanatory Memorandum and the government's pre-election commitment, suggests the Bill is necessary because some small businesses are vulnerable to unfair contract terms, and are in a comparable position to consumers (for whom unfair contract term protections already exist).

A small business is defined in the Bill as a business that employs fewer than 20 persons. Not all businesses under 20 persons, however, should be considered 'vulnerable'. A small

[7] See, for example, the Council of Small Business Australia (COSBOA), *Submission – Extending Unfair Contract Terms to Small Businesses*, COSBOA, Crows Nest, 3 May 2015.

business with an office manager, or a number of lawyers or accountants, for example, is arguably not in a 'vulnerable' position when presented with a standard form contract.

Similarly, although public companies or special purpose vehicles may fall under the definition of a small business, they should not be considered 'vulnerable' and requiring protection from unfair contract terms.

The small business definition should be limited to businesses that are vulnerable or in a comparable position to consumers. Public companies and special purpose vehicles should be explicitly excluded from the definition.

A post-implementation review should be done within three years

The Explanatory Memorandum recommends a review be undertaken within five years of the legislation coming into force.[8]

This is not consistent with other time frames for post-implementation reviews. Where the Office of Best Practice Regulation (OBPR) requires a post-implementation review, it is mandatory to undertake a review within two years.[9]

For this reason, we recommend conducting a full analysis of any unintended costs of the change within three years of the legislation coming into force.

Comments on the Regulatory Impact Statement process

The Business Council considers that the regulatory impact statement (RIS) associated with the extension of the unfair contract term protections did not provide a compelling case for extending unfair contract terms legislation and the regulatory burden on business and the economy.

The OBPR has assessed the RIS as compliant. However, the approach taken in the RIS raises a number of concerns:

- The RIS has not quantified the net benefits of the proposed legislation. Rather, the RIS makes a judgement that the benefits from the preferred option will outweigh identified costs.
- Costs are only estimated for the preferred option, so the RIS cannot consider whether alternatives would incur lower costs.
- The cost estimation only includes one-off transition costs and has excluded:
  - additional ongoing compliance costs to businesses, which would be required to continually assess whether future contract terms could be considered unfair
  - ongoing costs to businesses from the greater risk of commercial disputes and litigation

[8] Paragraph 3.211.

[9] Australian Government Office of Best Practice Regulation, *Post-Implementation Reviews Guidance Note*, Department of the Prime Minister and Cabinet, Canberra, July 2014.

  - potential for reduced use of standard form contracts when dealing with small businesses.

- The Commonwealth has allocated the $50 million of one-off transition costs to business from this new legislation:

  - across a ten-year period – thus allocating the costs to future governments and deferring the obligation to match the costs with offsets

  - across all Australian jurisdictions – thus dramatically reducing the Australian Government's share of the costs for the purpose of requiring offsets under the red tape reduction program and making it highly unlikely that business will see a commensurate regulatory offset from the federation. This approach is taken despite the policy being a federal government election commitment.

Considering the deficiencies in the RIS process for this legislative amendment, at the very least, the Senate should limit the impact of the legislation and better align it with the government's pre-election commitment, by making the Business Council's recommended legislative amendments.

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