SHOPPING CENTRE COUNCIL OF AUSTRALIA

Submission to the Senate Economics Legislation Committee

TREASURY LEGISLATION AMENDMENT (SMALL BUSINESS AND UNFAIR CONTRACT TERMS) BILL 2015

28 August 2015

1 EXECUTIVE SUMMARY

The Shopping Centre Council of Australia (SCCA) does not oppose the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* ("the Bill"). Our primary objective is to ensure, once the Bill becomes law, that parties have a reasonable opportunity to convince the relevant Minister that existing laws already provide fair and adequate protections for small businesses and should therefore be exempted from the application of the new law under (the proposed) sections 28(4) and 139G(2A) of the *Competition and Consumer Act.* As the Bill stands, our legal advice states that few, if any, existing laws can be exempted. We do not believe this is the intention of the Government.

The SCCA has previously opposed the extension of unfair contract term (UCT) protections to small business contracts. We have always believed it is vital for the efficient operation of a market economy that business relationships are able to be formed and operate within a legal framework that provides certainty and instils business confidence. It is also vital that bargains that are struck will endure and be enforceable and are not lightly put aside by courts or tribunals.

The relationship between business and consumer (for which the UCT protections were conceived) is quite different to that between business and business. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. The business-to-business contract, unlike the business-to-consumer contract, is commercial in nature and is one on which small businesses could be expected to obtain legal advice. Even if legal advice is not obtained, businesses (including small businesses) have greater knowledge of contractual terms and have greater resources to enforce other legal and contractual remedies. In a competitive market, businesses (again including small businesses) also have greater opportunity to negotiate terms than do ordinary consumers.

We are also concerned that the extension of the UCT protections to business contracts will put the focus on the individual terms of a contract and will not take into account the complexities and subtleties of commercial negotiations. There are many circumstances where businesses compromise and consciously accept less favourable contractual terms in one area in exchange for more favourable terms in another area. Examination of a contractual term by a court will fail to appreciate the overall commercial context and the nuances of commercial negotiations. Courts typically are not commercially experienced and judges generally do not have commercial training or commercial expertise.

Nevertheless the SCCA accepts the Federal Government has a mandate to introduce this legislation. We also note the Federal Government has received support for the proposed new law from a meeting of Australian State and Territory Ministers for Consumer Affairs, although we query whether this was an appropriate and relevant government forum given that Consumer Affairs agencies and Fair Trading agencies have little expertise or experience in business-to-business affairs. We therefore do not oppose the Bill. Our concern is to ensure that the proposed new law does not impose unnecessary and costly duplicate regulation of business transactions. This would inevitably raise the cost of doing business in Australia for all parties, including the party ostensibly being protected. This is consistent with the Federal Government's pledge, on many occasions, to remove unnecessary business red tape.

Consistent with this common objective we have previously sought an exclusion from the UCT provisions in the Bill for retail leases (i.e. contracts) to small businesses. These contracts are already regulated by all state and territory governments with the objective of ensuring that lease terms are fair to retail tenants. We outlined our arguments for the exclusion of retail leases in our submission on the Federal Government's Consultation Paper *Extending Unfair Contract Protections To Small Business.* A retail lease, unlike most other business contracts, is not a one-off transaction but a contract that is actively on foot seven days a week, 365 days a year, usually for a minimum of five years. We are disappointed that our arguments were not accepted by the Government, particularly the desultory consideration given to those arguments – only three paragraphs in a document of 82 substantive pages - in the Decision Regulation Impact Statement.

We are encouraged, however, that the amendments proposed by the Bill will result in two possible exclusion mechanisms. The first exemption process (to be introduced by the Bill) will become section 28(4) of Schedule 2 of the *Competition and Consumer Act* and will permit contract terms that are covered by a Commonwealth, State or Territory law to be exempted by regulation. A new subsection (s.139G (2A)(a)) requires, before the Minister exempts such a law, he "*must be satisfied that the law provides enforceable protections for [small businesses] that are equivalent to [the unfair contract term protections and enforcement provisions].*" The second exemption process (which already exists in the *Competition and Consumer Act*) is section 26(1)(c) of Schedule 2: the UCT law does not apply to a contract term to the extent (and only to the extent) that the term "*is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory*".

We have sought legal advice on both of these exemptions. In the opinion of our legal advisers, Speed and Stracey Lawyers, the proposed new section 28(4) of the Act cannot be utilised by the Minister to exempt, from the operation of the new law, terms in retail leases which comply with the current State and Territory retail lease legislation. We note that another legal firm, Baker and McKenzie, has independently come to a similar conclusion. Speed and Stracey have also advised, in their opinion, section 26(1) of the Act does not satisfactorily exempt retail lease terms which comply with State and Territory retail tenancy legislation.

We discuss this further, and make recommendations for amendments to the Bill, in section 3 of this submission.

We accept that many thousands of other small business contracts involved in the operation and development of shopping centres (such as for cleaning, security, marketing, waste removal, construction sub-contracting etc.) will be covered by the new law. We have never sought an 'exemption for shopping centres'. Our concern is only to ensure that there is no 'double regulation' of retail leases and therefore to ensure, once the Bill becomes law, that we, on behalf of our members, have a realistic chance of fairly being able to make a case to the Minister for the exemption of those retail lease terms which comply with State and Territory retail tenancy legislation. We simply seek a level playing field.

We have also made several other recommendations which we believe will improve the operation of the Bill. These are outlined in sections 4 to 6. In particular we draw attention to the need for a 'safe harbour' arrangement in the Bill allowing businesses to rely on what they are told by the other business about the number of persons that business employs.

In our submission of the Exposure Draft Bill we drew attention to the problematic nature of the concept of 'upfront price' in a business contract, particularly a retail lease. We appreciate that the final Explanatory Memorandum now gives greater clarity around the term 'consideration'. However in recent discussions with the Australian Competition and Consumer Commission (which has the task of explaining the UCT provisions once they become law), it is obvious that this remains an area of uncertainty for businesses. We believe further clarity should be provided before the Bill is passed.

In this submission we have directed our comments to the relevant provisions of the *Competition and Consumer Act 2010*, as proposed to be amended by the Bill, although many of our comments are equally relevant to equivalent provisions of the *Australian Securities and Investment Commission Act 2001*, as amended by the Bill. References in this submission to "the Act" are references to the *Competition and Consumer Act 2010*.

2 SUMMARY OF RECOMMENDATIONS

2.1 **The proposed section 139G(2A)(a) of the Act be amended to require that "The Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses." This should be reinforced by adding a new paragraph (iv) to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses." (see Recommendation 3.1, p.7)**

2.2 **Section 26(1)(c) of Schedule 2 of the Act be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory." (see Recommendation 3.2, p.7)**

2.3 **If these recommendations are not adopted by the Senate Committee we recommend that the Senate Committee recommends to the Federal Government that an explicit statement be made during the parliamentary debate on the Bill, or by way of an amendment to the Explanatory Memorandum, that section 139G(2A)(a) of the Act does not prohibit a Minister exempting the terms of a retail lease if that term is regulated by State or Territory retail tenancy legislation. (see Recommendation 3.3, p.7)**

2.4 **Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, toge3ther with any related body corporate, employs fewer than 20 persons." (see Recommendation 4.1, p.9)**

2.5 **A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs. (see Recommendation 4.2, p.9)**

2.6 **Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the threshold. (see Recommendation 4.3, p.9)**

2.7 **Restore the usual onus of proof in section 27(1) of Schedule 2 of the Act for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract. (see Recommendation 5.1, p.11)**

2.8 **Section 24(4) of Schedule 2 of the Act be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b). (see Recommendation 5.2, p.11)**

2.9 **A new section ((5)) should be added to section 28: "This part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2 of the Act." (see Recommendation 6.1, p.12)**

3 MAKE THE EXEMPTIONS FROM THE PROPOSED NEW LAW WORK

The Bill introduces a new process for seeking exemption from the new law. According to the Minister's second reading speech: "*This mechanism recognises the importance of avoiding regulatory duplication and unnecessary compliance costs in sectors where there are equivalent and enforceable protections against unfair contract terms*." According to our legal advice, however, the objectives of avoiding regulatory duplication and unnecessary compliance costs will not be achieved as the Bill now stands.

If the Bill becomes law, there will be two avenues for exemptions from the proposed new law. The **first avenue** is introduced by the Bill and will become section 28(4) of Schedule 2 of the Act. This will read: *"This Part does not apply to a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies*". A new subsection (s.139G(2A)(a)), to be introduced into the Act, also specifies the steps that must be taken by the "Commonwealth Minister" before a regulation is made prescribing such a law. The Minister "*must be satisfied that the law provides enforceable protections for [small businesses] that are equivalent to [the unfair contract term and associated enforcement provisions.]* In addition, in s.139G(2A)(b), the Minister must take into consideration: (i) any detriment to small businesses resulting from prescribing the law; and (ii) the impact on business generally resulting from the prescribing the law; and (iii) the public interest.

We sought legal advice on these provisions from Speed and Stracey Lawyers, who advise the SCCA on competition law issues. Speed and Stracey have advised that "*section 28(4) cannot be utilised by the Minister to exempt . . . from the operation of the proposed unfair contract amendments, terms contained in retail leases which comply with State and Territory retail lease legislation."* Speed and Stracey examined relevant terms of the NSW *Retail Leases Act* to see whether they came within the scope of the exemption. They concluded: *"In our opinion, therefore, the terms of existing State and Territory retail tenancy legislation could not be deemed equivalent to Part 2-3 and hence not susceptible to being exempted by the proposed section 28(4) of the [Australian Consumer Law]".* We have separately provided a copy of this legal advice to the Committee.

We note that another legal firm, Baker and McKenzie, has independently come to a similar conclusion. In its submission to Federal Treasury on the Exposure Draft Bill, Baker and McKenzie described this exemption process as "too narrow" and recommended a "broader test would be more appropriate". The firm states: *"The proposed test would prevent the Minister from applying an exemption to small business contracts covered by existing industry-specific legislation designed to meet similar objectives, and having similar (but not necessarily equivalent) protections."* Baker and McKenzie state that the use of the word "equivalent" sets a very high standard. "*This, together with the fact that it refers to enforcement and remedies* ***as well as*** *to contractual terms, will make it extremely unlikely that the Minister will be in a position to allow any such exemption."* (Emphasis added by Baker and McKenzie). We note the SCCA is not a client of Baker and McKenzie.

We recommended in our submission on the Exposure Draft Bill an alternative formulation for section 28(4) and this is repeated below.

The **second avenue** is the exemption for certain terms in consumer contracts which is already included in section 26(1)(c) of Schedule 2 of the Act. This will now be extended to include small business contracts. Section 26(1)(c) provides that the unfair contract terms law does not apply to a contractual term to the extent (and only to the extent) that the term, *"is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory."*

Speed and Stracey also examined the scope of this exemption in the context of various provisions of the NSW *Retail Leases Act*. They did this because any analysis to determine whether a term of a retail lease is exempt under section 26(1)(c) can only be undertaken on a term by term basis under the contract, and on a provision by provision basis under the relevant legislation. This of itself highlights a generic problem with the proposed exemption in the Bill.

Having regard to the sample of lease clauses and retail lease provisions reviewed Speed and Stracey concluded that the wording of the proposed exemption does not satisfactorily exempt all terms of a retail lease (that otherwise comply with State and Territory retail lease legislation) from the operation of the UCT provisions. This raises the possibility that a term in a retail lease which has been contemplated by, say, the Parliament of NSW, and is considered satisfactory by that Parliament, could subsequently be declared void by a Federal Court judge. This is an outcome which must be avoided.

We also made a recommendation about alternative drafting of section 26(1)(c) of Schedule 2 of the Act in our submission on the Exposure Draft Bill and this is repeated below.

If our arguments in this section in relation to the exemption process in the proposed section 139G(2A) of the Act are not accepted by the Senate Committee, we would urge that the Government explicitly states, either during remaining parliamentary debate on the Bill or by an amended Explanatory Memorandum, that this section does not preclude a Minister exempting the terms of a retail lease if that term is regulated by State or Territory retail tenancy legislation.

Recommendations

3.1 The proposed section 139G(2A)(a) of the Act be amended to require that "The Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses." This should be reinforced by adding a new paragraph (iv) to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses."

3.2 Section 26(1)(c) of Schedule 2 of the Act be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory."

3.3 If these recommendations are not adopted by the Senate Committee we request that the Senate Committee recommends to the Federal Government that an explicit statement be made during the parliamentary debate on the Bill, or by way of an amendment to the Explanatory Memorandum, that section 139G(2A)(a) of the Act does not prohibit a Minister exempting the terms of a retail lease if that term is regulated by State or Territory retail tenancy legislation.

4 DEFINITION OF SMALL BUSINESS

We support the transaction thresholds contained in the Bill. We have noted that there were arguments in some of the submissions on the Exposure Draft Bill to increase the level of the thresholds. We strongly oppose this. According to the Minister's Second Reading speech, "around four in five" small business standard form contracts will be covered by these thresholds. The Minister also made the point that, as businesses review their standard form contracts to ensure they are compliant with the new law, these changes will also flow through to businesses and transactions that are above the thresholds.

The Regulation Impact Statement also found that "most" small business transactions would be covered by the thresholds currently proposed in the Bill (p.57)

The Minister, in introducing the Bill, made the point: "*The selected transaction value thresholds ensure the protections apply when small businesses engage in day-to-day transactions, whilst encouraging small businesses to conduct due diligence on large contracts fundamental to the success of their business."* This is another way of saying that the higher the thresholds the greater the risk of 'moral hazard', which will be to the detriment of Australian businesses generally.

There is, however, a need for clarification around the definition of small business. First, when calculating the number of employees of a business to determine if it is a small business, there is a need to add in related corporate entities. Often the subdiary of a large company, or even a large company which operates businesses through a related service entity, may employ no employees or very few employees. Some large retailers, for example, undertake their leasing through a separate service company which often employs fewer than 20 persons. This can also be true of major shopping centre landlords. For example, the responsible entity (lessor) of many institutionally owned shopping centres in Austraia does not have any employees. Similarly, incorporated joint ventures often do not employ any employees. It would obviously be nonsensical if such entities were able to seek relief under the new law. The new section 3A of Schedule 2 needs to be amended to include any related body corporate. The Act already contains (in section 4A) an explanation of a related body corporate and this is already used in sections of the Act (see section 45(8) and section 6 of Schedule 2).

Second, considerable time and expense will be involved for large businesses (and also small businesses unless Recommendation 6.1 of this submission is adopted) in determining the number of employees of a party with which they are contracting. This is in addition to the other costs imposed by the new law. Businesses could be placed in a position where a counter party seeks relief under the unfair contracts terms provision even though the contractor had been told the counter party had more than 20 employees. A safe harbour arrangement needs to be included in the legislation to allow businesses to rely on what they are told by the other business about the number of people they employ.

Third, we note, that it would also be possible for a small business to have multiple contracts with one business, each of which is below the transaction thresholds, and still receive the benefit of the new law for each contract. This is obviously not the intention of the Government and we suggest there should be an aggregation provision included in the proposed new section 23(4) of Schedule 2 of the Act.

Recommendations

4.1 Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, together with any related body corporate, employs fewer than 20 persons."

4.2 A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs.

4.3 Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the threshold.

5 RESTORE USUAL ONUS OF PROOF

The proposed new law will contain two significant 'rebuttable presumptions' which, while justified in the context of a 'consumer contract', cannot be justified for a 'small business contract'. We have recommended that the usual onus of proof should apply in both cases. This would mean that the party challenging the contract term is required to prove that a contract is a 'standard form contract' and is also required to prove that a term is not reasonably necessary to protect the interests of the party advantaged by the term.

The **first rebuttable presumption** is contained in section 27(1) of Schedule 2 of the Act which provides: "*If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise*". This section is not amended by the Bill so this rebuttable presumption will be retained in the new law. This reversal of the usual onus of proof may be justified in a business-to-consumer contract, where a reasonable assumption can be made that a business would have greater resources than an ordinary consumer to prove a contract was not a standard form contract. Given the large volume of standard form contracts that exist in business-to-consumer relationships (such as mobile phone contracts) this rebuttable presumption is unlikely to be an onerous provision for such businesses since there is little doubt such contracts are standard form.

The business-to-business contract, unlike the business-to-consumer contract, is obviously commercial in nature and one on which both parties should be expected and encouraged to seek legal and other advice before concluding. Small businesses, unlike consumers, already have sufficient knowledge of the subject matter in respect of which they are contracting. They have ready access to legal and other specialist advice. Even if legal advice is not obtained, small businesses have greater knowledge of the impact and effect of contractual terms than ordinary consumers and have greater resources to enforce legal and contractual remedies than ordinary consumers. We are also concerned that the new law, if this rebuttable presumption is retained, may introduce greater 'moral hazard' in small business decision-making by discouraging small businesses from seeking specialist advice.

Determination of whether or not a contact is a standard form contract is unlikely to be as straightforward in a business-to-business context. As well as leaving some businesses vulnerable to vexatious or whimsical litigation, fairness requires that the onus should be on the party challenging the term to prove that a contract is a standard form contract. If not, businesses will undoubtedly be involved in unnecessary litigation which will result in significant costs being incurred. These costs will inevitably have to be recovered from customers, thereby leading to higher prices for goods and services. It is also possible that some small businesses will 'game' the new law by not negotiating any of the terms of a contract (other than the upfront price). There is no justification therefore for retaining this rebuttable presumption when both parties to the contract are businesses.

The **second rebuttable presumption** is contained in section 24(4) of Schedule 2 of the Act states: "*For the purposes of subsection 1(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless the party proves otherwise."* This will also not be amended by the Bill.

In a business-to-business relationship it makes no sense for the party under challenge to have to prove that the term of a contract is necessary to protect its legitimate interests. This might be justified in a consumer contract but places an onerous burden on the supplier in a small business contract that cannot be justified.

In the case of retail leases particular terms are included in a lease because years of operational and legal experience have found them necessary to protect the lessor's legitimate interests. They are not included simply to make the lease document as thick as possible. If it is to be left to the discretion of judges (most of whom lack commercial experience or expertise) to decide what is in the best interests of the owners or investors in a shopping centre (or any other large complex business), then the usual onus of proof should apply. It should be up to the party challenging the contract term to prove that the term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term. Section 24(4) of Schedule 2 of the Act should therefore be deleted.

Recommendations

5.1 Restore the usual onus of proof in section 27(1) of Schedule 2 of the Act for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract.

5.2 Section 24(4) of Schedule 2 of the Act be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b).

6 EXCLUSION OF SMALL BUSINESS TO SMALL BUSINESS CONTRACTS

There is no justification for the new law to apply when both parties to a contract are small businesses.

The justification given by the Government for the introduction of the new law is that there may be market failures, as a result of an imbalance in bargaining power, which need to be corrected by regulation. The Explanatory Memorandum makes clear that the new UCT law is supposedly to protect small businesses from large businesses, which have much greater bargaining power, and which can exercise that power in an unfair manner.

Inclusion of small business-to-small business contracts will increase costs for every small business in Australia since they will all be required to undertake the costly legal examination and review of their standard form contracts. This was not a matter which was assessed in the Regulatory Impact Statement. This also has the potential to introduce 'moral hazard' on a widespread scale among Australia's small businesses. It also opens the possibility that some small businesses will 'game' the new law by deliberately challenging contractual terms in the knowledge that their supplier, another small business, will have to go to the time and expense of proving that the contract is not a standard form contract.

Recommendation

6.1 A new section ((5)) should be added to section 28: "This part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2 of the Act."

7 SHOPPING CENTRE COUNCIL OF AUSTRALIA

The Shopping Centre Council of Australia (SCCA) represents Australia's major shopping centre owners, managers and developers. Our members own and manage shopping centres from the very largest ('super-regional') centres to the smallest ('neighbourhood') centres in cities and towns in every state and territory.

Our members are AMP Capital Investors, Blackstone Group, Brookfield, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lancini Group, Lendlease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group (owner and operator of Westfield shopping centres in Australia and New Zealand) and Stockland.

The SCCA would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

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