COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

# SENATE

## ECONOMICS LEGISLATION COMMITTEE

**Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015**

(Public)

THURSDAY, 3 SEPTEMBER 2015

MELBOURNE



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**SENATE**

**ECONOMICS LEGISLATION COMMITTEE**

**Thursday, 3 September 2015**

**Members in attendance:** Senators Dastyari, Edwards.

**Terms of Reference for the Inquiry:**

To inquire into and report on:

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015.

## WITNESSES

**LACY, Mr Norman, Chair, Independent Contractors Australia**

**PHILLIPS, Mr Ken, Executive Director, Independent Contractors Australia**

**Committee met at 13:59**

**CHAIR (Senator Edwards):** I declare open this public hearing of the Senate Economics Legislation Committee. The committee is hearing evidence on the committee's inquiry into the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill of 2015. The Senate referred this inquiry to the committee on 13 August 2015 for report by 14 September 2015. I welcome you all here today.

The committee has received 25 submissions so far, which are available on the committee's website. There is a public hearing and a transcript of the proceedings is being made.

Before the committee starts taking evidence, I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground on which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

On behalf of the committee, I would like to thank all of those who have made submissions and sent representatives here today for their cooperation in this inquiry. Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and the committee will then take some counsel from you.

**Mr Lacy:** Thank you, Mr Chairman and thank you very much for the opportunity to appear at this important committee. We regard this as one of the most important issues before the parliament and therefore we are very happy to try to assist the committee in any way we can.

I will leave to my colleague some comments on the other submissions that have been made and other issues, but let me just start by saying the Independent Contractors Australia have for the duration of my chairmanship for the last eight years been active in supporting and advocating for this legislation. We do so, because we believe and agree with the Productivity Commission that this legislation will make an important difference to the productivity of this country and also to the wellbeing of independent contractors in particular—the one million or so independent contractors in the Australian workforce but also the more than one million self-employed people in the workforce.

We have to say that we support strongly and have for many years the concept of this legislation. We support what it seeks to do in codifying the outcomes of the contract law issues that have come before the courts and the 13 principles it would codify and incorporate into law. We support that wholly but we cannot support this bill in its current form.

We regard the $100,000 exclusion as being sufficient to neuter the affect of the bill. The bill would be avoidable by large organisations with respect to providing benefits to independent contractors and it would be unfair in that it would be possible for high-income contractors to experience the benefits of the legislation and low-income contractors to not experience the benefits of the legislation. So we totally oppose the exclusion clause and recommend that the exclusion clause be removed. If the exclusion clause were removed, we would wholeheartedly support the bill. I will hand over to my colleague to make some comments about the other submissions to the inquiry and also some other issues.

**Mr Phillips:** On page 2 of the sheet that we have given you there—pardon the typos that run through that—we want to be clear on exactly what we are talking about here in terms of the concept. This is not a bill that goes to the price of a contract or the specific arrangements under which people work; it is essentially to the structure of the contract. Arguments that deviate from that, I think, are arguments that are not valid. We just wanted to make sure that there is focus on the essence of what we are talking about here.

On page 3 of the sheets that we have supplied you, we have been through the 20 submissions that were on the website as of last night and have done a quick summary running through those to give you a perception of where we relate to all of that. The numbers that run down the side are the numbers of the submissions. You have the

Direct Selling Association supporting the concept but not wanting it for direct selling. The Credit Investment Ombudsman wants it in. Motor Traders Queensland want the bill. The Shopping Centre Council actually supports the bill. We have had a lot of discussion with them, and they are talking to you after this. We are at one with them. We are delighted that they support the concept of the bill, but they have said that it should exempt retail leases because there is a tremendous amount of regulation covering the retail leases currently, and we are not in the business of doubling up. So we are in agreement with the Shopping Centre Council—the big end of town and small end of town on the one page on this.

We have had considerable discussions with the Australian Bankers Association over the issue. They have long been opponents of this, but I am very pleased to say that their submission does not oppose the bill. They are seeking some very sensible amendments. One of the issues that they are concerned about, for example, is the fact that they do not want large businesses to have a subsidiary small business that by subterfuge gets access to the protections under that sort of arrangement. There are other issues that they raise in there which we have not really got our head around as yet, but I think that they have come through at long last with some substantial stuff.

The Australian Automotive Dealer Association want it extended to franchise agreements. They are very clear about that. Telstra, who we also have had extensive discussions with, have in the past opposed this but in this particular instance are now turning around and saying they are for it. We can tell you that we have had discussions with the head of retail at Telstra, who says that the implementation of this for consumers has been good for the Telstra business. Of the other ones there, the people who support the concept are, like us, concerned or opposed to the $100,000 limit. The people who are opposing the unfair contract concepts in particular are the Franchise Council, Business Council of Australia, Arnold Block Leibler, and HIA.

We want to very quickly go to the franchise issue because it is now extremely current. We believe the *Four Corners* show and the Fairfax expose of what has gone on with 7-Eleven are quite relevant to the considerations here. Allan Fels has come out and said quite publicly that he views the 7-Eleven franchise model as flawed and that, with the underpayment of the workers that is occurring—the Fair Work Ombudsman is actively in the process of litigation in those areas—a significant part of the problem is the nature of the franchise agreements. We hold the same view as Allan Fels. The implications for the proper implementation of these unfair contract laws is that, in our view, 7-Eleven will need to review their contracts. They will need to review their franchise agreements, and we think that is a good thing.

We are very aware of the extent to which this is probably a world first. Unfair contract laws exist in the UK, for example. They exist in other jurisdictions, but we are not aware of any other jurisdiction where it has gone to the business-to-business area; it has only been business-to-consumer. So we are aware that this is a leap, but it is an extremely important leap. It is consistent with what the Productivity Commission said back in 2008-2009. It is consistent with the original intent of the ACL laws in 2010 when they went through but small business was dealt out. We believe this is the continuation of the agenda, and we would like to see the agenda implemented fully and properly, which means the exclusion of the $100,000 limit.

**CHAIR:** Thanks very much. Everything is okay apart from one area?

**Mr Phillips:** Yes.

**CHAIR:** So you are happy with head counts?

**Mr Phillips:** Yes.

**CHAIR:** You spoke about related companies and the Australian Bankers Association. What about monetary thresholds?

**Mr Phillips:** I do not think it is necessary. I think it is going to confuse it. One of the things that we need to have here is clarity of jurisdiction. The 20 employee limit is lining up and consistent with other legislation and the definition of 'small business'. We do not think it is necessary.

**CHAIR:** Clarity of how a business can tell the size of its contracting partner?

**Mr Phillips:** I think it becomes fairly clear with the 20 limit.

**CHAIR:** No worries. What about up-front price payable? Are you confident that the definition of that is sound or that you can work with it?

**Mr Phillips:** No, the up-front price is the nub of the whole problem around the $100,000 issue. I will give you a very specific example.

**CHAIR:** I need an example. I am trying to—

**Mr Phillips:** All IT contracts, consultant contracts, engineering contracts—all the consultancy area—usually operate on an hourly rate. This was a very specific question that we put to Treasury when the draft legislation first

came out. Say an IT contractor gets a contract for $100 an hour. If it is a nine-month contract, they are easily going to exceed the $100,000 limit if you consider the total notional value of the contract. The question is: is the up-front price the total notional value of the contract or the $100? The issue is which one. The response we have had from Treasury quite clearly and from our discussions with the ACCC is it will be the total notional up-front price. The problem with that is that it is standard for these standard-form contracts to be cancellable at a month's notice, a week's notice or on the spot, so the total notional value of the contract may or may not be the value of the contract. We do not know. If, for example, the up-front price were the $100, we would not have a great problem; but, with the notional value being the total value of the contract, we have got a significant problem.

**CHAIR:** How do you fix it?

**Mr Phillips:** Remove the limit. It is not necessary. It does not exist in the ACL.

**CHAIR:** To go on from that: how does that relate to small businesses as suppliers? The Business Council has argued that the bill should only apply when small businesses are purchasers and not suppliers.

**Mr Phillips:** I see that as a subterfuge to get out of the principle of what we are talking about.

**CHAIR:** That is fairly strong language.

**Mr Phillips:** Yes. There is a very long history of the Business Council, the Franchise Council—a number of these large organisations—consistently opposing efforts through the states and at the federal level to balance out the relationship between big business and small business. We have a history of this going back 15 years. We did significant battle with the Franchise Council, who opposed the small business commissioner legislation in both South Australia and WA. We have a lot of experience with this battle.

**CHAIR:** Righto. Before I hand to Senator Dastyari, did you want to make a comment on what the proposed new law will mean to you with regard to reverse onus of proof?

**Mr Phillips:** Can you expand on that?

**CHAIR:** It contains two significant rebuttal assumptions which operate to reverse the usual onus of proof. Under section 27(1) of schedule 2, which you probably do not have in front of you, it says:

> 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 reverse onus of proof is justified because of the vulnerability of the small businesses. With regard to that, there are some people who are obviously saying in their submissions—if you have read them up to last night; I have not read them all, I must say—

**Mr Phillips:** I flick read a number of them.

**CHAIR:** There are people who disagree with this approach, contending that the commercial nature of the contract means that small businesses should seek legal and other advice before concluding any contract. The Franchise Council of Australia agree. The FCA argue that the reverse onus of proof could damage small businesses that are challenged and may encourage spurious claims. Do you support the reversal of onus of proof?

**Mr Phillips:** The answer would be yes, if I am understanding correctly. In other words, it is for the other party to prove. Let us look at how this is going to be implemented. I had a very long meeting with the implementation team at the ACCC, the same people who did the implementation with the consumer area. Their process is to go out and actively seek to get people to change their contracts. There has only been, under the ACL, one prosecution of which I am aware since 2010 in this area, because what has happened—the commercial reality—is that large businesses that saw they could not get out of it have gone and changed their contracts. The commercial success is sitting there. We are hoping that the same dynamic will be in play and that really we are not going to have this tested very much, because the ACCC is going to be out there suggesting to people that they should be reviewing their contracts.

**Senator DASTYARI:** Mr Phillips and Mr Lacy, I have read your submission and I understand the point you are making. The one bit about it that I do not quite understand is this point. You say:

> The exclusion is so destructive in our view that it renders the Bill worthless for the great bulk of the 5.3 million Australians in the workforce it purports to serve.

The bit that I do not quite understand in the position you are putting is why you oppose the bill. Why not have a position that says—

**Mr Phillips:** It is very simple.

**Senator DASTYARI:** 'This is an imperfect bill. We'd like to see this changed. We feel that for the bulk our members it doesn't serve the purpose it intends to serve.' I can accept that. But wouldn't it be better than no bill at all?

**Mr Lacy:** I will deal with one element of that. It is totally possible for an organisation to avoid the benefits of the bill being available to an independent contractor. All they need to do is offer a contract—let us say they need $90,000 of work over a nine-month or 10-month period. So they offer a contract for $110,000. That allows them to put whatever clauses they like into this common-form contract. That allows them to put in an at-whim termination clause.

**Senator DASTYARI:** I get that there are loopholes.

**Mr Lacy:** We have to be—

**Senator DASTYARI:** If the Senate does not close what you see as the loopholes, why are you advocating no bill?

**Mr Phillips:** It is strategic. We are well aware of the intense pressure that parliament is under, under any government, to push through reform of any sort. Our view is that if this exceedingly imperfect and flawed bill goes through as it is, the pressure for this sort of legislation to come through and to be fixed really disappears. We would say we are probably going to be stuck with a dead-end bill for a decade, maybe two decades. If the bill is rejected it retains the pressure to get the issue fixed. We would like to see the issue fixed and fixed properly, once. And if it cannot be fixed now, if we have to fight and argue for this for another three, four or five years, we will keep fighting and we will keep arguing for it.

**Senator DASTYARI:** You position seems crystal clear: the Senate should amend the legislation to close the $100,000 loophole, and then you would wholeheartedly support it.

**Mr Phillips:** Yes.

**Mr Lacy:** Absolutely.

**Senator DASTYARI:** That is the clearest—we deal with some very nuanced positions; that is not a remotely nuanced position.

**CHAIR:** That is a very good note to finish on. Thank you very much, Mr Lacy and Mr Phillips. I appreciate your candour.

**COCKBURN, Mr Milton, Adviser, Shopping Centre Council of Australia**

**GIUGNI, Mr Paul Francis, Adviser, Shopping Centre Council of Australia**

**NARDI, Mr Angus, Executive Director, Shopping Centre Council of Australia**

[14:20]

**Senator DASTYARI:** This is a bill that has come into the parliament very quickly in a bipartisan fashion to be brought forward. I do note that a lot of people had to change their diaries to be able to come and give us some quick evidence today. Just so you know, we actually changed our agenda as well. We cut our credit card hearing short so that we could do this today.

**CHAIR:** Would you like to make an opening statement?

**Mr Nardi:** Thank you for the opportunity to engage with you on the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, which we do believe is quite a radical bill. We draw your attention to the executive summary of our submission. Our major concern is addressed in section 3 of our submission. We do not believe the mechanisms for exemptions will prevent what Minister Billson has always promised about this proposed law: firstly, that it will not be an avenue for forum shopping; and, secondly, it will not impose duplicate regulation.

We do not oppose the bill. We are no longer seeking an exemption for regulated retail leases in the bill although that has always been our preferred position. We accept that that battle has been lost. We are simply seeking the opportunity, after the bill becomes law, to make a detailed submission to the minister under the proposed section 28 subclause (4) of schedule 2 and proposed section 139G(2)(a) of the act to seek an exemption for terms of retail leases, which are already highly regulated by state and territory retail tenancy legislation.

If we are successful in such a submission, it will only be because we have been able to demonstrate to the minister's complete satisfaction the state and territory laws comprehensively ensure fair and adequate protections for retail tenants. However, if we are unsuccessful then that is the end of the matter and our members will have to live with the expensive consequences of double regulation, potentially significantly higher compliance cost, smart lawyers going forum shopping and the possible political embarrassment of a single judge of the Federal Court overruling a state parliament.

However, as the bill now stands, preparing and lodging such a submission would appear to be an exercise in futility. Our lawyers, Speed and Stracey, and an independent legal firm, Baker and McKenzie, have concluded that section 28 subclause (4) of schedule 2 cannot be utilised by the minister to exempt from the operation of the new law terms in retail leases, which comply with state and territory retail tenancy legislation. We have recommended alternate drafting of section 139G and we refer you to recommendation 2.1 in our summary of recommendations. We have also recommended alternate drafting of section 26(1)(c) in recommendation 2.2 of our submission.

If the Senate committee disagrees with this legal interpretation of the proposed section 139G(2)(a), we respectfully request that the committee recommends that a clear statement be made on behalf of the legislature during the remaining parliamentary debate that this section does not prohibit the minister exempting under clause 28(4) of schedule 2 terms in retail lease, which comply with state and territory retail tenancy legislation. We also believe there are some deficiencies in the current definition of a small business and we respectfully draw your attention to section 4 of our submission.

Finally, we support the thresholds which have been nominated in the bill and we are obviously happy to take question on these matters and any other matter raised in our submission.

**CHAIR:** In a nutshell, you have got the shirts on about the fact that there is a duplication. You have recommended that there be some various applications but that has not been picked up in the current legislation. What is it that you want to see done? Overall, give it to me in layman's terms. You have given me a whole heap of recommendations. You have referred to subsection ABCD and everything. Just give me one minute of what it is.

**Mr Giugni:** There are two exemption processes in the bill. The first exemption process allows the minister to make a declaration that if a state, territory or other federal law is equivalent to unfair contracts, it can make a declaration there. Our problem is 'equivalent' is such a definitive standard. We have put in alternate wording which goes towards a wider overall fairness test. But 'equivalent' is a very high bar. We picked up in our discussions with Treasury that unless it actually has an unfair contracts test in that state law, it will not get past equivalent.

**CHAIR:** So the unintended consequence of that is that it is reaching for that but will never achieve it?

**Mr Nardi:** That is correct. But in a very simple terms, we do not believe that this bill should apply to regulated retail leases. The average retail tenancy legislation runs at 100 provisions. They are very detailed provisions. They are before a lease is signed, during a lease and after a lease. We do not believe that it should apply to everywhere.

**CHAIR:** Does it vary from state to state?

**Mr Nardi:** It would vary from state to state to state. And we think that is entirely consistent with the minister's ongoing statements to, firstly, avoid duplicate regulation and, secondly, to prevent forum shopping as he has called it.

**CHAIR:** What else are we missing here?

**Mr Giugni:** On that point about varying from state to state, there is actually a lot of commonality between the states. We can refer the committee to a compendium to our various law firms. We have got a copy here if you like. You can see them lined up state-by-state. The second point also is related to the state based legislation. Effectively, there is an existing carveout in the ACL, which picks up a concept whereby if a term is required or expressly permitted by a law of the Commonwealth, state or territory, the unfair contract provisions do not apply.

With the nature of retail tenancy laws through the various states, quite often the laws provide for minimum standards. So it is not just a matter of it being required by the legislation or expressly permitted, they provide minimum standards as to what a clause in a contract should do to otherwise not be void. What we are actually suggesting is the existing provision in the ACL pick up not just those terms which are required or expressly permitted but also meet the minimum standards set out by state legislation. And that goes to the way the wording of the state legislation works.

**Mr Cockburn:** As Paul said, we think a very minor amendment to section 26(1)(c) would pick up that fact to make it clear that if it meets the minimum standards of a state law or a territory law or even a Commonwealth law then, in fact, the extended to UTC provisions would not apply.

**CHAIR:** You heard the independent contractors earlier. You heard their evidence and somebody's read their submission. Where are you at variance with them?

**Mr Cockburn:** In relation to the issue of the thresholds do you mean?

**CHAIR:** Yes.

**Mr Cockburn:** If you go back to the regulation impact statement, it makes it very clear that in the survey that they did, they believe that this law will apply to around 80 per cent of commercial transactions, which is obviously a very high number. The minister, in introducing the bill, said that he believed that this would capture most of commercial transactions. The independent contractors obviously come to this table from a particular approach, almost from a quasi employee approach, whereas we are looking at it in terms of business-to-business approach.

There are two other points we would make. This is a very radical law, as you know, that Australia is about to introduce. We are not aware of any other country, certainly not any other country with which Australia likes to compare itself, that has gone down the path of regulating a business-to-business relationship in this way. In fact, the minister recently described this as a 'world first'. Given it is such a radical departure from the notion of sovereignty of contract that we have adopted up until now, it is important that a very prudent approach is taken. A prudent approach has been adopted in terms of the thresholds that have been set.

When it comes to retail tenancy legislation, on the assumption that we will remain captured by this legislation, I note that the National Retail Association, which is the major retailer association covering retail tenants, has supported the current level of the threshold. Certainly from the point of view of our industry, the people who are going to be protected by this legislation obviously see the current thresholds as being fair and reasonable.

**CHAIR:** So the tone of your evidence is that you are none too impressed—is that fair?

**Mr Cockburn:** To be very honest, we have opposed the notion of extending the unfair contract terms from the moment this was first mooted under a Labor government back in 2010. It is no secret that we tried to persuade Minister Billson, when he was in opposition, not to commit himself to this legislation. Given that the government did do so—it was a centrepiece of their small business legislation—then from the moment they were elected we accepted that the government had a mandate to introduce this bill, and so all of our efforts were then devoted to seeking an exemption for leases that are currently regulated by retail tenancy legislation, simply because otherwise we would be confronted with double regulation.

We were disappointed that the bill, when it finally arrived, did not give us that exemption; we have decided that that ship has sailed as well. Our major focus now, as we said in our submission, is to ensure that in fact we

have at least a chance of going to the minister, whether it is Minister Billson or a subsequent minister, and making a persuasive case as to why there should not be double regulation in our industry. As Angus said in his opening statement, the problem is that, based on our legal advice, that is now an exercise in futility. We do not believe it should be an exercise in futility. We think there is an alternative formulation, which we have suggested in recommendation 2.1 of our summary, that we believe will satisfy all parties. If we can make the case, if we can demonstrate that, then fine. But, as Angus said, if we cannot demonstrate it, then we will have to live with it.

**Senator DASTYARI:** I have a couple of things. Firstly, you referred to the legal advice that you have obtained. Was that legal advice produced for the Shopping Centre Council?

**Mr Cockburn:** Yes, it was.

**Senator DASTYARI:** It was not part of your submission.

**Mr Cockburn:** No, but we did provide that to the committee. You do have a copy of it.

**Senator DASTYARI:** We do?

**Mr Cockburn:** Yes.

**Senator DASTYARI:** I pulled your submission off our website a few nights ago and read it, so I am not going to—I was going to ask if I could have a copy of it. There are a couple of things I want to try to cover. You are attesting that you believe the minister has said that 80 per cent of contracts are going to be covered by this anyway. The amendment that we spoke about a moment ago, about removing that exemption, your view is that that is not a—it is a smaller group of people than the information we were just previously given said. Is that your contention?

**Mr Cockburn:** Do you mean the people who will not be covered by the legislation?

**Senator DASTYARI:** Yes. The submission we were just given by Independent Contractors said:

The exclusion is so destructive in our view that it renders the Bill worthless for the great bulk of the 5.3 millions Australians …

That is not your view?

**Mr Cockburn:** From the point of view of the individual contractors it may well be the case. As I said, it is—

**Senator DASTYARI:** I will be very clear, frank and honest about this. In the last parliament, when Minister Emerson was going down this path, you argued vigorously against it. You also argued vigorously against the current government doing it. They took it to an election. They won. As a stakeholder you have accepted that that is a reality of the democratic process. You would rather the bill not be passed, but you are not going to oppose a bill that is going to pass. Now you are trying to say: how do we make this more workable for our clientele?

**Mr Cockburn:** Yes.

**Senator DASTYARI:** And you were trying to raise with us what may be unintended consequences?

**Mr Cockburn:** Yes.

**Senator DASTYARI:** I want to get to those. What would be your issue with removing the threshold?

**Mr Cockburn:** As the minister said when he was introducing the bill, one of the major problems is that the further up the scale you go—he did not use these words—you adjust the threshold and the greater the potential for moral hazard being introduced into business and business relationships. In other words, people basically enter a business relationship and say, 'I'm protected by the government anyway, so I really don't have to do my own due diligence. I'll go into this and will sign the lease' or do whatever. Moral hazard is obviously a very real issue. In our view, this was always conceived to be an extension of Australian Consumer Law. In other words, the Australian consumer does not have a great deal of bargaining power when they are dealing with a corporation. That was the justification. The government said, 'We think there's a market failure there, so we're going to step in and regulate it.' There is really no justification for extending that beyond the people you think need the protection of parliament in their business dealings. For that reason, it is very important to ensure that, in fact, the bill is limited in its protections to those people who really do need that protection. When you are deciding who will be in and who will be out of the bill, there will always be some arguments to say, 'We think X should be getting rather than out,' but, on the basis of surveys that the government did through the regulation impact statement, the government has come up with an estimation, saying, 'We think this is a fair and reasonable protection for the sorts of businesses we feel should be protected by parliament.'

It is not as though people are going to have two streams of contracts. When our members go back to review their contracts after the bill is passed to ensure that the contracts do not offend the legislation, as difficult as that will be for them, given the problematic nature of defining what is unfair and what is not unfair, they will be

adjusting all of their contracts. The minister made this point in the introduction as well. Even though the thresholds may be set at this level, it will have an impact above those threshold levels as contracts are being revised to ensure that they do not run foul of the law.

**Senator DASTYARI:** You make a series of what strikes me as reasonably modest recommendations around implementation. They get into the weeds of the legislation and how you feel the legislation would work better. Minister Billson is obviously quite an accessible minister and I am sure you have had many conversations with him. I can only assume that some of the recommendations you have brought to us in your summary of recommendations are matters that have been raised directly with him in the preparation of the bill or after the bill was presented.

**Mr Cockburn:** We certainly had discussions with the minister and we have certainly had discussions with the group within Treasury that has responsibility for the implementation of the bill. It is fair to say that Treasury's view is that they are aware of the very limited circumstances of the exemption mechanisms. The way they put it was: 'Yes, we recognise that probably the only laws that will be exempted are laws which already have an unfair contracts terms provision in them.' We have done that to ensure, in fact, that there is a level playing field. What they have not taken into consideration is that that assumes that at the moment all business contracts are unregulated, and that is not the case. Our industry has a regulated contract; the franchise industry has a regulated contract. In our case, there will never be a level playing field because we will be one of the few industries that will, in fact, have double regulation of our business contracts. One of the frustrating things is that this is a federal law. It is being implemented by a federal body. It is not a body that really understands retail tenancy legislation, because that is essentially a state and territory based law. I think if it were more conversant with the regulation of retail leasing and suchlike, I think there probably would have been a different approach.

**Senator DASTYARI:** There are a fair few recommendations here. We will obviously need to work our way through what recommendations we make to the Senate on the bill. Your position, effectively, is that these amendments would improve the bill but you are not going to oppose the bill even if it is not amended.

**Mr Cockburn:** We would be very unhappy with the bill if the exemption mechanisms are not made to work in the way that the minister indicated they would work in his second reading speech. To put it crudely, we believe we would have been dudded if that were the case. Before we finish, I draw your attention to the fact that, as I said, we do not oppose the thresholds but we do think there are some problems with the definition of a small business, and we have addressed those—

**Senator DASTYARI:** Stuff about safe harbour is what I am interested in.

**Mr Cockburn:** Yes. At the moment, it is going to be very difficult for a firm to do its due diligence as to whether the firm it is contracting with has 17, 18, 19 or 25 employees. We think that there needs to be a safe-harbour provision so that the contracting party can rely on what it is told by the other party as to how many employees it does in fact have.

**Senator DASTYARI:** And at this point in time you cannot?

**Mr Cockburn:** No, there is no provision in the bill that provides that level of comfort to a contracting party. The other thing is that at the moment there is no recognition of related party entities. In the retail leasing game, it is very common for a major retailer to do its leasing through what is called a service company, and the service company does not have any employees. It is also true of landlords, by the way. With a lot of the big landlords, when you track down who is the lessor of the shopping centre, it is a responsible entity or a joint venture which does not actually contain any employees at all. We are a bit puzzled as to why this would have got through unamended, because it just seems such an obvious loophole that needs to be corrected.

**CHAIR:** There is still an opportunity, which is why we are here today. Mr Cockburn, thank you very much. In South Australia, would call you 'Mr Coburn'.

**Mr Cockburn:** That is why I accept both pronunciations. When I go to South Australia and Western Australia, I go with the flow.

**CHAIR:** We are a bit different towards the west.

**Senator DASTYARI:** You are still a Sydney boy, aren't you?

**Mr Cockburn:** I am.

**CHAIR:** You are the former media baron, aren't you, as well as a property baron now?

**Mr Cockburn:** I would like to think I was a media baron.

**CHAIR:** You were contributing to the baron.

**Mr Cockburn:** I am a former journalist, yes.

**CHAIR:** Thank you, fellows, for your candour and for fitting in with the times.

**DE BRITT, Mr Kym, General Manager, Franchise Council of Australia**

**GILES, Mr Stephen, Director, Industry Policy and Government Relations, Franchise Council of Australia**

[14:43]

**CHAIR:** Welcome.

**Senator DASTYARI:** Gentlemen, we know we have played around with your diaries today to get you here a bit earlier, so thank you.

**CHAIR:** May whatever god you believe in bless you very much. Thank you for appearing before the committee today. I invite you to make an opening statement.

**Mr Giles:** We have provided a written submission which is perhaps a little more holistic than some of the other submissions. We have also, I think, enjoyed a pretty collaborative relationship with the minister over a fairly long period of time with the Franchising Code of Conduct. I think it is worth noting there that, once the policy position was determined on that, we had achieved a pretty constructive outcome in terms of the legislation itself, which has been widely accepted, and also substantially reduced compliance costs in the sector.

In the context of our submission: a bit like Mr Cockburn mentioned, we do not think this legislation is a terrifically good idea, and we have made that clear in some previous submissions. But we have now, I guess, focused the main part of our submission on maybe how to make it work effectively in the circumstances. The concerns that I think we mentioned were that, if legislation is going to be introduced, it must provide mechanisms for parties to contract with certainty. In the context of particularly franchise agreements, the other dynamic is that those agreements often have third parties that are transacting in reliance on those contracts—someone has lent some money; there are supply arrangements; and so forth—as opposed to a typical consumer transaction, where all the logic for the legislation has come from, where essentially the transaction is consummated at the time. It is take it or leave it; get the rental car or whatever. If you want the product, you get it.

We have made the point that in our sector we have a very comprehensive prior disclosure regime with disclosure documents and cooling-off periods. There are provisions in the legislation which prohibit certain types of provisions in franchise agreements and so forth. So we have also made the point that we think there is a fair case for the sector to be exempted, but they are arguments that the minister does not seem to have necessarily warmed to. Alternatively perhaps, in fairness, he has suggested, 'I've included in the legislation a mechanism for you to make your case subsequently under that process for essentially persuading the powers that be that this particular mechanism addresses the concerns in an equivalent way.'

We are concerned—and one of the great successes, I think, of the Franchising Code of Conduct is that about 80 per cent of the disputes are resolved by mediation, which is very cost-effective and happens quickly, and in many instances the parties are able to then resume their relationships or alternatively settle quickly. You are dealing with an intangible asset, so you essentially maximise the net value that someone is going to get in any situation. This legislation, we believe, will encourage litigation, essentially. There is talk about rights, and there is also a lot of uncertainty. There is also—as a member of the legal profession I can probably say this—even an incentive for lawyers to perhaps run up a case on a relatively speculative basis, particularly because the onus of proof as it exists in the legislation provides that, once you make an allegation, essentially unproven, the onus of proof flips over.

**CHAIR:** Lawyers wouldn't do that! No, they wouldn't do that!

**Mr Giles:** You must know different lawyers to the ones that I might know!

I will cut to the recommendations. We tried to be a little bit innovative about solving the problems that we have raised, so we proposed to the minister—and I do not know that he disagreed; I just do not know if he had enough time to implement this or to get the point through Treasury—a suggestion that, if a party obtained legal advice, that would take them outside. I think it is consistent with the policy that business transactions are based on informed consent, willingness and understanding, and the legislation is around transparency. If you have had the opportunity to obtain some legal advice, that gives the certainty that someone can get a certificate. It is also consistent with the policy of the franchising code, which says: 'Here's your disclosure process. Here's a 14-day window where you're not allowed to sign the contract, and we strongly recommend you go and get legal advice in the process.' Our experience with that under our own complaints regime, which Kym administers, is basically that 100 per cent of the complaints that we receive are from people who do not obtain legal advice. That is our own internal experience. So we think that the process of encouraging people in business transactions is a sensible approach.

We have also tried to come up with another couple of ideas. One of the ideas that we had is this. If you look at the UK legislation on unfair contracts, which is the only legislation in the world that touches on this, it is nowhere near as comprehensive as this legislation. What the UK legislation says, in essence, is this: 'If you've got a contract that purports to come up with a different contractual outcome than what people would expect to be the case or what the law says to be the case, either we will prohibit that'—that is, if you are saying that you are never going to be liable for anything ever—'or alternatively we will make that subject to a reasonableness test.' So what the UK have done with their unfair contracts legislation—and of course Australian law is very largely based on UK law—is to say that freedom of contract is important in business transactions; people have to move forward; there is a lot of fluidity attached to business transactions; there is business value attached to a contract; and there needs to be certainty that attaches. Once people have signed a contract, the law says, currently, that they are deemed to have read and understood that. The UK have said, 'Well, yes, but, if you're trying to put into a contract something that actually changes the law from what it would otherwise be, we're not necessarily going to allow you to do that,' whereas the proposed unfair contracts legislation in the bill before the parliament essentially has this sweeping, undefined, 'you figure it out' kind of model, which creates a lot of uncertainty. We think the legislation is inviting people essentially to make ambit claims and see what happens.

I suppose the other point that we were making in our recommendations, if you like, was: what if someone could make a complaint about an unfair contract, but they could only do it in a short time? If someone says, 'I've got an unfair contract,' they should not have three years or six years to make the claim. Give them 60 days or let them do it before they sign the contract so they sign under protest. As a practising lawyer, I know this happens a lot. Sometimes you sign a contract and you say, 'We're not happy with that, but we acknowledge that we want the deal.' That at least reduces the window in which it can be upset. So, if you have a contract sitting there, if it is less than 60 days old, maybe you have a bit of uncertainty; if it is longer than that—these are some of the processes that have been adopted around the world.

I suppose that is our view. We have also made some comments about definitional clarity. We also support the Shopping Centre Council's comments about this safe harbour idea of being able to rely on what you are being told by another party about whether they are or are not a small business and so forth. It is interesting. As I start to speak, in my professional capacity, to clients, the amount of work involved in going through not just franchise agreements but their standard terms and conditions of trade and all sorts of other contractual documents that they use every day of the week to make things happen efficiently is going to be just a massive compliance cost more broadly. I guess that is a comment that is outside the franchise sector but just addresses it more broadly. Kym, do you have any observations on that?

**CHAIR:** I am not left in any doubt about how you feel about this, Mr Giles. I just go to recommendation 1: rejection of the bill.

**Mr Giles:** I think the reality is that we can see the merit, the intent and the purpose, so really our message is that we would like to try to make the legislation work. We essentially see that it is likely that the legislation will come in. We had the discussions with Chris Bowen many years ago. If you accept the policy intent—we actually do not think it is good legislation, and we think that it would merit a significant period of further consideration to work through it. This is a very short window. We are here today giving you some reasonably complex arguments. People are throwing quite interesting suggestions up. It is not a great time period to be able to make some adjustments.

**CHAIR:** No worries.

**Mr De Britt:** To stick to more layman's terms, the feedback that I get from the different businesses is that there are a lot of terms that may be in the contract that may be deemed to be quite fair, but, when someone goes to try to implement it later, the way that they implement it may not quite be the fairest manner. People will turn around, use this legislation and go, 'Oh, that was unfair,' and start looking at litigation to resolve it. They will see this as a panacea for all problems that they may or may not have in small business.

Our attitude is that we acknowledge the legislation is going to go in. Yes, we put in that we did not think it should, but knowing full well that that was not going to be accepted. In talks with Mr Billson, part of putting the limits on was that he believed that anyone over those certain limits—that should be enough money to force them to sensibly go and get legal advice. That is why we have acknowledged that the legal advice is a good term to have in there as an exemption, but also, as Stephen raised, the 60 days—to have people say, 'I don't think that is quite fair and I want to get something done about it,' so they have either got to go and get legal advice or there needs to be some mechanism set up within the ACCC or the small business ombudsman to be able to deal with that.

**Senator DASTYARI:** I am very conscious of time. Mr Giles, Mr De Britt, without pussyfooting around the issue, this is a bill that is highly likely to pass. We are at five minutes to midnight now. Regardless of views, we are in a position where realistically the most likely role that we are going to play is to be making some suggestions for some amendments to the bill as you have already seen it. So park aside some of the bigger issues about whether it is a good or a bad bill. They are your views. Your views have not changed. Your views have been consistent since the last government, so credit where credit is due. Today we have been given a couple of different ideas from different people, suggestions for how to improve the bill. Is your take—again, I am not saying you support the bill; if the bill is going to pass anyway—that the most significant thing we can do is around contractual certainty?

**Mr De Britt:** Yes.

**Senator DASTYARI:** You are saying that the contractual certainty parts are the parts that you seem to have the most issues with. Our first set of witnesses this afternoon talked about this $100,000 threshold. Is that something you have an issue with?

**Mr Giles:** As Kim mentioned, the reason the threshold came in was that we actually had some discussions with the minister around this, saying, 'You're contradicting a little bit, in a policy sense, that in the franchise sector you've said you've got to get legal advice for business contracts.' That essentially changed the thinking to say that maybe it should only apply to low-value contracts, in his words. Our view conceptually is that that threshold level is neither here nor there, and our view is that we do not have a position on the threshold. Our view is that, if contractual certainty is there, then that potentially solves all problems. Our members do not want there to be a threshold, because that then distinguishes between one or two models. The other thing is that personally I think it encourages anti-avoidance, because, as soon as you provide a mechanism for avoidance, then people will sit down and figure out a way around it.

**Senator DASTYARI:** You have obviously gone, at some point in the past few weeks, to the minister. I just want to pre-empt what he is going to come back to us and say. If you were talking to the minister—just to play devil's advocate here—and you said to him, 'Our fundamental problem is contractual certainty; we would like to see contractual certainty fixed up in this,' what is the policy reason against it? I know it is unfair for you to argue against your own case, but what is the reason you have been given?

**Mr Giles:** I think the answer to that has been—and in fairness I think it has probably been Treasury; I think Treasury see this as a simple change. When we first met with Treasury, they said, 'This is simple; we're just adding two words after the words "consumer" and "small business."' It is getting those people to understand that a business-to-business transaction is so dramatically different. But the minister—the legal advice point, I think, was understood and we actually felt, if I can talk a bit politically, it solved the potential political problem, because it is a fair way of doing things. I suspect the objection to that was some person saying to the minister, 'You can't force people to get legal advice.' We had the same view with the franchising code, where we were quite happy to mandate that people get legal advice, but the bureaucrats in Canberra watered that down to, 'We strongly recommend that you get legal advice.' I think the minister would probably say, 'That makes a bit of sense, but someone said that that wasn't possible,' which is why we came up with the 60-day window, just in case that was a blocker or something else.

**Senator DASTYARI:** Chair, maybe that is something we can—

**CHAIR:** Yes, we will raise it.

**Senator DASTYARI:** explore and see whether we can make a practical recommendation to amend it.

**CHAIR:** And the definitions around all of that, which have been a consistent theme.

**Mr Giles:** And what is or is not a standard form contract. If you are at the car rental counter, that is clearly a standard form contract. Not only do you have no chance to amend it; but you try and say to the car rental clerk: 'How about I change clause 14.3'! Whereas, in a business transaction, if you are given a 'take it or leave it' contract then and there—as opposed to the franchise legislation, where the same issue came up, which is: 'Well, we don't want people going up and signing franchise agreements at trade shows'—there is a 14-day period and then a seven-day cooling-off period in there after it is signed. We have already explored that regime under franchising, which is why we think that it ought not be. In fact, when we first spoke to Treasury, they said: 'We're not too sure why you're even worried about this legislation. We didn't think it would apply to you.' So the view of what is or is not a standard form contract is kind of in the eye of the beholder.

**CHAIR:** As an association, I think you have made that point in your submission. Gentlemen, Mr Joyce and Mr Borghetti do not wait for us, so we are going to have to leave you here. I thank all of you who are still in the

room for your contribution here today. Every witness is still present and is hanging off every word of everybody else, as we are. I thank you for your evidence.

**Committee adjourned at 15:01**