

## Labor will Protect Small Businesses from Unfair Contract Terms

### Labor will ensure large firms face penalties and deterrents for unfair contract terms

Labor's suite of competition and small business measures will be strengthened with the commitment that a Shorten Labor Government will make unfair contract terms illegal, introduce penalties of up to \$10 million for contracts that contain unfair contract terms, and increase the number of small businesses eligible for protection from such contract terms.

### The case for change

- Legislation to prevent unfair contract terms was originally introduced by Labor in the Trade Practices Amendment (Australian Consumer Law) Bill 2009.
- In 2015, the unfair contract terms provisions of the Australian Consumer Law were updated so that they would apply to some 'business to business' contracts (where at least one of the parties is a small business).
- Leading-up to the new law taking effect, the Australian Competition and Consumer Commission (ACCC) examined standard form contracts in the advertising, telecommunications, retail leasing, independent contracting, franchising, waste management, and agriculture industries.
- Common unfair contract terms include:
  - allowing the contract provider to unilaterally vary all terms,
  - broad and unreasonable powers to protect themselves against loss or damage at the expense of the small business
  - unreasonable ability to cancel or end an agreement
- Currently, if a particular term in a standard form contract signed by a small business is found to be unfair by a court or tribunal, then that clause will be void and the small business will no longer be required to comply with it. There is no prohibition, however, against unfair terms being included in a contract.
- There are no penalties or deterrents for inserting unfair contract terms into contracts.
- Seeking to have a term voided is a cumbersome and costly process, particularly for small businesses, and the court's or tribunal's decision does not extend to equivalent provisions in other business-to-business contracts.
- A further limitation to the current regime is that the ACCC cannot seek civil pecuniary penalties when an unfair contract term is declared unfair and void by the court. Nor can it issue infringement notices for contract terms that are likely to be unfair.
- Finally, too few small businesses are eligible to benefit from the existing protections. For small businesses to be eligible for protection from unfair contract terms, they must fall within the following thresholds:
  - 'Small Business' is defined as an employer of 20 or less employees.
  - Contract sizes must be no more than \$300,000 in value, or no more than \$1 million for contracts greater than 12 months.

## What Are Labor's proposals? How will they work?

### Labor will:

- **Make unfair contract terms illegal.**
- **Introduce penalties for contracts that contain unfair contract terms of up to \$10 million.**
- **Expand the definition of small businesses eligible for protection from such contract terms.**

### Illegality and Penalties

- Currently, including an unfair contract term in a standard form contract is not illegal.
- Making unfair contract terms illegal and subject to penalties will allow the ACCC to seek pecuniary penalties and issue infringement notices when a business is found to have imposed unfair contract terms.
- Making unfair contract terms illegal will also allow cases where an unfair contract term is voided to provide precedents for other contracts.
- The ACCC would issue public guidance on the broader application of precedent-setting cases, and on contract terms likely to be found unfair.
- Without reform, the ACCC will effectively become the compliance department for large firms, and the application to void contract terms will remain a resource constraint on the regulator.
- With Labor's reforms, there will be an effective deterrent to unfair contract terms even before the regulator takes action.

### Small business definitions and contract size thresholds

- Labor will broaden the qualifying thresholds for unfair contract term protections to ensure that they apply appropriately to more small businesses.
- Labor will adopt the following small business thresholds:
  - An additional business size definition – so that turnover of up to \$10 million becomes an eligible alternative to the 20 employee definition; and
  - Increase the contract size threshold to \$1 million for contracts up to 12 months (up from \$300,000) and \$5 million for contracts greater than 12 months (up from \$1 million).

### Definition of a standard form contract

- The competition watchdog notes that one of the keys to the current unfair contract term regime is the definition of a 'standard form contract'. Under the current law, only terms in a standard form contract can be declared void. The Australian Consumer Law

provides a number of factors that need to be considered to determine whether a contract is 'standard form'.

- These factors include whether another party was given an effective opportunity to negotiate the terms of the contract.
- As part of this unfair contract terms reform platform, a Shorten Labor Government will commit to consultation and review of the definition of a standard form contract.

### **Labor's record**

In Opposition, Labor has announced a broad suite of small business measures. In particular, Labor has introduced Access to Justice reforms to Parliament, which help small businesses pursue court action to address anti-competitive conduct.