

## **Submission to Treasury**

### **Review of Unfair Contract Term Protections for Small Business**

December 2018

#### **Overview**

Self-Employed Australia is a strong supporter of the Unfair Contract laws for small business. We were a primary advocate for the introduction of the laws.

The evidence is that a significant number of large businesses have chosen to ignore the laws or have remained ignorant of them. This has resulted in a situation where changes to standard form contracts to comply with the laws have, arguably, been limited. This is despite the impressive activities of the regulator, the Australian Consumer and Competition Commission, to ensure compliance

We support a ‘beefing up’ of the enforcement regime around the laws to achieve improved compliance.

#### **Recommended reforms**

##### 1. Application to government

The laws currently do not apply to the government sector. This is a glaring double standard of ‘one rule for the ruled and a different rule for the rulers’. The non-application of the laws to government sends a signal to the private sector that the government is not truly serious about the laws. This diminishes the willingness of the private sector to comply voluntarily.

\*\* At minimum, the Unfair Contract laws should be extended to apply to the Commonwealth government.

##### 2. Non-compliance illegal

Unfair contract terms should be made illegal.

##### 3. Civil penalties

Civil penalties should be applied where contract terms are declared unfair by a court.

##### 4. Infringement Notices

The ACCC should be able to apply infringement notices for contract terms that are likely to be unfair.

### 5. Standard form contracts: Discretion to declare

At this stage the laws should continue to apply only to ‘standard form’ contracts.

However, it should be recognised that sometimes there are difficulties determining whether a contract is a ‘standard form’ or not.. Currently, a company can arguably ‘negotiate’ minor amendments to a standard form contract and then argue that the contract is no longer ‘standard.’

This needs to be addressed.

\*\*The most obvious solution would be to give the regulator the discretion to declare a contract to be ‘standard form’. We support this.

Large firms may argue that this leads to uncertainty. But the uncertainty they may argue about is counter-balanced by minimising the ‘game play’ a business may engage in to avoid the laws.

### 6. Threshold: No limit

The current threshold was hotly contested when the Bill was being debated in the Senate. The Bill initially had a limit of \$100,000 as an upfront price for an applicable contract. The Bill passed by the Senate and then accepted by the government raised that limit to \$300,000 and \$1 million for contracts of 12 months’ duration or more.

\*\*We support the suggestion that there should be no limit on the upfront price of the contract.

### 7. Threshold : Discretion to declare a business a small business

At this stage we support retaining the definition of small business as it currently stands—namely, enterprises with fewer than 20 people, including casual employees. But this can lead to unnecessary dispute even within this guideline. This can be resolved.

\*We would support the ACCC being given the discretion to declare a business ‘small’ for the purposes of the unfair contract laws.

We note that the Small Business Commissioners in the states—Vic, SA, NSW, WA—each has discretion to decided who/what is a small business for the purposes of their functions. This has been important in the conduct of the Commissioners’ dispute-resolution processes and effectively eliminates disputes over jurisdiction. It’s a good, practical model that should be available under the unfair contract laws.