



The gander should be required to do what the goose is required to do



Submission to the Review of the Commonwealth Procurement Rules By the Australian Small Business and Family Enterprise Ombudsman September 2023

1. Overview and Recommendation

Australian government departments and entities are excluded from Australian competition laws except where the entity is conducting a business (e.g., Australia Post). The consequence of this is that government departments are not subject to the Unfair Contract laws that apply to the rest of the community. That is, government departments can procure goods and services from small businesses and force unfair contracts on to those businesses without penalty.

1. Self-Employed Australia (SEA) submits that what is good for the 'private sector goose' should apply to the 'government gander'. In other words, that the unfair contract provisions of the competition laws be amended to ensure that government departments are subject to the unfair contract provisions of the Act.

The common sense of this is so obvious, we say, that the only objection could come from government departments that want to engage in unfair contracts with the small businesses from whom they procure goods and services.

2. To this end, SEA asks that the Small Business Ombudsman make a recommendation that the following amendment be made to the *Competition and Consumer Act 2010*, section 2A:

Application of Act to Commonwealth and Commonwealth authorities

(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth **in relation to the unfair contract provisions of the Act** in so far as the Crown in right of the Commonwealth engages in trade or commerce, either directly or by an authority of the Commonwealth **with a small business**.

If this recommended amendment is not sufficient to achieve the stated objective at (1) above, then an appropriate amendment be drafted to achieve that objective.

2. Background: Unfair Contract laws – small business

Unfair contract laws for small business people adapt unfair contract provisions for consumers to the small business situation. Application of the laws to small business started in 2016.

The laws are administered/enforced by the ACCC and ASIC.

<https://www.accc.gov.au/about-us/publications/a-guide-to-the-unfair-contract-terms-law>

A review of the existing laws resulted in a ‘beefing up’ of the legislation for small business in 2022. The new legislation comes into effect in November 2023.

The laws do not apply to government departments. As matters stand, they only apply to government-owned businesses (e.g., Australia Post) .

3. Summary of the ‘beefed up’ Small Business Unfair Contract laws

The Act that will apply from November 2023:

- *Expands the definition of small business.* To apply to businesses up to 100 full- or part-time employees (excludes casuals) or less than \$10m in turnover. Currently only 20 employees.
- *No limit on the value of the contract* (currently restricted to contracts up to \$300K).
- *A ‘standard form’ contract* is one if the contract has been used before.
- If *minor changes* have been made to a contract in negotiations this does not stop the contract being ‘standard form’.
- *Imposes fines* for breaches. (Up to \$2.5 million for individuals. \$50 million for corporations). There are currently no fines.
- *A person breaches* the law if they propose to or seek to apply an unfair clause.
- *Multiple* unfair clauses create multiple breaches.

Court orders: (This will close many of the loopholes in the current laws)

- If a clause has been declared unfair by a court, all similar clauses in other contracts are taken to be unfair. A party must disprove the unfairness if they want to use the clause.
- An order can be made to stop loss or damage from an unfair clause. Loss does not have to be proven, only that loss *may* occur. Such an order can apply to a ‘class of persons’ to stop loss.
- An order can be made to stop someone from engaging in contracts with unfair clause/s. A public warning can be issued about such a person.
- Persons can be disqualified from ‘managing a corporation’ due to the use of unfair clauses.

Orders can be made within six years of a clause being declared to be unfair.

The Bill/Act is enforced (proposed and currently) by the

- ACCC—covering contracts for goods, services and the sale of land.

- ASIC—covering financial products & services and insurance contracts. (This started in April 2021.)

4. Examples of unfair contract clauses

The laws make it clear that a contract is ‘unfair’ if it gives one party, but not the other, the ability to:

- a) Avoid or limit the performance of the contract.
- b) Terminate the contract.
- c) Apply penalties against the other party for a breach or termination of the contract.
- d) Vary the terms of the contract.
- e) Renew or not renew the contract.
- f) Vary the price payable without the right of the other party to terminate the contract.
- g) Unilaterally vary the characteristics of the goods or services to be supplied.
- h) Unilaterally determine a breach or interpretation of the contract.
- i) Limit one party’s vicarious liability for its agents.
- j) Permit one party to assign the contract to the other party’s detriment without consent.
- k) Limit one party’s right to sue the other party.
- l) Limit the evidence one party can adduce in legal proceedings in respect to the contract.
- m) Impose the evidential burden on one party in legal proceedings in respect to the contract.

5. Background: Making government departments subject to unfair contract laws

In [2015, the Harper Report](#) recommended extending competition laws to all government entities. This did not occur. The following passage is a modification to a recommended Harper amendment to the Competition and Consumer Act 2010 This amendment would require all government entities (e.g., departments, etc.) to comply with unfair contract laws:

Application of Act to Commonwealth and Commonwealth authorities

(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth **in relation to the unfair contract provisions of the Act** in so far as the Crown in right of the Commonwealth engages in trade or commerce, either directly or by an authority of the Commonwealth **with a small business**.