

Submission

# AUSTRALIAN CONSUMER LAW REVIEW

27 May 2016



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# 1 EXECUTIVE SUMMARY

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This submission by the Shopping Centre Council of Australia (SCCA) is in response to the Issues Paper for the Australian Consumer Law Review (“the review”). The Australian Consumer Law (ACL), in Schedule 2 of the *Competition and Consumer Act* (“the Act”), began operation on 1 January 2011 but was substantially amended in November 2015 by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (“the 2015 Bill”). This amendment extended the unfair contract terms protections of the ACL (Part 2-3 of Schedule 2), previously applying only to ‘consumer contracts’, to also include ‘small business contracts’. This amendment commences on 12 November 2016.

The SCCA has a number of major concerns in this review. First, the current exemption in the ACL from the unfair contract terms protections for terms required or permitted by federal, state or territory legislation is drawn too narrowly. The Federal Government, when it introduced the 2015 Bill, stated it wanted to avoid regulatory duplication and unnecessary compliance costs in industry sectors where there is already equivalent regulation. Without a widening of the drafting of the exemption in section 26(1)(c), this objective will not be achieved. We have addressed this in section 2.1 of this submission.

Second, in relation to ‘small business contracts’, uncertainty surrounds the process for determining whether a contract is a ‘standard form contract’. The ACCC is unable to provide guidance to businesses as to how much negotiation of a standard or pro-forma company contract, which is prepared in advance by that company, must occur before the contract is no longer considered to be a ‘standard form contract’ and therefore not open to challenge in relation to terms on which both parties have agreed. This uncertainty must be removed or, at least, reduced. We have addressed this issue in section 2.4 of this submission.

Third, we remain concerned about the wide judicial discretion in section 24(2) dealing with the meaning of unfair. This conflicts with the separation of powers doctrine which requires that all regulation should set down clear and identifiable standards, which are capable of being interpreted and applied correctly and consistently by the courts, without wide judicial discretion. We have addressed this, and other matters relating to the definition of unfair, in section 2.3 of this submission.

Fourth, during the drafting of the 2015 Bill in relation to ‘small business contracts’, we raised a number of concerns and made several recommendations which would provide greater clarity and certainty for contracting parties. These were not adopted and we were advised that some of these would more appropriately be addressed in the (then) forthcoming review of the ACL. These concerns remain and we have addressed these in sections 2.5 and 2.6 of this submission.

We have also addressed in sections 2.2, 2.7 and 2.8 of this submission several other matters which have been raised in the Issues Paper.

## Summary of recommendations

The SCCA has made the following recommendations in this submission.

1. Section 26(1)(c) of Schedule 2 be amended to state: *"is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, State or a Territory"*.
2. No amendments be made to the unconscionable conduct provisions in Part 2-2 of Schedule 2 of the Act until the amendments which began in 2012 have been given a reasonable period to be tested, including by the courts.
3. No amendment be made to the exclusion of 'listed public companies' in section 21(1)(a) and section 21(1)(b) of Schedule 2 the Act. If this recommendation is not accepted, and the public company exemption is removed, this must be accompanied by the reintroduction of a monetary threshold (of \$3 million) on the supply and acquisition of goods and services captured by section 21.
4. The words *"may take into account such matters as it thinks relevant, but"* be deleted from section 24(2) of Schedule 2.
5. The words *"having regard to the nature of the contract"* should be added after *"expressed in reasonably plain language"* in section 24(3)(a).
6. The words *"material detriment"* should be substituted for *"detriment"* in section 24(1)(c).
7. The unfair contract terms protection should not be extended to include the contract as a whole.
8. Section 27 of Schedule 2 be amended to provide: *"A small business contract is considered to be a standard form contract if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract."*
9. If this recommendation is not accepted we recommend that section 27 of Schedule 2 be amended to provide that if the counter party to a contract varies at least one term of a draft contract prepared by the other party (other than the terms setting the 'upfront price') then the contract is no longer considered a 'standard form contract'. Alternatively a provision be inserted to the effect that a contract is no longer a standard form contract if the counter party to a contract provides to the party which prepared the contract a signed statement that it has been given an effective opportunity to negotiate the terms (other than the terms setting the 'upfront price') and is satisfied with the contract entered into.
10. Section 26(2) of Schedule 2 be amended to provide: *"The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, or the formula for its calculation is disclosed, at or before the time the contract is entered into."* Alternatively, if the review is reluctant to remove the words after the semi-colon in section 26(2), we recommend the following words be added after our suggested revised section 26(2): *"; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event beyond that for which any estimate is provided."*
11. Section 25(f) of Schedule 2 be amended to specifically exclude an agreed price escalation term of a contract.

12. Section 26(2) should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.
13. Section 23(4)(b) be amended so that 'a business' includes any related body corporate.
14. A safe harbour provision be included in section 23(4) allowing a business to rely on what it is told by the counter party about the number of employees the counter party employs.
15. 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 exceeds the monetary threshold.
16. The ACL should not be extended to include a prohibition against unfair commercial practices.
17. The maximum financial penalties in the ACL should be indexed to take into account inflation since these penalties were set in 2010.
18. The misleading and deceptive conduct provisions in section 18 should not attract the same financial penalties as those in section 29 and should not involve criminal sanctions.
19. Monetary penalties should not be introduced for breaches of the unfair contract terms provisions.

## 2 ISSUES

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### 2.1 Exemption for terms required or permitted by other laws in section 26(1)(c)

All Australian governments have a commitment to avoid unnecessary and costly regulation and, particularly, to ensure there is no duplication of regulation. When the ACL was introduced the governments were also keen to ensure that provision was made to exempt contract terms that are required by other laws. Hence section 26(1)(c) was included in Schedule 2 of the Act.

Clause (c) provides that the unfair contract terms provisions do not apply to the term of a consumer contract or a small business contract *“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 are not aware of any case law relating to section 26(1)(c) and this is not an issue that is raised in the Issues Paper. Our concern is that this exemption is likely to be interpreted by the courts in a very limiting fashion and we consider it should be broadened to ensure that regulatory duplication does not arise and to eliminate possible conflicts between the ACL and relevant federal, state and/or territory legislation.

In the Oxford Dictionary the words “extent”, “express” and “permit” are defined as follows:

**“extent”** (1) *the area covered by something* (2) *the size or scale of something* (3) *the degree to which something is the case.*

**“express”** (1) *stated clearly and openly* (2) *specifically identified to the exclusion of anything else.*

**“permit”** (1) *officially allow someone to do something* (2) *make possible.*

A literal interpretation of section 26(1)(c) would therefore suggest a narrow interpretation. The relevant Commonwealth, State or Territory law must “clearly and openly” state that the term under consideration is “officially allowed” but the exclusion term must be strictly limited to the action which is “officially allowed” by that term.

A decision by Fullagar J in *Avoc Financial Services v Abschinski* [1994] 2 VR 659 is possibly relevant in considering how a court may interpret s.26(1)(c). Fullagar J. said (at page 665):

*“. . . the words “permitted by this Act” [in section 75 of the Credit Act 1984 (NSW)] . . . should be read down to refer only to costs fees or charges which are by the Act affirmatively permitted, that is to say, by the Act affirmatively singled out for permission, and so as NOT to include costs etc. which are permitted only for the reasons that the Act outside section 75 fails to prohibit them. I would myself emphasise in the critical words the expression “by this Act”, and I think that expression leaves the critical words open to the construction that the permitting referred to is only a permitting which is effected by the statute itself rather than by so much of the common law rights of contracting as are silently left by the statute unimpaired or unprohibited.”*

Consistent with the finding of Fullagar J., our view is that section 26(1)(c) provides only a very narrow exemption. In the case of a retail lease which is also a ‘small business contract’, the exemption would only apply to the terms of that contract which are required by, or permitted by, the effect of a state or territory statute, *“rather than by so much of the common law rights of contracting as are silently left by the statute unimpaired or unprohibited”* – to use the words of Fullagar J. – and even then *“only to the extent”* required by, or permitted by, effect of that statute.

Our concern about the interpretation of clause (c) obviously relates mainly to terms in retail leases (contracts) which are already heavily regulated by states and territories in the following statutes and regulations. Nevertheless we believe this issue has implications for other contracts as well, including consumer contracts.

The relevant statutes which regulate retail leases (and the dates of introduction of the original statute) are:

- *Retail Shop Leases Act* (Queensland) (1984)
- *Commercial Tenancy (Retail Shops) Agreements Act* (Western Australia) (1985)
- *Retail Leases Act* (Victoria) (1986)
- *Retail Leases Act* (NSW) (1994)
- *Retail and Commercial Leases Act* (South Australia) (1995)
- *Fair Trading (Code of Practice for Retail Tenancies) Regulations* (Tasmania) (1998)
- *Leases (Commercial and Retail) Act* (ACT) (2002)
- *Business Tenancies (Fair Dealings) Act* (Northern Territory) (2002)

In addition, most of the state and territory legislation also have associated regulations:

- *Retail Shop Leases Regulations (Queensland)*
- *Commercial Tenancy (Retail Shops) Agreements Regulations (WA)*
- *Retail Leases Regulations (Victoria)*
- *Retail and Commercial Leases Regulations (SA)*
- *Leases (Commercial and Retail) Regulations (ACT)*
- *Business Tenancies (Fair Dealings) Regulations (NT)*

These laws sometimes *require* particular terms to be included in retail leases. For example, section 31 of the NSW *Retail Leases Act* (RLA), dealing with reviews of current market rent, provides: (1) *A retail shop lease that provides an option to renew or extend the lease at current market rent is taken to include provision to the following extent: . . .*" Our view is that the exemption in section 26(1)(c) of the ACL would probably generally protect from challenge on the grounds of unfairness (i.e. as terms "required by, or expressly permitted by, a law") a term regulating market rent reviews but only to the extent they are required by section 31 of the RLA

In other areas of the retail tenancy relationship these state and territory laws specify minimum protections which must apply to the lease term and a term which does not meet these minimum standards is void. For example, section 34A of the RLA, dealing with relocations, provides: "*If a retail shop lease contains provision that enables the business of the lessee to be relocated, the lease is taken to include provision to the following effect: . . .*" It might be argued, but with no certainty, that the RLA "expressly permits" relocation clauses provided they conform to the minimum protections required by s.34A. We consider it is more likely to be interpreted that s.34A of the RLA does not of itself expressly permit relocation clauses. Section 26(1)(c) of the ACL will therefore not generally protect a relocation clause covered by s.34A of the RLA from challenge on the grounds of unfairness (i.e. as provisions "required by, or expressly permitted, by a law").

This could lead to a situation where one particular term of a retail lease is open to challenge under the ACL, but not another, even though both have been considered by, and are deemed satisfactory, by a parliament. Further, it could lead to a bizarre outcome, and one that must be avoided, where a lease term which is permitted by, say, the Parliament of NSW (and is therefore not regarded as 'unfair' by that parliament) is nevertheless deemed to be unfair and declared void by a Federal Court judge. This is an outcome which must be avoided.

This argument should be put beyond doubt by amending s.26(1)(c) to state: *"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"*. If our recommendation is adopted, the outcome is still the same: if the lease term in question does not meet the standards of fairness laid down by the relevant state or territory parliament then the term is void.

## Recommendation

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

## 2.2 Unconscionable conduct provisions in Part 2-2

We strongly oppose any amendments to the unconscionable conduct provisions in Part 2-2 of Schedule 2 of the Act.

The unconscionable conduct provisions (and section 51AC of the former *Trade Practices Act*) are among the most reviewed provisions of the Act. The frequency of these reviews might suggest the provisions themselves are problematic. This is not the case. Rather, as was intended by the Federal Parliament, the courts have interpreted the term "unconscionable" in section 21 more broadly than the interpretation developed by the courts of equity. In particular, the courts have accepted that large businesses might now be caught by section 21 not only when dealing with someone under an inherent disadvantage because of something personal such as lack of education, drunkenness or illness (as covered by the equitable doctrine) but also when dealing with someone in a weaker commercial position, including smaller businesses.

The fact that there has not been a large number of section 21 (or section 51AC) cases reaching the courts is not evidence that the unconscionable conduct provisions are failing in their purpose. Rather this is evidence that they are achieving their purpose. The true test of a law should be its success in changing behaviour. The success or otherwise of road safety laws, for example, is judged by the reduction in traffic accidents and deaths; not by the number of successful prosecutions for breaches of the law. In the area of retail leasing, to take one area, the Productivity Commission has noted in 2018: *"while there is a relatively limited case history pertaining to unconscionable conduct claims, threat of action under unconscionable conduct provisions appears to have had an influence on market conduct."*

The relatively small number of unconscionable conduct cases brought before the courts is the result of a range of factors: the small number of complaints actually made to the ACCC (itself an indication that the incidence of such behaviour has been exaggerated); the wide availability of alternative forms of relief, both under the Act and under other legislation; a better educated and better informed small business constituency; and a more heavily regulated market in the retail tenancy and franchising industries.

It is our experience, for instance, that major shopping centre owners and managers now devote significant resources to education and compliance courses for their staff in order to ensure they are aware of their legal and ethical obligations in dealing with tenants, franchisees and other parties. No reputable shopping centre owner or manager wants to be accused of acting unconscionably or to be found to have acted unconscionably. Such a finding has wider commercial ramifications, as well as the liability flowing from the particular action.



The most recent review of the unconscionable conduct provisions commenced with an inquiry in 2009 by the Senate Economics Committee into the statutory definition of unconscionable conduct. Following recommendations by that Senate Committee the Federal Government established an Expert Panel (comprising Professor Bryan Hourigan, Mr Ray Steinwall and Mr David Lieberman) to undertake further examination. The Expert Panel recommended the inclusion in the unconscionable conduct provisions of a number of principles to assist courts in the interpretation, development and application of the provisions. These were subsequently included in the Act in 2011 and began operation in January 2012.

In the light of these recent legislative amendments, and the fact that they have been operative for only four years, there is no justification for further amendments at this time. The statutory interpretation of the unconscionable conduct provisions continues to evolve and the courts should be given a reasonable opportunity to test whether these amendments have satisfied previous claims that the provisions are difficult to interpret.

This is consistent with the findings of the Harper Committee in last year's Review of Competition Policy and Law. The Committee, in its final report in March 2015, noted two recent Federal Court decisions in actions brought by the ACCC. The Committee noted these cases indicated the current provisions are working as intended. The Committee recommended that there be an ongoing review of these provisions as other matters arise and, if deficiencies become evident, they should be remedied. The Issues Paper does not raise any deficiencies for either the ACCC, or the courts, and recent cases have not highlighted any concerns (other than the amount of penalties, which we address in section 2.6 of this submission).

For these reasons we consider there should be no amendment to the unconscionable conduct provisions at this time.

#### *Exclusion of publicly listed companies*

The Issues Paper asks whether the prohibition against unconscionable conduct "*should be extended to protect all businesses including publicly listed companies*". We have also noted comments by the Chairman of the ACCC, Mr Rod Sims, that the protections in section 21 should be extended to publicly listed companies. Mr Sims was reported as saying, when addressing on 16 March 2016 the ACCC National Consumer Congress, that the prohibition against publicly listed companies in section 21(1) of the Act was out dated; that ASX listing is no longer a reflection of size; and that any company should be able to take action if they are on the receiving end of unconscionable conduct.

ASX listing might not be perfect proxy for size but it remains a reasonable proxy for size. More significantly ASX listing is an indication of financial, strategic and business sophistication. Listed public companies are, by definition, sophisticated businesses which have media and public prominence, financial resources and access to capital. Such companies have plenty of opportunities, by commercial and other means, to respond to actions which they consider might be unconscionable. Such companies do not need the protection of Parliament in their commercial dealings.

This would also be an 'all or nothing' amendment. If the listed public company exclusion is removed there would be nothing to prevent, say, Woolworths or Coles using these provisions to bring unconscionable conduct actions against a supplier or a landlord. It is only necessary to write those words to realise what a nonsense this proposal would be in practice.

When the original section 51AC was introduced into the former *Trade Practices Act* in 1998 there was a limit of \$1 million on the size of transactions which would be caught by the provisions. This threshold was increased to \$3 million in 2001; to \$10 million in 2007; and was removed completely in 2008. This gradual 'creep' in the extent of commercial regulation by the national Parliament would be exacerbated even further if the current exclusion of listed companies was removed.

Parliaments have always recognised that some businesses are sufficiently large not to need legislative protections. Retail tenancy legislation in some states, for example, excludes retailers which are listed public companies from receiving the protections contained in that legislation. Large retailers – those whose floor area is larger than 1,000 square metres or whose annual occupancy costs exceed \$1 million, whether publicly listed or not – also do not receive the protections of retail tenancy legislation.

The ACL already recognises that many businesses (i.e. those with more than 20 employees or those with contracts worth more than \$300,000 a year) should not receive the protections of the unfair contract terms protections. The prohibition on publicly listed companies from bringing unconscionable conduct provisions is entirely consistent with these precedents and should be maintained.

If the publicly listed company exclusion is removed by this review, then the monetary threshold on the size of transactions 'caught' by this provision must be reinstated. In our view the threshold should be set at \$3 million, which would be more consistent with the monetary thresholds contained in the ACL for the 'small business unfair contract terms law'.

The ACCC has admitted in the *ACCC Compliance and Enforcement Policy* (February 2016) that it does not have the resources to act on all complaints made to it. The policy states that the "ACCC cannot pursue all the complaints it receives about the conduct of traders or businesses and the ACCC rarely becomes involved in resolving individual consumer or small business disputes. While all complaints are carefully considered, the ACCC's role is to focus on those circumstances that will, or have the potential to, harm the competitive process or result in widespread consumer detriment. The ACCC therefore exercises its discretion to direct resources to matters that provide the greatest overall benefit for competition and consumers." It therefore makes little sense for an organisation which does not have the resources to pursue all consumer and small business complaints to stretch those resources even further by permitting big businesses to also make use of the law.

## Recommendations

2. No amendment be made to the unconscionable conduct provisions in Part 2-2 of Schedule 2 of the Act until the amendments which began operation in 2012 have been given a reasonable period to be tested, including by the courts.
3. No amendment be made to the exclusion of 'listed public companies' in section 21(1)(a) and section 21(1)(b) of Schedule 2 of the Act. If this recommendation is not accepted, and the public company exemption is removed, this must be accompanied by the reintroduction of a monetary threshold (of \$3 million) on the supply and acquisition of goods and services captured by section 21.

### 2.3 Meaning of 'unfair' in section 24

The Issues Paper raises the issue of “*whether the current approach to determining if a term is 'unfair' . . . is sufficiently clear*”.

The term 'unfair' is highly subjective and is incapable of precise definition. The Productivity Commission warned in 2008: “*Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to . . . potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty.*” This is why legislatures have previously steered clear of using this term as a legal norm or standard (rather than a desirable guiding principle) in transactions between businesses.

Because each party to a commercial transaction is obliged to protect its own interests, the concept provides no meaningful guide as to how one business is to act in a particular transaction with another business. Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect clear, confident and consistent answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench.

Section 24 (Meaning of unfair) and section 25 (Examples of unfair terms) include vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions, rather than clear and consistent standards. Section 24(2), for example, affords a court an extraordinarily wide discretion in that it “*may take into account such matters as it thinks relevant*”. While this might not be consequential in a business to consumer contract it can have profound consequences in the context of business to business regulation. It is not clear whether, and to what extent, this discretion may be read down so that it is confined to matters relevantly connected to the actual findings that the court is required to make in relation to the definitional elements of section 24.

This wide discretion in section 24(2) also conflicts with the separation of powers doctrine which requires that all regulation should set down clear and identifiable standards, which are capable of being interpreted and applied correctly and consistently by the courts, without wide judicial discretion on subjects of subjective merit which require arbitrary or prerogative judgment. Section 24 and 25 ignores this doctrine by including vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions and personal notions of 'fairness', rather than clear and consistent standards.

We therefore recommend that the words “*may take into account such matters as it thinks relevant, but*” be deleted from section 24(2) of Schedule 2.

Section 24(2)(a) also provides that the courts “*must take into account . . . the extent to which the term is transparent*”. Section 24(3) provides that a term is transparent if, among other things, it is “*expressed in reasonably plain language*” and “*readily available to any party affected by the term*”. These provisions are unexceptional in the case of a business-to-consumer contract. In the case of a business-to-business contract, however, such a provision is naïve. Commercial transactions are usually very complex and it is nonsensical to assume, say, that a lease to rent premises for five years or more in a major shopping centre, which involves complex infrastructure and operation, is a seven-day-a week concern, has hundreds of tenants and hundreds of millions of dollars in turnover, can be equated to, say, entering into a contract for the purchase of a mobile phone.

We therefore recommend that the words *"having regard to the nature of the contract"* should be added after *"expressed in reasonably plain language"* in section 24(3)(a).

We also consider section 24(1)(c) should include a materiality test. At present a court could find a term of a contract to be unfair even if the detriment is insignificant and even trivial. The words *"material detriment"* should be substituted for *"detriment"*.

We note that the Issues Paper also raises the question of whether the protections should extend not only to particular unfair contract terms but also to a contract that is unfair as a whole (2.2.3). We note that no evidence or justification has been provided for taking such an extreme step. Presumably this would involve repealing the provision in section 26(1)(a) that excludes from challenge a term that *"defines the main subject matter of the contract"*. 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 ensure and be enforceable and are not lightly put aside by courts. The extension of the unfair contract terms regime in the ACL to also include business-to-business contracts is already a radical departure from this principle and one that other comparable countries have not taken. To extend these protections even further, particularly without justification, would undermine business confidence in Australia.

## Recommendations

4. The words *"may take into account such matters as it thinks relevant, but"* be deleted from section 24(2) of Schedule 2.
5. The words *"having regard to the nature of the contract"* should be added after *"expressed in reasonably plain language"* in section 24(3)(a).
6. The words *"material detriment"* should be substituted for *"detriment"* in section 24(1)(c).
7. The unfair contract terms protection should not be extended to include the contract as a whole.

## 2.4 Determination of 'standard form contract' in section 27

The ACL does not include a definition of a 'standard form contract'. Section 27 of Schedule 2 lists a series of matters which the court *"must take into account"*, although the court is also able to take into account *"such matters as it thinks relevant."*

By not defining a standard form contract the ACL intentionally casts the net as widely as possible. In a business-to-consumer context that is understandable. The sheer volume of transactions for, say, mobile phones - where the volume may run into thousands per day - means such contracts have to be 'standard' to enable the demand to be met without incurring significant delays and imposing significant transaction costs. For consumer contracts there is unlikely to be an argument as to whether the contract is a standard form contract or not, since such contracts are generally presented as a 'take it or leave it' contract. In the case of a 'consumer contract' the current approach to determining if a contract is a 'standard form contract' does not appear to have caused problems. We note there does not appear to have been any case law on this section since it was introduced.

In the case of a 'small business contract', however, things are rarely so clear cut and the current approach in section 27 is far from clear. The difficulty in practice is that most commercial transactions involving a contract usually commence with a standard form contract according to most of the indicia contained in section 27. For example, where certain transactions are frequent, it is standard and sensible business practice for a contract to be "*prepared by one party before any discussion relating to the transaction occurred between the parties.*" In the case of retail leasing the current state and territory law requires a landlord to provide a copy of the draft contract to a tenant as soon as negotiations commence (see, for example, section 9(1) of the NSW *Retail Leases Act*).

The amendments to the ACL in the 2015 Bill have left businesses in a state of uncertainty on this issue. At the present time the ACCC is unable to provide guidance as to how much variation of a standard lease has to occur before this contract is no longer a 'standard form contract'. Nor is the ACCC able to advise whether the regulators or the courts will accept a signed statement from a lessee that it was given an effective opportunity to negotiate the terms of the contract [other than the terms setting out the upfront price]. It seems unlikely that the ACCC will be able to give this guidance since there does not appear to be a provision in section 27 which can provide any comfort. Given section 27 incorporates a 'reverse onus of proof' it is particularly important that greater certainty on this issue is given to businesses.

The consultations which preceded the 2015 Bill made clear that the market failure that the law was supposed to address was the alleged prevalence of 'take it or leave it' contracts in business-to-business transactions. Indeed, in the Explanatory Memorandum (EM) for the 2015 Bill, the terms 'take it or leave it contract' and 'standard form contract' are used interchangeably.

The Regulation Impact Statement (RIS) which preceded the 2015 Bill does include a definition of a 'standard form contract': "*Standard form contracts are pre-prepared contracts typically offered on a 'take it or leave it' basis by a party with greater bargaining power. Generally, a contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract when agreeing to it.*" (p.1) Similarly the EM for the 2015 Bill notes that "*small businesses, like consumers, are vulnerable to unfair terms in standard form contracts as they are offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate terms.*" (p.3)

The behaviour that the law should address, therefore, is the practice of 'take it or leave it' contracts, not the use of 'standard form contracts' (as commonly known), which are an efficient, practical (and, in some cases, a compulsory) means of commencing contract negotiations. We propose, therefore, that the definition of a 'standard form contract' included in the RIS should form the basis of a definition to be included in section 27(2) of Schedule 2 and we have recommended this below.

If this recommendation is not accepted, we believe that a 'safe harbour provision' needs to be incorporated in section 27 to provide guidance to businesses and to ensure comfort that a contract freely entered into by both parties will not subsequently be declared a 'standard form contract'.

## Recommendations

8. Section 27 of Schedule 2 be amended to provide: "A *small business contract* is considered to be a *standard form contract* if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract."
9. If this recommendation is not accepted we recommend that section 27 of Schedule 2 be amended to provide that if the counter party to a contract varies at least one term of a draft contract prepared by the other party (other than the terms setting the 'upfront price') then the contract is no longer considered a 'standard form contract'. Alternatively a provision be inserted to the effect that a contract is no longer a standard form contract if the counter party to a contract provides to the party which prepared the contract a signed statement that it has been given an effective opportunity to negotiate the terms (other than the terms setting the 'upfront price') and is satisfied with the contract entered into.

### 2.5 Calculation of 'upfront price' in section 26

The 2015 Bill used the existing ACL concept of 'upfront price' as the basis for coverage of the new law. The monetary transaction thresholds refer to the upfront price payable under the contract. The concept of upfront price is also used in the ACL (in section 26(1) of Schedule 2) as one of the terms of a contract which cannot be challenged as unfair.

While we accept the logic of using the 'upfront price' as the basis for defining the thresholds in the coverage of the new small business unfair contract law, determination of the 'upfront price' in a small business contract is inevitably more complex than for a consumer contract.

Section 26(2) states: "*The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.*"

For most consumer contracts the determination of the "consideration" provided under the contract is usually relatively straightforward and often calculated in monthly terms which can be multiplied over the number of months of the contract. For most commercial contracts this is far from straightforward. In the case of a retail lease, for example, the consideration usually comprises:

- Rent
- Rent increases usually escalated annually for each year of the contract. (This increase may be defined as a fixed dollar amount, a fixed percentage amount or an amount based on the CPI. To complicate matters further, some leases provide that at some point during the lease the new rent will be calculated by a valuer as a 'market rent').
- Operating expenses of the shopping centre ("outgoings") allocated proportionately according to a legislated formula. (These are the actual costs of the various statutory charges, such as land tax and council rates, and operating expenses, such as cleaning).
- Promotion and marketing levy (based on a formula agreed by the parties in the lease and usually paid monthly).

In other cases some or all of these separate payments are bundled into a single 'gross rent' lease which has the advantage of providing reasonable certainty for the landlord and tenant but does not have the transparency advantage of the previous example (generally known as a 'net rent' lease). Obviously if some of the items listed above are excluded as consideration in determining the upfront price then an uneven playing field will exist between those operating a 'net rent' lease and those operating a 'gross rent' lease.

The disclosure statement provided to a prospective tenant (required by retail tenancy legislation) will, among many other things, specify: the annual base rent to be paid by the tenant in the first year; the means by which the base rent will be escalated; the estimated promotion and marketing costs in year one; and the estimated outgoings to be paid in year one.

The EM for the 2015 Bill does provide some clarification on this matter but it is still unclear whether certain considerations attract the protection of s.26(1)(b). Courts have also been known to ignore provisions contained in EMs when interpreting the law.

The Act therefore needs to be more specific in how the "consideration" is to be calculated in the case of commercial contracts, such as retail leases. (All of the items listed above are matters for negotiation between the parties to the lease and are disclosed in advance to the prospective tenant and included in the lease. These are already regulated by state and territory retail tenancy legislation to ensure the tenant is fully aware. This is another reason why those retail leases which are already regulated by state and territory retail tenancy legislation should be excluded from the new law.)

Increases in rent in a lease (and prices in other commercial contracts) are usually negotiated between the parties when they enter into multi-year contracts. These provide for increases in rents and prices to occur on particular dates. In such cases the parties have voluntarily entered into a contract which permits the 'consideration' to be unilaterally varied according to an agreed formula. Such contractual terms could be regarded as a term that may be unfair according to section 25(f) of Schedule 2 i.e. "a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract."

The escalation of rents and prices in multi-year contracts is commonly based on the consumer price index and we therefore recommend that there is clarification in the Act that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.

## Recommendations

10. Section 26(2) of Schedule 2 be amended to provide: "*The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, or the formula for its calculation is disclosed, at or before the time the contract is entered into.*" Alternatively, if the review is reluctant to remove the words after the semi-colon in section 26(2), we recommend the following words be added after our suggested revised section 26(2): "*; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event beyond that for which any estimate is provided.*"
11. Section 25(f) of Schedule 2 be amended to specifically exclude an agreed price escalation term of a contract.
12. Section 26(2) should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.

## 2.6 Clarification of the definition of small business contract in section 23(4)

A 'small business contract' is defined in section 23(4) of Schedule 2.

When calculating the number of employees of a business to determine if that business employs fewer than 20 employees there is a need to add in related bodies corporate. Often the subsidiary 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. Similarly incorporated joint ventures often do not have any employees. It is nonsensical for such entities to be able to seek relief under the new small business unfair contract terms law. The Act 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 other sections of the Act (see section 45(8) and section 6 of Schedule 2).

Considerable time and expense will be involved for both large businesses and small businesses in determining the number of employees of a party with which they are contracting. This is in addition to the other additional 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 business 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 counter party about the number of people they employ.

We also note that it is possible for a small business to have multiple contracts, each of which is below the transaction thresholds, with another business and still receive the benefit of the new law for each contract. We suggest there should be an aggregation provision included in section 23(4) of Schedule 2.

### Recommendations

13. Section 23(4)(b) be amended so that 'a business' includes any related body corporate.
14. A safe harbour provision be included in section 23(4) allowing a business to rely on what it is told by the counter party about the number of employees the counter party employs.
15. 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 exceeds the monetary threshold.

## 2.7 Unfair commercial practices

We are firmly opposed to the ACL being extended to 'unfair commercial practices'. No justification is given in the Issues Paper for any such extension, other than the fact that there are such regimes in the European Union and the United States of America. We note that in both of these jurisdictions these prohibitions relate only to business-to-consumer transactions, not business-to-business transactions.

The Productivity Commission in 2008, in its *Review of Australia's Consumer Policy Framework*, noted Australia "should only consider pursuing a general unfair practices provision at a later time if warranted by strong evidence in its favour". No such evidence has been produced.



## Recommendation

16. The ACL should not be extended to include a prohibition against unfair commercial practices.

### 2.8 Remedies

#### *Deterrent effect of financial penalties*

The Issues Paper poses the question of whether or not the current maximum financial penalties are adequate to deter future breaches of the law. This has also been recently raised publicly by the Chairman of the ACCC, Mr Sims.

These penalties were set by agreement between governments in 2010 and came into effect on 1 January 2011. There is an argument that the maximum penalties should now be indexed to take into account inflation over the past six years.

No evidence has been produced that the current penalty regime is not having a deterrent effect. The only reference is to commentary by Federal Court judge, Justice Gordon, in proceedings which the ACCC brought against Coles in 2014 under section 22 (unconscionable conduct) of the ACL.

Justice Gordon commented "*the current maximum penalties are arguably inadequate for a corporation of the size of Coles.*" It should be noted, as a result of the consent orders in this case, Coles paid a financial penalty of \$10 million and also paid an amount of \$1.25 million towards the ACCC's costs. This is not an inconsiderable amount for any ASX-top 10 company.

Justice Gordon's comments, however, reflect a certain naiveté about the operation of the commercial world. The real significance of this case is the blow that Coles has taken to its corporate reputation by effectively admitting that it had behaved unconscionably towards its suppliers. That is a corporate stain which will linger far longer than the financial pain caused by losing more than \$13 million (after taking into account its own costs), money that could have been applied to its business. Already this admission has been widely reported in the media, and is regularly repeated, and it will take many years before this reputational damage is repaired. No company, particularly a publicly listed company, wishes to have to admit to, or to have been found guilty of, unconscionable conduct.

#### *Misleading and deceptive conduct*

The Issues Paper also raises (in sections 2.2.1 and 2.3.1) the question of whether the misleading and deceptive conduct provisions (section 18) should attract the same financial penalties and criminal sanctions that apply to the making of false or misleading representations (section 29).

Contraventions of section 18 already attract a variety of remedies, including injunctions, damages and compensatory orders. The emphasis, properly, is on deterrence, remedies and compensation.

We strongly oppose extending the financial penalties in Part 5-2 to include a breach of the prohibition on misleading and deceptive conduct. We also strongly oppose the use of criminal sanctions. Such breaches often occur inadvertently or accidentally and the consequences of such breaches are often not substantial. As a consequence a lesser standard of proof, based on the balance of probabilities, is required for determining whether or not a breach has occurred. We can find no justification in the Issues Paper for conflating the penalties in sections 18 and 29 of the ACL.

### *Unfair contract terms – monetary penalties*

The Issues Paper also raises the question of whether regulators should be able to seek monetary penalties against businesses in breach of the unfair contract terms provisions, in addition to having the term declared void (2.2.3). The Issues Paper provides no justification for raising this question. Monetary penalties are neither necessary nor appropriate. The business, as well as having incurred legal costs (which are likely to be significant since there is a 'reverse onus of proof'), will also lose the protection of the contract term, which it obviously regards as being reasonably necessary to protect its legitimate interests. Given the vagueness and uncertainty involved in the definition of 'unfair', and how subjective such a court decision will inevitably be, there can be no justification for a monetary penalty. Once a court declares a term unfair, it has a range of powers to enforce its decision, including issuing an injunction and making various orders.

### **Recommendations**

17. The maximum financial penalties in the ACL should be indexed to take into account inflation since these penalties were set in 2010.
18. The misleading and deceptive conduct provisions in section 18 should not attract the same financial penalties as those in section 29 and should not involve criminal sanctions.
19. Monetary penalties should not be introduced for breaches of the unfair contract terms provisions.

### **2.9 Multiple regulator model**

We note that an independent review and assessment of the 'single law, multiple regulators' arrangement for the ACL is being undertaken by the Productivity Commission separately to this review.

We believe this model, while it may have been appropriate when the ACL was confined to business-to-consumer contracts, is not appropriate now the ACL has been extended to include 'small business contracts'.

The SCCA will be making a submission to the Productivity Commission's review on this issue.

## 3. SHOPPING CENTRE COUNCIL OF AUSTRALIA

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The Shopping Centre Council of Australia (SCCA) represents the major owners, managers and developers of shopping centres in Australia. Our members are: AMP Capital Investors, Blackstone Group, Brookfield, Charter Hall, DEXUS Property Group, Eureka Funds Management, GPT Group, Ipoh, ISPT, Jen Retail Properties, JLL, Lancini Group, Lendlease, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group, Stockland and Vicinity Centres.

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