

# Unfair terms nasty business

## Opinion

Frank Zumbo

**T**he imminent enactment of federal laws dealing with unfair contract terms means Australia will join those jurisdictions that have long had such laws.

The Europeans have them. The English have had them since 1994 and the Victorians since 2003.

The changes, part of the government's overhaul of national consumer protection law, ban unfair terms in standard contracts and give the Australian Competition and Consumer Commission new powers.

As unfair terms are an entrenched part of industry-wide standard contracts, it's time for a national framework to deal with such nasty terms.

Despite attacks from vested interests, the laws boost confidence in standard contracts and are to be welcomed. Rather than taking a defensive posture, critics from the big end of town should turn the proposals into a positive and take the lead by exploring a co-operative approach to fairer contracts. That's not to say big business should compromise their legitimate business interests. Contracts should benefit both parties, rather than the larger party alone.

The proposed unfair terms framework will target contracts that cause a significant imbalance between the rights and the

obligations of the parties. It won't interfere with terms reasonably necessary to protect the legitimate interests of the larger party.

This approach represents a careful balancing of the need to weed out unfair contract terms with the need to maintain business certainty.

Such an approach is relevant to both consumer contracts, and to business-to-business contracts involving small businesses.

Despite this, the federal Minister for Competition Policy and Consumer Affairs, Craig Emerson, has excluded small

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business from the proposals, even though the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen, and federal cabinet had previously agreed to include small businesses.

Emerson's reversal is very disappointing and runs contrary to federal cabinet's previous endorsement of Bowen's decision to include small businesses. There are more than enough safeguards in the proposals to maintain business certainty, while still giving small businesses a new, effective avenue to challenge unfair contract terms.

Suggestions by Emerson that the proposals would disadvantage small businesses in their ability to get finance can be readily dismissed as the global financial crisis has been making it harder for all businesses to get finance.

No evidence is offered of any disadvantage suffered by beneficiaries of such laws in other jurisdictions.

Unfortunately, the minister's decision will be detrimental to small businesses because they often face unfair terms in standard-form retail leases, franchises and supply agreements.

Is there a way forward on the issue? Of course there is. This involves adding a safe-harbour mechanism to the laws whereby big businesses could have the contract ticked off in advance as not being unfair under the laws. The mechanism would be voluntary and be administered by the ACCC in the same way as it administers the authorisation procedure under the Trade Practices Act.

The mechanism would be open and transparent and would set out legislative criteria to be used in reviewing the contract.

Providing safe harbours would give big businesses complete certainty, enable small businesses to be reinstated in the proposals and lead to fairer standard contracts for the benefit of both consumers and businesses.

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