



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

28 June 2018

Mr Michael Hirschfeld  
Procurement Coordinator  
Department of Finance

**By email:** [haveyoursay.procurement@finance.gov.au](mailto:haveyoursay.procurement@finance.gov.au)

Dear Mr Hirschfeld

### **COMMONWEALTH STANDARD TERMS CONSULTATION**

We support the provisions of pre-drafted contract terms for use by Commonwealth entities to promote consistency across Commonwealth contracts.

The first twelve draft clauses released for consultation appear to appropriately balance the rights and obligations of both Customer and Supplier. We draw your attention to Clause C.C.10 which frames obligations between the Customer and subcontractors engaged by the Supplier.

Australian small businesses generally participate in large Government procurement as subcontractors, or as secondary subcontractors to a larger subcontractor. As such we would recommend that clearer language is used to enforce that the obligations between the Supplier and subcontractor must be contained in contracts down the whole supply chain.

As highlighted by the Black economy taskforce report payment of subcontractors slows down the further along the supply chain a subcontractor sits. We further suggest that the need to include payment terms no less advantageous than the Customer's payments terms be drawn out in separate statement.

We submit for your consideration the following:

The Supplier must ensure that in any subcontract entered into by the Supplier for the purposes of fulfilling the Supplier's obligations under the Contract imposes on the Subcontractor the same obligations that the Supplier has under the Contract. Specifically, that the subcontract contains payment terms that are no less advantageous than the payment terms contained in this Contract.

The Subcontractor must ensure that in any secondary subcontract entered into by the Subcontractor for the purposes of fulfilling the Subcontractor's obligations under the Subcontract imposes on the secondary subcontractor the same obligations that the Subcontractor has under the Contract. Specifically, that the subcontract contains payment terms that are no less advantageous than the payment terms contained in this Contract.

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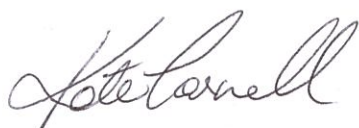
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Small businesses who seek our assistance frequently cite unfair contract terms as a cause of significant detriment to their business. We encourage continued regard for the terms of small business contracts as set out in clause 23, schedule 2 of the *Competition and Consumer Act 2010*. This will ensure that the legitimate interests of both parties to the contract are effectively considered and supported.

We recommend the provision of advice to Commonwealth agencies to ensure that contracts engaging small businesses do not inadvertently create unequal bargaining power between the parties. Attention should be drawn to contract terms that may be construed as unfair including those that permit the: unilateral variation of the contract, restrict the Supplier's ability to terminate the contract, restrict or omit options for dispute resolution and impose excessive fees, charges or interest rates on unpaid amounts. Such advice will assist to reduce the potential for significant detriment to small businesses.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Jill Lawrence on 02 6263 1558 or at [jill.lawrence@asbfeo.gov.au](mailto:jill.lawrence@asbfeo.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kate Carnell', written in a cursive style.

**Kate Carnell AO**

Australian Small Business and Family Enterprise Ombudsman