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Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer
Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

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MELBOURNE
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Dear Sir / Madam

Submission on Extending Unfair Contract Term Protections to Small Businesses

- 1 We refer to the Treasury's Consultation Paper, "*Extending Unfair Contract Term Protections to Small Businesses*" dated May 2014.
- 2 We welcome the opportunity to make the following submission in response to the Consultation Paper.

The Proposed Extension is Unwarranted and Not in the Interests of Small Businesses

- 3 At the outset, we acknowledge that the Commonwealth Government has committed to extending the current consumer unfair contract regime to small businesses. This was set out in the Coalition's *Real Solutions for All Australians* policy document in January 2013, before the Federal election. However, in our view and experience acting for small and large businesses, the proposed extension is unwarranted and not in the interests of businesses generally, or in the interests of small businesses.
- 4 The proposed extension would undermine freedom of contract and, perhaps even more importantly, certainty of contract. Certainty is critical for all businesses. In order to make plans and invest for the future, businesses need confidence that when they make a contract the deal is the deal. Making the enforceability of contracts uncertain is particularly harmful to small businesses, who cannot realistically afford the significant time, expense and additional uncertainty of litigation through the courts.
- 5 The current unfair contract regime in Part 2-3 of the *Australian Consumer Law* is inherently uncertain. It does not merely prohibit specific clauses that, in effect, would deny one party the entire benefit of the contract. Rather, the regime prohibits all "*unfair terms*" in "*standard form contracts*". Both of those concepts are defined not by precise criteria but rather by lists of various matters that a court may or must take into account in forming an essentially subjective view as to whether

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a contract term is “*unfair*” or whether a contract is a “*standard form contract*”. Such broad definitions may be appropriate to protect consumers but, in our view, they should not be introduced into commercial dealings between businesses.

- 6 The Consultation Paper argues that small businesses, “*like consumers, can lack the time and legal or technical expertise to critically analyse contracts, and the power to negotiate.*” In our submission, the analogy is inappropriate. Unlike consumers, businesses are about creating value and this inevitably involves operating efficiently and taking risks. All businesses can face time pressures and this may or may not be a real barrier to reading a standard form contract. Depending on the length of a standard form contract, reading it might typically take anywhere from 5 minutes to an hour. Further, there is no shortage of external legal or technical expertise available to businesses. The question for all businesses is how they should best allocate their time and financial resources. Similarly, a lack of bargaining power or other ability to negotiate amendments to contract terms does not mean a business has no interest in knowing or understanding what it would be agreeing to if it enters into the contract.
- 7 In our experience, if a business does not analyse a standard form contract before agreeing it, that is because the business considers it is not *worthwhile* to spend the time or other resources to do so. In other words, it is more efficient to assess and accept the level of risk associated with the standard terms than to spend resources critically analysing those terms.
- 8 In this context, it is important to understand the scope of the current unfair contracts regime. Under s 26 of the *Australian Consumer Law*, the regime does not affect the most important contract terms — those that define the main subject matter of the contract or set the price. The regime only applies to lesser, subsidiary terms. Those are precisely the types of terms that are appropriate and efficient to be specified in standard form contracts that are proffered and accepted, rather than being subject to detailed critical analysis and negotiation on every transaction. For businesses, and even for consumers, legal analysis and negotiation are not ends in themselves. Whilst it might seem fairer for supermarket shoppers to have the opportunity to negotiate the price of each grocery product, rather than accept or reject the supermarket’s take-it-or-leave-it offer, that would dramatically increase waiting times at the checkout.
- 9 Further, small businesses are already protected by a range of laws, including:
 - (a) misleading or deceptive conduct under Part 2-1 of the *Australian Consumer Law*;
 - (b) unconscionable conduct in Equity and under Part 2-2 of the *Australian Consumer Law*; and

- (c) the “consumer guarantees” under Division 1 of Part 3-2 of the *Australian Consumer Law*.
- 10 In particular, under s 3 of the *Australian Consumer Law*, the “consumer guarantees” protect individuals and businesses that purchase goods or services where:
- (a) the price does not exceed \$40,000; or
 - (b) the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - (c) the goods are a vehicle or trailer for use principally in the transport of goods on public roads;
- provided that, in the case of goods, the goods were not acquired for the purpose of resupply or to be used up or transformed in a production, manufacturing, repair or treatment process.
- 11 Importantly, the protections of the laws referred to in paragraph 9 above cannot be excluded by contract, whether standard form or otherwise.
- 12 The proposed extension would also increase red-tape and the regulatory burden on businesses, including small businesses.

Definition of “Small Business”

- 13 The Consultation Paper highlights a further difficulty with the proposed extension of the current consumer unfair contract regime to small businesses. The difficulty is how to define what is, and what is not, a “small business”. This inherent difficulty means that attempting to apply the unfair contracts regime based on the size of the relevant business will likely result in the arbitrary application of the provisions and increased uncertainty (and cost) for businesses. Many businesses may seek to portray themselves as small businesses in order to gain an advantage by being subject to the regime. Further, counterparties will not know whether they are contracting with a business that is a “small business” or not.
- 14 If, contrary to our submission above, the current unfair contract term regime is extended to apply to small businesses, the application of the regime should depend on the nature of the goods or services being acquired under the relevant contract, regardless of whether the acquirer is an individual or a business. Under s 23(3), the current regime applies to a supply of goods or services “*to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption*”. This could be amended so that the regime applies to a supply of goods or services “*to a person [which can be an individual or company] where the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption*”.

- 15 This approach would mean that the extension of the unfair contracts regime is limited to suppliers and to goods and services that are already, by and large, affected by the unfair contracts regime because those suppliers supply those goods or services to individuals. In other words, the extension of the unfair contracts regime in this way would give small businesses the same rights as individuals when they buy the same goods or services, but it would not impose the costs of compliance on suppliers who previously have not been subjected to the unfair contracts regime.
- 16 The proposed approach would also be clearer and more certain than applying the unfair contracts regime based on matters such as the number of employees or the turnover of a business. Those are matters that a counterparty cannot be expected to know.
- 17 The proposed approach is also largely consistent with that taken in New Zealand to the application of unfair contract term provisions. The application of the unfair contract term provisions under the New Zealand *Fair Trading Act 1986*, which are due to come into force in 2015, will be based on whether the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption (other than for purposes such as resupply).

Financial Products and Services

- 18 In our view, the unfair contract regime should not be extended to contracts for financial products and services provided to small businesses. The nature of financial products and services, and the risks involved, means that it is particularly important that contracts for such products and services are certain and enforceable. Extending the unfair contract regime to financial products and services provided to small businesses would increase uncertainty about the enforceability of financial contracts. We expect that this would increase the cost of finance to small businesses because of lenders' concerns about the risks of lending to small businesses subject to the operation of the unfair contract regime. Such a result would be a disaster for both small businesses and the economy more generally.

Yours sincerely


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