



14 May 2015

RP:rjp

Small Business, Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
Parkes ACT 2600

Via email: [AustralianConsumerLaw@TREASURY.GOV.AU](mailto:AustralianConsumerLaw@TREASURY.GOV.AU)

Dear Sir/Madam

### **Extending Unfair Contract Term Protections to Small Businesses**

The Law Society of South Australia wishes to make a submission to the Treasury for the purposes of its public consultation on the exposure draft of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* ("the Bill").

In summary, the Government's proposals will make amendments to the Australian Securities and Investments Commission Act 2001 (Cth) and the Competition and Consumer Act 2010 (Cth) to afford "small businesses" protections against unfair contract terms of the kind currently only provided to consumers. The amendments will empower a court to declare that an unfair term of a standard form small business contract is void. The context of the proposals is that small businesses can be vulnerable to unfair contract terms as they may lack resources for in-house legal expertise, for obtaining legal advice on low-value contracts, or for absorbing the costs associated to risks allocated to them under a contract.

The Society makes the following comments on the proposals.

Pursuant to clauses 8 and 32 of Schedule 1 of the Bill, a contract will be a "small business contract" if:

- (a) *at the time the contract is entered into, at least one party to the contract is a small business; and*
- (b) *either of the following applies:*
  - (i) *the upfront price payable under the contract does not exceed \$100,000;*
  - (ii) *the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$250,000.*

When working out the upfront price payable under a contract under which credit is or is to be provided, any interest payable under the contract is to be disregarded (clause 8).

Pursuant to clauses 8 and 29 of the Bill, a business is a "small business" if:

*it employs fewer than 20 persons. In counting the persons employed by a business, a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.*

The Society suggests that there is a practical issue in defining a small business solely by the number of its employees: how is the other party to a contract to be aware, or to be made aware, of the number of employees the business has?

In addition, the definition of a small business under the Bill may mean that some businesses well-resourced businesses are inappropriately deemed small businesses. There are examples of businesses employing fewer than 20 persons that are asset rich, have a large financial profile and are sophisticated, including special purposes vehicles and related entities of large corporate groups. This may be particularly problematic in respect of contracts for financial services, whereby it is conceivable that a contracting business with fewer than 20 employees with significant assets or income will potentially be afforded protections for unfair terms despite having resources to undertake proper risk management, take legal advice and bear risk under the contract.

In respect of the definition of a small business contract and “upfront price”, there may be circumstances in which a small business financial services customer has loan exposure well above the price limits. If that customer borrows additional funds below the price limits under a separate contract, it would appear that the additional loan would be covered by the protections.

For these reasons, the Society is concerned that the scope of the Bill is too broad and it will have unintended consequences. The purpose of the Bill is to give protection to small businesses that are in a similar position to consumers in that, for example, they are not well-resourced and consequently do not have ready access to legal and financial advice. Notwithstanding this, the Bill as presently drafted will protect large and well-resourced businesses. Further, the protection that may be afforded to those well-resourced 'small businesses' may (somewhat paradoxically) be to the detriment of true 'small businesses'; i.e. the regime may be used as a sword against those true 'small businesses', rather than providing those businesses with a shield.

The Society suggests that it may be easier and more beneficial to achieving the purpose of the proposals to define a small business contract with reference to "total consideration" under the contract rather than upfront cost. This may be particularly beneficial with respect to financial services which often do not have an upfront price.

With respect to the potential impact on the banking and finance industry particularly, the Society makes these additional comments:

- Banks are already subject to numerous compliance obligations and disclosures and must act honestly, fairly and efficiently when providing financial services under the Corporations Act.
- There is a high risk that some contract provisions that ultimately protect a

bank's legitimate interests (but not necessarily consumer small businesses) will be challenged and may be deemed unfair.

- It is not clear how the proposals in relation to overdrafts, variations and other changes to existing contracts will operate.


In addition, as the number of employees of a contracting party will not ordinarily be known to the other party to the contract, it is conceivable, if not likely, that one or more of the contracting parties will not know, at the time of entering into the contract, whether the unfair contractual term provisions would apply to the contract. The application of the unfair contractual term provisions might fundamentally change the respective risks accepted by the parties to the contract. This changed risk profile will not have been priced by the parties to that contract.

Accordingly, the Society submits that an 'opt-in' or 'notify' process should be a pre-requisite to enlivening the unfair contractual term provisions. For example, if a party to a contract were to represent that they were a 'small business' (however ultimately defined) to the counter-party to the contract at or before the time of entering into that contract, then the unfair contractual term provisions would be enlivened and, as such, both parties would then know that the provisions apply, or may apply, subject to the satisfaction of remaining criteria (price, etc).

Separately to the proposed implementation of the unfair contractual term provisions, the Society reiterates that there is a fundamental public policy issue with the proposed regime, being that it increases the uncertainty surrounding the enforceability of commercial contracts. The implementation of such a regime is, in effect, asking the judiciary to determine what may be 'fair' or 'unfair' between commercial parties in respect of contracts which may have been entered into many years previously. The Society submits that there is therefore a very real risk of increased litigation between commercial parties, with a resultant increased burden on the legal and justice systems.

Finally, the Society notes that the Bill includes a 6 month transitional period (i.e. changes will become effective six months after receiving Royal Assent). The Society is concerned that the time frame for implementation is too short, and suggests a 12 month period would be a more reasonable time frame.

Yours sincerely



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