



**Small Business  
Development Corporation**

Our Ref: D15/2090

Exposure Draft Consultation:  
Extending Unfair Contract Term Protections to Small Businesses  
Australian Treasury

## **UNFAIR CONTRACT TERMS**

The Western Australian Small Business Development Corporation (SBDC) has been a strong supporter of the Federal Government's proposal to extend the unfair contract term protections currently available to consumers to cover the small business sector.

In line with our previous submissions on this proposal, the SBDC contends that many small businesses have suffered detriment as a result of an unfair contract term being enforced against them and that in the absence of legislative protection they remain vulnerable to unreasonable business risks and practices. In the SBDC's experience, a small business may be just as susceptible (if not more) as individual consumers to the legal consequences of unfair terms in standard form contracts, especially in regards to the quantum of the detriment that can occur.

It can be argued that the detriment to small businesses caused by unfair contract terms is potentially greater than that suffered by consumers due to the overall value and length of the contracts entered into and the impact that specific terms can have on their finances (for example, changes to payment terms and delays in the payment for the supply of goods and services can significantly impact on the cashflow and financial viability of a small business and their ability to promptly pay their staff, suppliers and other creditors) as well as the flow on impacts on the small business owner and their family (including bankruptcy, stress and family breakdown).

As such, the SBDC strongly supports the reform's objective of promoting fairness in contractual dealings with small businesses.

The SBDC also recognises that such intervention necessitates an appropriate balance being struck between protecting the legitimate interests of small businesses (such as the fair allocation of risk) and the ability of parties to negotiate and enter into their own commercial arrangements (including the concepts of "freedom of contract" and "sanctity of contract"). This tension has been recognised by the Federal Government by limiting the application of the proposed protections to small business transactions under certain thresholds, based on business size and transaction value. Further, these thresholds also limit this intervention so as not to apply to contracts where it would be reasonable for a business to undertake appropriate due diligence before signing.

As highlighted in our earlier submissions, the challenge for lawmakers in this regard has been on appropriately defining what a “small business transaction” is for the purpose of applying the protections. In this context, consideration had to also be given to ensuring that the resulting protections provide a degree of certainty, are effective and also minimise additional compliance costs for small business operators (in their capacity as both suppliers and acquirers of goods and services).

In this regard, the SBDC had argued that using a factor-based approach (i.e. number of employees, value of the transaction) to defining small business transaction may have unintended consequences. These relate to concerns about such factors creating circumstances in which a small business on the margins may fall in and out of the legislative protection should that factor change (such as taking on additional staff), as well as the potential for uncertainty arising from changes to a small business’s circumstances during the life of the contract (i.e. would the protections continue to apply?).

While the SBDC’s preference was for an “exclusion definition” (i.e. defining what is **not** a small business transaction for the purposes of the legislation) to apply, in the absence of any protections currently in place the proposed approach – based on the small business transaction limited to small businesses with fewer than 20 employees and to standard form contracts valued up to \$100,000 (or \$250,000 if its duration is more than 12 months) – is a step in the right direction and is likely to be largely welcomed by the small business sector.

However, given the potential for this factor-based approach to lead to confusion, lack of clarity or other unintended consequence, the SBDC would strongly urge the Federal Government to undertake a post-implementation review of the legislation (and any associated case law) within two years to ensure the protections are operating effectively and not leading to uncertainty, increased litigation and higher costs to small businesses. This is particularly the case in areas that cross-over with other regulated contractual relationships, most notably in the case of retail leases and franchise agreements.

In any case, the SBDC shares the Federal Government’s view that even with the introduction of unfair contract term protections for lower valued transactions, small business operators should be strongly urged to conduct appropriate due diligence for more significant contracts.

Please contact my office on (08) 6552 3300 if you would like to discuss these comments in more detail.

Yours sincerely



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