

Extending Unfair Contract Term Protections to Small Businesses

Submission by the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 22,000 calls for advice or assistance during the 2013/2014 financial year.

Financial Rights also conducts research and collect data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on the Consultation Paper: Extending Unfair Contract Term Protections to Small Businesses.

General comments about Small Businesses

Financial Rights Legal Centre is not funded to assist small business with advice. We do however give legal advice and financial counselling assistance to many small business owners with personal debts. From this experience we are well aware that small business owners:

- Can be as unsophisticated in money matters as any individual consumer;
- Hold very little bargaining power in negotiating products and services contracts; and
- Are often asked to sign non-negotiable standard form contracts

Based on our experience in this area, Financial Rights strongly supports the extension of unfair contract terms to small businesses. In particular, we contend that the unfair terms protection for small businesses should extend to financial services contracts and include insurance.

General comments about Insurance Contracts

We would also like to comment on the exclusion of insurance contracts from unfair contract term protections. Unfair contract terms protections currently apply to every other contract an Australian consumer is ever likely to enter and it has always been the view of consumer advocates that there is no sound reason to exempt the insurance industry. National unfair contract terms (UCT) laws apply to most contracts of financial products and financial services under Subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Act 2001* (ASIC Act). The laws were introduced as part of the *Australian Consumer Law* reforms on 1 July 2010 to protect consumers from unfair terms in standard form consumer contracts. The UCT laws apply to all sectors of the economy, and to all businesses operating in those sectors in Australia which use standard form contracts in their dealings with consumers. However, the UCT laws for financial products do not currently apply to contracts of insurance regulated by the *Insurance Contracts Act 1984*.

The process to fix this oversight was well underway, with numerous consultations and drafting proposed changes to the *Insurance Contracts Act*. We understand that the draft legislation just needs to be introduced into parliament. We would urge the parliament to proceed with enacting unfair terms legislation for insurance contracts for consumers urgently which would then enable similar legislation to be passed for small business following the outcome of this consultation.

Specific comments on Consultation Paper

Statement of the options and impact analysis of each option

We support option 3. We contend that 1 and 2 would not assist in reducing unfair terms. Option 4 is impracticable. We also contend that the unfair terms legislation for consumers has clearly been successful with standard form contracts being modified to remove unfair terms.

Financial Services and Products

We contend that the UCT provisions in the ASIC Act should be extended to small business. This would mirror what has happened with consumer contracts. We contend that small business is still liable to fall prey to very predatory loan contracts with unfair terms. We are concerned that predatory lenders who have been forced out of the consumer credit market by the National Consumer Protection Act 2009 are continuing to operate in the small business lending sphere, at great cost to small business operators. We contend that protections in financial services are also critical for small businesses.

We also note that insurance is a financial service and many small businesses rely heavily on insurance contracts to manage risk in their business. Small businesses are often affected by natural disasters in addition to home owners, and the recovery of the local economy is closely connected to the resilience of these businesses. In both the Victorian Black Saturday bushfires 2009 of and the Queensland floods of 2011 affected many small businesses who encountered difficulties claiming on their insurance. It is essential that unfair terms legislation also applies to insurance contracts being a part of financial services.

Case study

Mrs A ran a small business earning around \$650-700 a week. Her husband was on a disability support pension.

They needed a loan to pay off a mix of business and personal debts. Mr and Mrs L enquired about a personal loan with a payday lender, but were instead directed to a business lender who put them into a joint business loan for \$15,000. All the loan documents (around 100 pages worth) were signed after one 20-30 minute meeting at a McDonalds restaurant.

The "features" of this business loan included:

1. interest of 3% a week (156% pa), which reduced to 1.5% a week if payments were on time (78%pa). They fell behind in repayments and the business wound up. Just over a year into the loan, they had repaid more than \$19,000 but still owed over \$22,000 and interest was still accruing at \$660 per week at 3% per week interest
2. Two security contracts were entered into, one over specific items and another over all of their business and personal assets, both currently owned and any obtained in the future
3. An irrevocable power of attorney given over to the lender to exercise any rights under the contract.

Concluding Remarks

Thank you again for the opportunity to comment on the Consultation Paper. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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