



Australian Government

**Australian  
Small Business  
Commissioner**

12 May 2015

[REDACTED]  
Manager  
Consumer Policy Framework Unit  
Small Business Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear [REDACTED]

**Re: Draft Legislation – Extending unfair contract term protections to small business**

I am writing to provide some feedback on the draft legislation to extend the consumer unfair contract term protections to small businesses. My observations are in addition to our earlier submission on the discussion paper and are based on my experience and the feedback my Office has received from small business stakeholders.

Firstly, I congratulate the Consumer Policy Framework Unit for putting the draft legislation together for consultation. From a small business perspective, I am encouraged by the objectives of the Exposure Draft to reduce the incentive to include and enforce unfair terms in small business contracts and address the vulnerability faced by many small businesses when in contract negotiations.

While we generally support the Exposure Draft as released, we suggest that the monetary limit be examined. In this regard the Draft states that a contract is a small business contract if either of the following applies: (i) the upfront price payable under the contract does not exceed \$100,000; or (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$250,000.

In the main, these limits would be sufficient to cover a significant number of the transactional types of contracts that a small business would enter into as a consumer. However we have reservations as to whether the limits are sufficient for the foundational or structural contracts—such as loan contracts, franchise agreements, leases etc—where small businesses may be more vulnerable to market power factors.

The explanatory material provided with the Exposure Draft confirms that the draft legislation proposes to extend unfair contract protection for small business to include credit contracts. As such, if passed, the Courts could decide if provisions in loan contracts contain unfair terms.

However, while including credit contracts is supported, it is our experience that the upfront price paid for foundational or structural components for the business requiring finance often exceed the proposed limits. There are other avenues open to small businesses for considering disputes with loan contracts such as the Financial Ombudsman Service (FOS). Nonetheless, the FOS Terms of Reference excludes disputes where the value of the claim exceeds \$500,000.

This is particularly pertinent in credit contracts in the agriculture sector where the borrowings are often significant and the risk profile can differ from other small business activities.

As such, it is our recommendation that the monetary limit be examined (including at the 5 year review). We suggest that a higher limit would ensure appropriate coverage to better reflect the nature of foundational or structural contracts and capture the significant number of small business contracts that the limits as proposed would exclude.

For flexibility, consideration could be given to providing for the monetary limit to be set by regulation or by a Ministerial gazettal notice.

We also note that communicating these changes with small business will be critical to their successful implementation. Small business should be assisted in understanding the importance and operation of the legislation so that the provisions can be called on when appropriate. Also, when creating their own contracts, small business needs to be aware of the nature of the unfair terms covered by the legislation especially if agreements are structured using contracts of other businesses as precedents (such as in back-to-back contractual arrangements where there may be a need to mirror terms).

If you would like to discuss this letter in further detail please do not hesitate to contact either myself or Matthew McLeay on (02) 6263 1503 or at [matthew.mcleay@asbc.gov.au](mailto:matthew.mcleay@asbc.gov.au).

Yours sincerely



**Mark Brennan**  
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