FACT SHEET: Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Businesses

What is the purpose of the current consultation process?

The purpose of the consultation process is to seek stakeholder views on the draft legislation (Exposure Draft) for an extension of unfair contract term protections currently available to consumers to low-value contracts involving small businesses. The Explanatory Materials, circulated as part of the consultation, provide an explanation of the Exposure Draft and will form the basis for the Explanatory Memorandum.

The Government finalised the design of these protections, in conjunction with the states and territories, following a 10 week consultation process in mid-2014. The Decision Regulation Impact Statement explains in detail why an extension of consumer unfair contract term protections to low-value contracts is the Government's preferred approach for dealing with unfair terms in small business contracts.

What is the timeline for implementing unfair contract term protections?

Following the conclusion of the consultation process, the legislation will be finalised and introduced into Parliament. Once the legislation receives Royal Assent, a transition period of 6 months will ensue before the protections come into effect, which is anticipated to be in early 2016. Contracts that are entered into or renewed, or terms of existing contracts that are varied on or after the date the legislation comes into effect, will be required to comply with the new protections.

The Government has provided $1.4 million to the Australian Competition and Consumer Commission to help businesses comply with the new law.

How will the new protections work?

In the same way that an unfair term contained in a standard form consumer contract can be declared void, a court will now also be able to declare void an unfair term of a standard form small business contract. This will reduce the incentive to include and enforce unfair terms in small business contracts and will provide a remedy for small businesses when those terms are included in a contract.

Where a term is declared void, that term will be treated as if it never existed, however the contract will continue to bind the affected parties to the extent that the contract is capable of operating without the unfair term.

A contract will be deemed a small business contract if at the time it is agreed to, at least one party employs fewer than 20 persons and where the value of the contract does not exceed either $100,000, or $250,000 for contracts of more than one year in duration.[1] The protections will apply to small business-to-small business contracts, and for all contracts that meet the criteria, regardless of whether the small business is involved in the acquisition or supply of goods and services.

How will a small business calculate how many persons they employ?

In calculating persons employed, each full-time, part-time and casual employee constitutes one person. Only casual employees that are employed on a regular and systematic basis (not on a seasonal roster) are to be counted, consistent with the approach used in the Fair Work Act.

Will any sectors be exempt from the new protections?

The Commonwealth Minister will have the power to exempt the application of the unfair contract term protections for small businesses, where an industry-specific legislation or regulation is deemed enforceable and equivalent. This will ensure there is no duplication with protections contained in another law.

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[1] When applying this threshold to credit contracts, interest payable should be excluded. Further information on this is provided in the explanatory materials.

KEY CONCEPTS: Extending Unfair Contract Term Protections to Small Businesses

An extension of unfair contract term protections to small business contracts that are standard form will utilise the existing concepts that underpin the consumer unfair contract term protections, as currently defined in the Australian Consumer Law and *Australian Securities and Investments Commission Act 2001*. These include a test for unfairness and a list of factors that a court is required to consider when determining whether a contract is standard form.[2]

What is an unfair contract term?

An unfair term is defined as a term that:

• causes a significant imbalance in the parties' rights and obligations under the contract;

• would cause detriment (whether financial or otherwise) to a party if it were to be relied on; and

• is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.

Before deeming a term unfair, a court is also required to consider:

• the extent to which the contract is transparent — that is, if the term is expressed in reasonably plain language, legible and presented clearly and readily to the party affected by it; and

• the contract as a whole.

A term that defines the main subject matter or sets out the upfront price of a contract, or a term that is required or expressly permitted by law, cannot be declared unfair.

What is a standard form contract?

A contract is presumed to be standard form unless a party to the proceeding alleges otherwise. In addition to using its discretion in determining whether a contract is standard form, a court is required to consider:

• whether one of the parties has all or most of the bargaining power relating to the transaction;

• whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

• whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;

• whether another party was given an effective opportunity to negotiate the terms of the contract; and

• whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.

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[2] Detailed information on the existing consumer protections has been produced by the Australian Competition and Consumer Commission in their guide to the unfair contract terms law.