

15 May 2015

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

[REDACTED]

By email: AustralianConsumerLaw@treasury.gov.au

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Extending unfair contract terms protection to small business consumers

In this letter, the Financial Ombudsman Service Australia (FOS)¹ comments on the exposure draft of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* released for consultation in April. Thank you for granting us an extension for these comments.

Upfront price of credit contract

It is not clear whether the principal loan amount is included in the upfront price payable under a credit contract for the purpose of proposed subsection 12BF(4) of the ASIC Act². The existing subsection 12BI(3) provides that, when working out the upfront price of a consumer credit contract, principal is included. When the proposed amendments are made, the position in regard to principal will not be clear from section 12BF.

Proposed subsection 12BF(6) provides that, notwithstanding subsection 12BI(3), when determining the upfront price of a credit contract, the interest should be disregarded. It is unclear whether the words "despite subsection 12BI(3)" mean principal should also be disregarded.

¹ Information about FOS, and the disputes we handle, is available on our website www.fos.org.au. Overview information appears in our annual review, which is in "Publications" on the website.

² *Australian Securities and Investments Commission Act 2001*.

If it is intended that the upfront price of a small business credit contract should include principal but not interest, it is our view that subsection 12BF(6) should read as follows:

“For the purposes of subsection (4) in working out the upfront price payable under a contract under which credit is or is to be provided, include principal but disregard any interest payable under the contract.”

FOS can consider small business loan disputes relating to debt collection where the amount of the loan is less than \$2 million. If it is intended that the legislation will not apply to loans where the amount advanced is more than \$250,000, then there will be a significant gap between the application of the legislation and the jurisdiction of FOS to consider disputes about small business loan facilities.

Definition of small business

In our dispute resolution work, we see that confusion can arise where different definitions of small business apply. The definition in proposed subsection 12BF(5) of the ASIC Act is different from the definition of small business that already appears in 12BC(2) of the ASIC Act. Including two different definitions in the ASIC Act may create confusion in our view.


The definition of small business used in subsection 12BC(2) of the ASIC Act is also used in subsection 761G(12) of the *Corporations Act 2001* (Corporations Act). The same definition is also used in the Code of Banking Practice and the FOS Terms of Reference.

To ensure that the protections afforded to small business are applied consistently, we suggest subsection 12BF(5) should use the existing definitions of small business in the ASIC Act and the Corporations Act. Similar changes should also be made to the proposed amendments to the *Competition and Consumer Act 2010*.

Further information or discussion

If you would like us to provide further information or discuss these comments, please contact our Policy Manager, Carolyn Bruns, on (03) 9613 7389 or cbruns@fos.org.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Philip Field', written in a cursive style.

Philip Field
Lead Ombudsman – Banking & Finance
Financial Ombudsman Service