



Exposure Draft Consultation
Extending Unfair Contract Term Protections to Small Businesses
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email to AustralianConsumerLaw@treasury.gov.au

Dear Sir or Madam:

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

We appreciate The Treasury identifying the Office of the NSW Small Business Commissioner (OSBC) as a key stakeholder, and inviting us to make a formal submission during its consultation on the exposure draft legislation and explanatory materials for the extension of the consumer unfair contract term protections to small businesses.

We support empowering courts to declare void an unfair term of a standard form small business contract, thereby reducing the incentive to include and enforce unfair terms in small business contracts and providing a remedy for small businesses when those terms are included in a contract.

We offer the following feedback on the design of selected elements in the exposure draft legislation.

Meaning of small business

A business is taken to be a small business if it employs fewer than 20 persons (*excluding* casual employees that are not employed on a regular or systematic basis).

We note that this definition of small business is consistent with the definition used in the unfair contract term provisions of the Australian Consumer Law, and that it is also used by the Australian Bureau of Statistics as an identifier of small businesses.

The OSBC would consider certain businesses that employ 20 or more persons to still be small in some cases. Considerations other than head-count that we may take account of could include the labour intensity of the industry, turnover and profit per employee, the businesses' use of contractors etc.

Our office has received enquiries recently about unfair contract terms from businesses that employ more than 20 (but less than 30) persons. While noting that the proposed definition captures around 97% of all Australian businesses, we consider it unfortunate that some businesses that we would consider small (i.e. some proportion of the other 63,000 Australian businesses) would be ineligible to enjoy the protections proposed.

Level 43, MLC Centre, 19 Martin Place, Sydney NSW 2000. GPO Box 5477, Sydney NSW 2001

Phone: (61 2) 8222 4800 **Fax:** (61 2) 8222 4816 **Email:** we.assist@smallbusiness.nsw.gov.au

www.smallbusiness.nsw.gov.au

ABN 72 189 919 072

We accept that the same situation would be (albeit less) probable even if the threshold were increased to, for argument's sake, 50 persons.

We are reluctant to propose what would be an appropriate number for this legislation, because the OSBC presently does not define small business according to number of employees. Nevertheless, we encourage The Treasury to consider options to:

- modify this number,
- refrain from stipulating an employee head-count threshold, or
- permit a minister or court to use their discretion and make a determination upon request.

The latter is our suggested approach.

The U.S. Small Business Administration (SBA), by way of contrast, maintains small business size standards that define the largest a business (including affiliates) may be and still qualify as a small business for SBA and most other federal programs. The most widely used head-count standard is 500 employees (for most manufacturing and mining industries). Significant variance according to industry type is also evident, e.g. for new car dealers, the standard is 200 employees and for fuel dealers the standard is 50 employees¹.

Meaning of small business contract

A contract is a small business contract if, at the time it is entered into, at least one party is a small business; with the subject of the contract relating to the supply of goods or services or sale or grant of an interest in land, and the upfront price payable under the contract does not exceed either \$100,000, or \$250,000 if its duration is more than 12 months.

Value threshold

We appreciate that the two-tiered transaction value threshold reinforces the onus on small businesses to undertake due diligence for high-value transactions.

However, we expect that for a range of reasons, the appropriate due diligence often won't occur in practice. In the case of certain complex or industry-specific contracts, expert local advice may not in fact be reasonably available, e.g. in a significant proportion of regional areas.

While we expect that the proposed value thresholds would cover *most* small business transactions (i.e. by count, not value), we hold some concern about contracts above the value thresholds that would be excluded. Such high-value contracts can be especially problematic for small businesses.

We are aware of representations from industry associations that the proposed value thresholds wouldn't adequately capture contracts that detrimentally affect their members.

In relation to franchise contracts and retail lease contracts, we believe that many would be excluded. These types of contracts have traditionally attracted significant levels of concern from small business operators and we would consider it unfortunate that some franchisees and retailers might not be eligible to enjoy the protections proposed in relation to contracts that are central to their business.

¹ Summary of Size Standards by Industry Sector, available online at: <https://www.sba.gov/content/summary-size-standards-industry-sector>

Upfront price payable

We see significant room for manoeuvre in relation to the phrase 'upfront price payable under the contract'. Retail leases, for example, are complex contracts that can involve:

- fluctuating payments over the course of the lease,
- performance obligations such as the acquiring of insurance policies, and
- other obligations which can be very costly, such as fit-outs and re-fits.

Further, many leases involve *side-agreements* that regularly equate to between seven and 11 per cent of the value of the lease. These *side-agreements* can be drafted as being between agents and lawyers rather than the principal parties to a lease, and can incorporate the true value of the lease, including in some instances, the rent.

It's not clear to us whether or not the elements described above, as well as other foreseeable arrangements common in business such as rebates, commissions etc. would be considered part of the 'upfront price payable under the contract'.

The price payable can vary substantially from the price actually paid. Other Commonwealth legislation, such as the *Customs Act 1901*, contains guidance enabling authorities to distinguish between the two concepts, generally with the aim of an authority establishing the price *actually* paid as the determinative measure.

The Treasury is encouraged to consider the merit of legislating such that a minister or court can make determinations in respect of price actually paid.

Contract type

We understand that the proposed protections would apply where the subject of the contract relates to the supply of goods or services or sale or grant of an interest in land.

This definition appears unlikely to capture agreements for lease², potentially rendering the protections unavailable (if not already excluded by the value thresholds) for some retail tenants.

Expressly permitted by law

We note that the proposed unfair contract term protection does not apply to a term of a standard form consumer or small business contract that sets out the main subject matter or the upfront price of the contract, or a term that is required or expressly permitted by law.

The phrase 'expressly permitted by law' might be interpreted as referring to a term that has been i) prescribed by legislation, ii) judicially considered and enforced by a court, or iii) implied by a court.

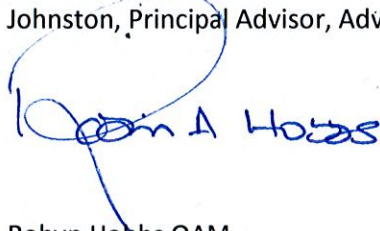
² 'An agreement for lease is a binding agreement between a landlord and prospective tenant to grant and/or to accept a lease in the future. It does not grant possession to the proposed tenant at the time it is entered into, but binds the parties to enter into the lease at some future date. The main distinction between a lease and an agreement for lease is that a lease gives the tenant an immediate right to exclusive possession of the premises. An agreement for lease grants the same right but at some future date. However, an agreement for lease still creates an equitable interest in the land, allowing a tenant to lodge a caveat to protect its interest'. (Source: *Agreements for lease: Back to basics*, available online at: http://www.dibbsbarker.com/publication/Agreements_for_lease__Back_to_basics.aspx)

Some contract provisions rely on, but vary in detail from a clause implied by statute, e.g. under s85 of the *Conveyancing Act 1919* (NSW), where rent or any part thereof is in arrear for the space of one month (although no formal demand therefor has been made) a landlord may terminate. This period is commonly reduced to two weeks by landlords. Whether the above example is 'expressly permitted by law' would naturally be a legal matter to decide, but demonstrates potential ambiguity on this point.

We're not in possession of information to suggest that this phrase has been problematic in the context of the Australian Consumer Law.

We believe that modifying this phrase to the effect: 'expressly permitted by any enactment' (if that is the intent) would serve to clarify. Alternatively, some guidance, perhaps in the explanatory memorandum would be helpful.

We appreciate the opportunity to comment on the exposure draft legislation and explanatory materials for the extension of the consumer unfair contract term protections to small businesses. Should you wish to discuss any of the issues raised in this submission, please contact Murray Johnston, Principal Advisor, Advocacy on (02) 8222 4842.

 Robyn A Hobbs 14.5.15

Robyn Hobbs OAM
14 May 2015