



**Tasmanian
Small
Business
Council**

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'Uniting Small Business'

Extending Unfair Contract Term Protection to Small Businesses – Legislation

The Tasmanian Small Business Council is pleased to respond to the invitation of Treasury to provide a submission in respect of the Exposure Draft of proposed legislation intended to provide unfair contract term protection to small business.

We express concern however that only providing only 14 days for consultation on the exposure draft of proposed legislation does not allow for any reasonable consideration of the problem or the various contentious issues raised by the legislative exposure draft that were not previously canvassed.

While it is appropriate to acknowledge the intent of the legislation and the protections that it will provide the proposed legislation falls far short of achieving any meaningful protection in regard to the important agreements that small businesses need to have in place for their very survival. In fact it seems that the legislation is totally un-responsive to any significant agreements that have major strategic intent and which may lead to the success or demise of a small business enterprise.

In particular it is clear that the authors of the legislation are focused on minor matters and small contracts rather than the important agreements of substantial monetary value. In particular the concern is the obvious exclusion from the legislation of "standard form" agreements which in many cases already contain clauses which are identified by the ACCC as being unfair by nature. Such contracts almost certainly exceed the contract values proposed and generally relate to tenancy, franchise and loan funding. It is suggested in the explanatory memo that small business owners "are more likely to seek legal advice" when considering such agreements. Such advice is useless when dealing with a "standard form" agreement which is offered on a take it or leave it basis.

Addressing the issue of unfair terms in "standard form" agreements is truly the key to providing a somewhat level playing field for small businesses.

Given that small business is regularly described (correctly) as the “engine room of the economy” surely the policy position of Government – as recommended by the most recent enquiries on the matter of unfair competition (Harper) and banking (Murray) should not be focused on allowing big business an unfettered pathway to rape and destroy small businesses at their will? More so, with the legislative support to allow unfair and unconscionable standard form agreements to continue.

Nothing in the draft legislation addresses the present inequities.

How is this intended to be addressed? The suggestion that a variation could trigger some form of fairness review is meaningless as the dominant party would not agree to any variation.

In particular we note that the proposed legislation restricts the definition of a small business to such an extent that the unfair contract term protections will cover only the smallest contracts of the smallest businesses. While we acknowledge the value of this small change, we do not accept that it adequately protects the 2.4 million small businesses that provide employment for around 80% of Australia’s workforce.

The proposal changes the present ASIC Act definition of small businesses and unnecessarily introduces financial limits to small business contracts of \$100,000 to \$250,000. It defies logic that a contract of \$100,000 is protected from unfair terms, but contracts of any more than this amount are granted no protection. It is difficult for small businesses and TSBC to understand why the proposed legislation should not, instead, read:

*“The unfair contract term provisions in subdivision BA of Division 2 of Part 2 of the ASIC Act protect consumers **and small business** only” (Treasury Legislation Amendment: page 4)*

*“The unfair contract term provisions contained in Part 2-3 of the ACL protect consumers and **small businesses** only” (Treasury Legislation Amendment: page 10)*

Any small business owner will tell you that the vast majority of occupancy and business contracts exceed the proposed limits. Unfair contract term protection will, therefore, not cover mortgages, most leases and loans and as a result, will not have the effect of giving the necessary protection to small businesses from unfair contracts with banks or with landlords.

Australian farming households, as an example of small businesses, had an average net worth of \$1.3 million in 2009-2010 according to the Australian Bureau of Statistics. This reflects the cost of farmland in Australia. This suggests that the vast majority of framing contracts in Australia with financial institutions would not be given protection by the proposed legislation from unfair contract terms. The majority of farmers "lack in-house legal expertise"

Further, the TSBC believe that the definition of small businesses in the proposed legislation of employing less than 20 people fails to take account of the nature of small businesses in Australia. Many employ more than 19 people on a regular, casual basis that will be precluded from the definition proposed by the amendment. This will see them receive no protection from unfair contract provisions.

Small businesses in the hospitality sector small supermarkets and retail businesses that are required to trade for seven days a week for example, regularly employ more than 19 staff members on a casual basis, reflecting the nature of this sector. We do not understand why an independent cafe would not be classed as a small businesses under this proposed legislation and thus denied even the marginal protection promised by the government under these proposed amendments.

The definition of a small business as less than 20 employees was chosen by Treasury as it has previously been used as a head count measure by the Australian Bureau of Statistics. The Small Business Council - in light of abuses by large business in the past decade - believe it is not reasonable to exclude a considerable number of the 2.4 million small businesses in Australia because of an arbitrary figure devised by the ABS many years ago and which may not even be relevant today. This standard is not satisfactory and should be reviewed.

The proposed legislation will have the effect of imposing a penalty on business growth and employment.

Let it not be said that TSBC is simply seeking to block the progress of fair and reasonable agreements. On the contrary there is an easy option for possible amendment. That is to have the wording changed to be all encompassing of any standard form agreement for any monetary value and introduce words like "*dominant party*" being the definition of the person offering the non-negotiable

standard form agreement and "lesser party" for the person who that has no option but to accept or reject the agreement.

*Prime Minister Tony Abbott recently said:
"Small business is the engine room of Australia's economic future. We want to ensure that small businesses have access to a level playing field so they can continue to grow, invest and create jobs"*

Small businesses are disadvantaged by their unequal relationship with contractual partners that use unfair contract provisions and misuse their market power.

Legislation that attempts to address these problems must be well considered by Treasury and small business in order to remedy this problem. As noted above 14 days for consultation is totally inadequate. TSBC would like to be able to list consideration of the proposed legislation on the agenda for the forthcoming National Small Business Summit in July 2015 and thus enable informed discussion.

Having addressed some detail items the concern is far bigger, in that the proposed legislation, irrespective of the definitions of dollar value or numerical definition of the minor party, it appears that the legislation actually removes the common law right to challenge such contracts on the grounds that they may be unfair. Not only that but it appears to makes it lawful for unfair contracts to be written provided that the monetary value exceeds the nominated figures.

There are two sides to every issue and in this case small businesses gain very little while giving away the right to fairness and legal protection in regard to the major agreements that will determine their future.

Using the proposed terminology one must ask; why would a contract, written in the same terms, for an amount of \$100,000 over one year be unfair while a contract written in the same terms for an amount of \$100,001 be fair? The proposed legislation would enshrine by law the right of the dominant party to include unfair provisions in such contracts.

By way of an example of the concerns expressed we attach a copy of a document submitted to the Harper review of unfair trading situations. Titled "The Great Australian Bank Scam" this document demonstrates how legally sanctioned unfair contracts are presently being used to exploit small businesses, primary producers (and consumers)

While Harper, Murray et.al are calling for free trade and competition this proposed legislation is the wolf in sheep's clothing. It is unbelievable that Treasury does not see this or that the States and Territories that have also agreed to the proposed terms cannot see the unintended impact. Perhaps it results from the fact that there has been little or no consultation on the proposed legislative definitions with small businesses in any of the States or Territories.

The Tasmanian Small Business Council respectfully requests that the proposed legislation be deferred until such time as a realistic period for consultation has been agreed and that the questions raised in this submission can be seriously considered. To do any less would be a further example of how small businesses are pushed into untenable situations by people or organisations with the power to do as they like.

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Att: "The Great Australian Bank Scam"