

11 May 2015

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

By email: AustralianConsumerLaw@treasury.gov.au

Dear Sir/Madam,

**Comments on the Exposure Draft and Explanatory Material regarding extending Unfair Contract Terms provisions to small business**

Telstra Corporation Limited (**Telstra**) welcomes the opportunity to provide comments on the Exposure Draft of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Unfair Terms Exposure Draft)*.

We recognise and fully support the need to protect small business interests in transactions. Small businesses form a valued part of Telstra's customer base and Australia's thriving small business sector delivers real benefits to the economy.

Our input to the Government's consultation process is focussed on ensuring the proposed extension to the unfair terms regime is clear and certain, and protects truly vulnerable small business consumers, rather than inadvertently capturing large value contracts.

**"Upfront price" as a threshold determinant of "small business contract"**

The proposed definition of "small business contract" creates some uncertainty of application, through the reliance upon the 'upfront price' definition already contained in the consumer unfair contract terms regime.

The Decision Regulation Impact Statement accompanying the Unfair Terms Exposure Draft ("**Regulation Impact Statement**") states that the proposed legislative design "seeks to reduce interference in the sanctity of the contract by using a transaction value threshold to encourage small business to conduct due diligence for more significant contracts"<sup>1</sup>. The Explanatory Memorandum to the Unfair Terms Exposure Draft similarly makes clear that the threshold for upfront price "reinforces the onus on small businesses to undertake due diligence for high-value transactions"<sup>2</sup>. Therefore it appears that the extension to the current regime is not intended to apply to high value contracts with small businesses, on the basis that it is reasonable in relation to such transactions that they undertake appropriate due diligence.

We agree a transaction value threshold is an appropriate way to define the scope of the extended unfair terms regime and should aim to provide a certain and objective criteria so as to provide confidence for transacting parties. However, by linking the relevant threshold value to the "upfront price" (as defined), the legislation will inadvertently extend to contracts with an

<sup>1</sup> Decision Regulation Impact Statement – Extending Unfair Contract Term Protections to Small Businesses, Consumer Affairs Australia and New Zealand, page 29.

<sup>2</sup> Explanatory Material to the Exposure Draft Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, para 1.13.

annual contract value in excess of the proposed \$100,000 and \$250,000 thresholds, thereby undermining the policy intention.

This is because many volume driven contracts contain 'upfront prices' which are based on a per unit construct. For these types of contracts a focus only upon the individual upfront or unit price per good or service will not be reflective of the overall spend or value of the relevant transaction. For example:

- Telstra has agreements in place with various small business customers to provide all of their telecommunications needs (such as mobiles, fixed and internet services and associated goods and equipment). The individual price per service/good may be less than \$100,000 (e.g. a mobile service may be \$80 a month) but the total payment for mobile services may be 'contingent' on the number of services acquired such that the total value of all mobile (and other) services under the contract may be over \$100,000; and
- Franchise or dealership arrangements involving small businesses often involve a range of fees, payments and commissions that may only be payable (or conditional upon) events occurring, such as the making of a sale or the ordering of a product. In many instances, there are no fixed payment requirements, or any minimum sales or order requirements.

Another example would be mortgage brokerage agreements. In these agreements brokerage fees and trailing commissions are often paid contingent upon a variety of events and supply and distribution arrangements, where the unit price of the relevant individual goods or services may be known and agreed by the parties upfront, but the total amounts expected to be paid are contingent on the number of goods ordered or the extent of the services supplied over the term.

In these cases there is a real risk that the definition of "upfront price" means that certain payments, fees and commissions are excluded from the calculation of the thresholds and contracts with an annual value well in excess of the thresholds are captured by the regime.

It appears that the intention of the Exposure Draft (as explained in the Regulation Impact Statement) is that the thresholds be calculated with reference to the overall value (including 'contingent' payments), and not the individual prices of goods or services provided under the contract. In this context, the concept of 'upfront price' is not appropriate to determine the fundamentally important question of the value threshold of a contract. It builds significant uncertainty into the most basic level of inquiry regarding the application of the legislation and therefore will lead to business uncertainty and wasted compliance expenditure.

Telstra appreciates that the existing unfair terms regime already utilises the concept of 'upfront price', although significantly in that context it acts to exclude certain contractual terms from falling within the regime. This is a fundamentally different function to that which is currently proposed, which is to form part of a definition that establishes the value thresholds of contracts for the purpose of identifying whether they, as a whole, will be subject to the unfair terms regime.

These concerns will affect a number of industries and may also lead to detrimental effects for small business, including for example the potential increase or reallocation of what small businesses are charged "upfront".

Further, it is likely that innovative pricing structures, which reduce the upfront charges payable by small businesses in large value contracting arrangements, will no longer be offered to smaller business customers if this legislative provision is enacted as currently drafted, which

has broader undesirable implications. Risks will need to be reallocated and managed differently as a result. This could detrimentally impact both suppliers and acquirers of goods and services.

### Proposed solution – threshold of actual or estimated contract value

Telstra considers that a threshold test based on the actual or estimated value of the contract would be more appropriate, reduce the scope for regulatory error and increase business confidence and certainty. Applying this to the Unfair Terms Exposure Draft, Telstra's recommendation is as follows:

*A contract is a **small business contract** if:*

...

*(c) either of the following applies:*

*(i) the total annual value under the contract will not, or is estimated on reasonable grounds not to, exceed \$100,000;*

*(iii) the contract has a duration of more than 12 months and the total value under the contract will not, or is estimated on reasonable grounds not to, exceed \$250,000;*

In our view, such a concept will significantly reduce the regulatory uncertainty of the regime. Both small and large businesses alike will be considerably better placed in their ability to assess the actual or likely monetary value of a contract if it is based on actual or estimated spend, rather than a problematic definition of “upfront price”. We expect all businesses should be comfortable with reasonable projections and valuations of this nature, as they will reflect usual practices for all industries in determining budgets and revenues sources as well as assessing the worth of potential deals with other parties.

The experience in the telecommunications sector provides useful guidance about the workability of the above proposed solution. The Telecommunications Consumer Protection Code 2012 (**TCP Code**) is an example of an industry code that already provides unfair terms protections to small business customers. A small business customer is one that has or will have an annual spend with a telecommunications supplier which is, or is estimated on reasonable grounds by the supplier to be, not greater than \$20,000. This regime has been in place for at least nine years without controversy, and provides a ‘tried and tested’ model for both small businesses and suppliers.

Telstra urges the Government to consider these issues and reflect these changes in the proposed legislative design.

### Unfair Terms and the Telecommunications Sector

The Government has made a number of statements acknowledging that the telecommunications industry is one of the most highly regulated in this country.<sup>3</sup> Cognisant of this fact and the technological dynamism which characterises this industry, the Government has also taken steps in the last year to reduce regulatory overlap by removing legislation which duplicates obligations or is obsolete owing to the advances and changing technological environment of today's times.<sup>4</sup> Telstra commends the Government's commitment to reducing red tape for business and the Government's understanding of the changing face of the industry in which Telstra operates.

<sup>3</sup> Regulation Repeal Day Measures, speech by the Hon Malcolm Turnbull to Parliament (26 March 2014) <http://www.malcolmturnbull.com.au/media/speech-to-parliament-regulation-repeal-day-measures>

<sup>4</sup> See for example *Omnibus Repeal Day (Autumn 2014) Act 2014* (Cth).

Within this context, we believe it is important to ensure that the legislative design for extending unfair contract terms to small business operates efficiently within the existing regulatory safeguards present in the telecommunications sector. As previously mentioned, the TCP Code provides unfair contract terms protections for small business customers and is enforceable by the Australian Communications and Media Authority (**ACMA**), albeit at a different monetary threshold.

The TCP Code was developed as a result of extensive consultation with relevant industry stakeholders (including the ACMA, the Australian Competition and Consumer Commission, social welfare groups, Legal Aid and telecommunications providers) and with deep insight into the way in which business practices in the industry operate. Industry experience is that these existing protections have been operating to effectively safeguard small business customers in the telecommunications sector, in addition to other more general protections offered in the Australian Consumer Law (**ACL**) in the *Competition and Consumer Act* (2010) Cth.

The Unfair Terms Exposure Draft contemplates the ability for the Government to exempt certain contracts from the application of the amended ACL. However, the Minister must first be satisfied that there is a law that provides enforceable protections for small business that are equivalent to those proposed under the Unfair Terms Exposure Draft, as well as certain other factors. Relevantly, the Explanatory Memorandum states that industry self-regulation cannot be exempted because it considers these to be voluntary measures.

We note that all self-regulation is not voluntary. In our view, it is not the process by which industry obligations or an instrument are developed that should be relevant to any consideration for exemption, but whether the resulting instrument or code is binding and imposes obligations to comply. For example, while the TCP Code was a product of industry, regulator and other key stakeholder consultation, once finalised, it is now registered and enforceable (e.g. the ACMA has the power to direct a relevant telecommunications participant to comply with the Code and a failure to comply attracts a civil pecuniary penalty<sup>5</sup>. The ACMA also has the power to issue formal warnings for contravention of the TCP Code<sup>6</sup>).

### **Proposed solution – more flexibility for Minister**

The exemption mechanism should provide more flexibility so as to allow the Minister to grant exemptions:

- to Industry Codes and other instruments, including where these are developed through a self-regulatory process and are binding and enforceable; and
- in circumstances where there is broad or reasonably comparable protection, even if it is not equivalent in all respects.

Applying this recommendation to the Unfair Terms Exposure Draft, Telstra's recommendation is as follows:

*(in relation to the Australia Securities and Investment Commission Act 2001 (Cth) with the same changes to be made to the Competition and Consumer Act 2011 (Cth))*

(2) *This Subdivision does not apply to a small business contract that is covered by a law of the Commonwealth, a State or a Territory or such other*

<sup>5</sup> Section 121 of the *Telecommunications Act 1997* (Cth).

<sup>6</sup> Section 122 of the *Telecommunications Act 1997* (Cth).

instrument (including binding industry codes) that is prescribed by the regulations.

- (3) *Before the Governor-General makes a regulation for the purposes of subsection (2) prescribing a law or instrument:*
- (a) the Minister must be satisfied that the law or instrument provides enforceable protections for small businesses of the kind referred to in subsection 12BF(5) that are equivalent to those provided by this Subdivision together with Subdivision G, or that otherwise provide reasonable protections to small businesses; and*
  - (b) the Minister must take into consideration:*
    - (i) any detriment to small businesses of that kind resulting from the prescription of the law or instrument; and*
    - (ii) the impact on business generally resulting from the prescription of the law or instrument; and*
    - (iii) the public interest.*

### **Employee threshold**

Finally, we note the definition of 'small business contract' includes an employee threshold. It is reasonable to calculate employee numbers by reference to an entire corporate group, given that the structure of some businesses is to have a number of smaller 'service company' subsidiaries that may procure and supply services (but which may not properly reflect the businesses' actual size).

Telstra would be happy to meet with Government representatives to provide additional comments on any aspect of this submission if requested.

Yours sincerely



Jane van Beelen  
Executive Director – Regulatory Affairs  
Corporate Affairs  
jane.vanbeelen@team.telstra.com