Tasmanian Small Business Council

'Uniting Small Business'

Treasury Consultation - Final

The enhancement of unfair contract terms

11 March 2020

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The Tasmanian Small Business Council (TSBC) appreciates the opportunity to participate in the consultation session on enhancement of unfair contract term protections for small businesses being held in Sydney on Wednesday 11 March 2020. The TSBC will be represented by the Chair, Mr Geoff Fader.

We note the extensive work of Treasury Officers in collecting information and preparing the discussion paper dated December 2019. We understand the paper will provide an agenda for the March 11th meeting. It seems possible that with the help of the logical thought and statements of possible impacts set out in the paper that some consensus on future direction can be achieved.

The TSBC wish to raise an additional perspective that may not have been considered but which, in our opinion is critical to achieving advancement in addressing the unfair and unbalanced relationships that often occur in the realm of small business operations.

The lack of balance is a serious matter as evidenced by research undertaken by the staff of a former Small Business Minister, the Hon Bruce Billson. In addressing members of the Council of Small Business Organisations of Australia (COSBOA) then Minister Billson noted that more than 80% of small business disputes are never resolved. He went on to say that in the most part this is because it becomes just too hard, potentially too expensive and more important an interruption to the normal business activity. We believe that these impacts must be considered when addressing the subject of unfair contracts. In short a "fair" contract must contain clear, inexpensive and simple processes for dispute resolution.

Dispute resolution is proposed as a further point of consideration when addressing the Treasury paper.

Clearly a fair contract will or should reduce the opportunity for disputes to arise. Thus, these considerations should also recognise such matters as timeliness, coverage, least cost and the opportunity to make use of an appropriate tribunal rather than courts.

The matter of timeliness is a serious concern as there are many debilitating factors that impact on a small business owner who may be waiting months or possibly years

for court access. These impacts will be both financial and emotional. A small business is not some inanimate object like a corporation. Only about 30% of small businesses are incorporated. A small business is one or more individuals and therefore these individuals will be subject to extensive emotional stress.

A further aspect of timeliness is the possible impact of interest costs which may or may possibly accrue through no fault of the small business owner yet continue to raise the stakes and therefore stress. It should not be possible for a negative impact on a small business owner to arise just because of delays while the enterprise is seeking a just outcome to a dispute.

Coverage is also significant. This matter is raised in the Treasury paper and it seems that where a term in a standard form agreement is found by a court to be unfair and thus struck out of the agreement that the same terms should automatically be removed from all use of the same standard form agreement. While this is a matter that may have been overlooked in drafting the current legislation this review provides an opportunity to address a clear anomaly. How can a term in an agreement that is determined to be "unfair" become fair in the same agreement with another small business?

Cost is another critical factor when considering the use of standard form agreements. Such agreements are used by the largest corporations in Australia and their legal mite and dominance is unquestionable. Courts are not a practical option for small business owners. Indeed larger enterprises use court action as a threat with the full knowledge that as a former Chief Justice of the High Court of Australia has remarked "Even on my salary I could not afford to take a matter to this Court" The dominant party wins by default because the system makes it almost impossible for a small business to seek legal redress. A simpler tribunal system may be a realistic option.

This cost inhibition is not limited to small businesses. In the finance industry there is a clear and well documented example of unfair standard form contracts of the type used by banks when providing mortgage backed loans to small businesses. The practices used by banks in collusion and with the support of the Australian Banking Association unquestionably disadvantages their small business, primary producer and home loan customers. This is systemic malpractice. Further information on this matter is included with this submission.

The underlying focus of the submission is fairness, clarity of process, speed/efficiency, consistency and the opportunity to resolve disputes directly without the need or cost to involve third parties.

Royal Commissioner Kenneth Haynes concluded in his recent investigations that *"all Australians have the right to be treated fairly and honestly"* further he made recommendations that included the tenant that institutions and individuals need to:

a obey the law

b not mislead or deceive

c act fairly

The Government has informed the people of Australia that it accepts Commissioner Haynes recommendations.

This Treasury review of unfair contract terms protection for small business should accept the objective he defined

It is the expression of this submission that there are three key requirements that achieve fairness are:

1. full and complete disclosure
2. compliance with consumer law
3. dispute resolution in accordance with the relevant Australian Standard.

Further, since consideration of standard form agreements form part of this review, that a dominant party must not take unfair advantage over a lesser party.

Full and complete disclosure

It is argued that a contract that does not provide full and complete disclosure should be deemed to be invalid. There can be no reason not to include all relevant terms in an agreement unless their exclusion is an attempt to deceive.

Comply with consumer law

On 16 May 2017 the Australian Government through the offices of the Small Business and Family Enterprise Ombudsman and Australian Securities and Investment Commission published a media release which among matters noted "*From 12 November 2016, the unfair contract terms legislation was extended to cover standard form small business contracts with the same protections consumers are offered*".

Given these protections it may be that and further regulations could be both confusing and superfluous.

Dispute resolution in accordance with the relevant Australian Standard

The Australian Standard AS/NZS 10002:2014 provides a process for dispute resolution that is comprehensive and can be provided without charge to an aggrieved party. This standard has been developed under a Memorandum with the Commonwealth Government. It is agreed and supported by fourteen peak bodies and Government Agencies including Australian Competition and Consumer Commission, Financial Ombudsmans Service, Consumer Federation of Australia and Australian Taxation Office.

Achieving acceptance of some alternative process for dispute resolution may be time consuming and expensive. Further, introducing any alternative will be confusing to the parties, particularly to small business owners who already claim to be overburdened with red tape and regulation. Requiring a simple statement to advise

that the dispute resolution process for standard form agreements will be in accordance with the appropriate Australian Standard would be clear, universal and effective.

Unfair advantage

The establishment of a standard form agreement results from the situation where one party has a dominant role in a relationship or is offering goods or services to many other parties based on "take it or leave it". This is not necessarily bad, but it can only be good if the agreement is fair to the lesser party. In the interests of achieving fairness the Tasmanian Small Business Council is pleased to be able to offer an opinion on the issues and clauses identified by the Treasury in the course of this review.

The importance of achieving fairness can best be demonstrated by the situation that exists regarding banks and small business and consumer borrowers. Since 2003 this client group of bank customers has been disadvantaged using unfair contracts which fail to meet the Hayne Royal Commission tests as described above. The standard form lending agreements used by bankers do not fully disclose all the factors pertaining to the agreement, they do not provide a resolution process which complies with the Australian Standard and for these reasons the agreements are unfair.

Included in this submission by way of attachments are three documents that demonstrate this assertion. Submission Number 77 which was lodged with and accepted by the Senate Select Committee on Lending to Primary Industry Customers in 2017 includes the wording of the Australian Bankers' Association Code of Banking Practice which is part of the lending agreement. The Code provides information on the dispute resolution process available to borrowers and this would seem to be in order. The Submission number 77 also includes the unpublished Constitution of the Code Compliance Monitors Committee Association. This document sets out instructions to the Monitors as to how they are to undertake their duties. These instructions are at variance with the information provided to borrowers and thus they deceive the borrower. Deception in this way provides potential advantage of the lender.

The second document which is Attachment 2 to Submission 61 to the Parliamentary Joint Enquiry on Corporations and Customer Lending in 2015 compares the information in the Code of Banking Practice with the instructions to the monitors and notes the variations and thus the lack of full and complete disclosure which in some cases may be better described as deceptions.

The third attachment headed Fairness of Loan Contracts provides a succinct summary of the unfair practices being visited by banks on their small business customers. The bankers' actions are systematic breaches of the rules and guidelines of both ASIC and the ACCC.

This submission requests that the outcome of the Treasury Review of Unfair Contract Terms for Small Business will lead to appropriate legal steps which will ensure that such actions can no longer occur.

The comments noted below are referenced to the various numbered sections in the discussion paper.

3. Key questions

3.1/2/3 The most prevalent use of UCTs in Australia occurs in the banking system and the standard form agreements used by banks when lending to consumers, small businesses and primary producers. The areas of concern are lack of disclosure, and dispute resolution. Banks fail to provide complete information at the time of signing referring to other documents but not making them available. The Banking Code of Practice is referenced only. This document contains vital information. It is also noted that while considerable improvement has been achieved in the Banking Code it contains contradictions and lacks clarity about the essential subject of dispute resolution. Numerous examples have been provided to a range of government and parliamentary inquiries during the past ten years and while recommendations have resulted any action to implement the recommendations has been reluctant.

There are more than 3.5 million small businesses in Australia and almost all will have their borrowings secured by such an agreement thus it is important that these standard form agreements are examined in detail.

3.4 Many thousands of UCTs are current in primary production where farmers have signed such agreements in either ignorance or for lack of realistic alternatives. This reflects the lack of willingness of Australian regulators to take reasonable action. This is a matter referred to by Commissioner Hayne during the recent financial services royal commission. Examples of such agreements have emerged in numerous cases where banks have foreclosed on primary producers where non-financial impairment was deemed to be the deciding factor.

3.5/6 The use of the term “regulatory guidance” needs clarification. Is this suggested as provision of knowledge to providers or perhaps borrowers/franchisees? Certainly, greater knowledge would be beneficial, but the reality is that the creation of an unfair contract should not be legal. “Fairness” has been proposed by Commissioner Hayne as a key requirement of a legal agreement.

3.7 Use of the courts is outside the legal, financial and emotional capability of small businesses and consumers. Various researchers have identified that more than 80% of small business disputes are not resolved. In practice the possibility of court proceedings is used as a threat by dominant parties rather than any genuine attempt at resolution. This is certainly so when banks are involved as there is no small business that can effectively match the might of a banking institution. This situation is best evidenced by the reluctance of even

the regulators to initiate court actions against members of the finance industry.

3.10 A process should be in place for a court decision that a term is unfair to become binding on the future use of such wording rather than a succession of small businesses having to suffer the cost and time delays of having the same offending clause or clauses continually referred to courts. It is logical that an unfair ruling in one agreement will mean that the same clause will be unfair in other parallel agreements.

3.11 Yes. Systemic breaches of an agreed notion of fairness are best and most efficiently addressed by regulators.

3.12-21 The numerous definitions of "a small business" are confusing. It seems that these definitions emerge more for the convenience of the party that names them than for any sound basis of logic. For example, there can be no logic behind the definition of "15 employees on the day" to be used by Fair Work Australia while the Australian Financial Complaints Authority, the Small Business Ombudsman and the Australian Banking Association now choose the number of 100. Indeed "small" is a relative term and in some sectors of the economy a business employing 100 people would in fact be large. The traditional numerical measures used by the Australian Bureau of Statistics have stood the test of time though consensus is moving toward the suggested combined headcount/turnover figure seems to be the most relevant.

3.22-25 While standard form contracts are a necessary form of agreement there could be merit in having a readily available system to ensure that all terms, conditions and documents are available to small business customers and that the terms and conditions are fair and reasonable. This approach could also be taken to address the question of "an effective opportunity to negotiate"

3.26 While status quo is clearly an option regarding minimum standards there seems to be very little detrimental effect or downside in accepting the notion that any legislated or prescribed minimum standard should be an allowable component of a standard form agreement.

We trust that these opinions will be of benefit to the consultation and look forward to contributing further during verbal consultations on Wednesday 11 March 2020.

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Chair

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10 March 2020

Attachments:

Submission Number 77 to Senate Select committee on lending to Primary Industry Customers 2017

Submission Number 61 to Parliamentary Joint Enquiry on Corporations and Financial Customers 2015 – three parts

Fairness of Loan Contracts 2020