

21 December 2018

Ruth Moore
Consumer and Corporations Policy Division
The Treasury
Level 5, 100 Market Street
Sydney NSW 2000

Sent by email to: Consumerlaw@treasury.gov.au

Dear Ruth,

Treasury consultation – Review of Unfair Contract Term Protections for Small Business

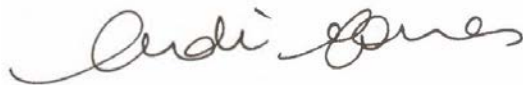
I welcome the opportunity to inform Treasury's *Review of Unfair Contract Terms for Small Business*.

The review seeks feedback on whether the protections have been effective in achieving their policy objective, two years on since their introduction.

Please find attached the TIO's submission which may be made publicly available. The submission draws on the experience and insights of my office when handling complaints and systemic matters in financial year 2018.

If you have any questions regarding this letter or our submission, please feel free to contact me, or my Senior Policy Advisor, Ai-Lin Lee on (03) 8680 8403 or Ai-Lin.Lee@tio.com.au.

Yours sincerely,



Judi Jones
Ombudsman
Telecommunications Industry Ombudsman

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Telecommunications Industry Ombudsman submission to the 2018 Treasury *Review of Unfair Contract Term Protections for Small Business*

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1. Introduction from the Ombudsman, Judi Jones

I welcome Treasury's *Review of unfair contract term protections for small business*.

The review seeks feedback on whether the protections have been effective in achieving their policy objective, two years on since their introduction. It also invites discussion about possible areas for improvement.

This submission draws on the experience and insights my office has from handling consumer complaints and systemic matters.

In financial year 2018, my office received 167,831 new complaints from residential and small business consumers of telecommunications services. Of these complaints, 12.2% (or 20,433) were made by consumers who identified as a small business. In the same year, our systemic function concluded consideration of 30 systemic matters in which the provider agreed to make changes to systems, process or practice. Of these, four matters raised concerns about the types of terms used in standard form small business contracts.

Drawing on our experience and insights, my general observation is the majority of standard form contracts we look at for small business customers do not cause us concern about terms being unfair. Where we identify a term in a small business standard form contract that may cause us concern, we treat it as a possible systemic matter. We do this because by the very nature of the term being included in a standard form contract, the issue is likely to impact a number of consumers or the provider's entire small business customer base.

I see some common themes arising from the systemic matters my office concluded in 2018:

- lack of awareness, particularly among smaller and less well-resourced telecommunications retailers of their Australian Consumer Law obligations, including that their standard form contracts for small business customers should contain fair and reasonable terms;
- smaller providers tending to operate a business model that focus on providing telecommunications products and services to consumers who are also small businesses;
- terms in standard form contracts appearing directed at mitigating the retailer's exposure to financial loss and the costs of complaints handling by passing all the risk on to the small business customer.

I believe improved awareness and greater incentives for compliance in this part of the telecommunications sector could improve the effectiveness of the operation of the safeguard.

I look forward to the outcome of Treasury's review and will continue to work closely with industry and the ACCC to improve consumer confidence in standard form small business contracts, to reduce complaints and systemic issues.

2. Through our systemic function, the TIO works with retail providers to explore whether a term is potentially unfair and unreasonable

In the course of handling a complaint, the TIO may identify a possible unfair contract term in a standard form small business contract.

The term is then drawn to the attention of our Systemics team, who may assess the matter further, contact the retail provider to inquire and understand the reasons for the term, and whether the term reflects actual practice, is relied on, and is reasonably necessary to protect the legitimate interests of the retail provider. We also consider the possible consumer detriment that may arise from the provider's reliance on the term.

In assessing whether a matter should be referred to or handled by our Systemics team, the TIO distinguishes between:

- in the particular circumstances of a case, whether the particular contractual term should not be relied upon by the provider in determining a fair and reasonable outcome for that small business consumer complaint (e.g. the bill or fee should be waived; debt recovery action should be halted). In these cases, the term seeking to be relied upon may not necessarily be an unfair contract term within the meaning of the Australian Consumer Law;
- whether the term in the standard form contract raises concerns about it being potentially unfair and unreasonable within the meaning of the Australian Consumer Law¹.

In the four systemic matters we concluded in 2018, the provider explained their basis for the term, and amended or removed the term from their standard form contract following an exploratory discussion with the TIO.

In certain circumstances we may refer a systemic matter to the ACCC, for example, when we consider the matter requires escalation because the provider is uncooperative, when there are many terms that may raise concern, or when there is potential for significant consumer detriment and the ACCC would be the more appropriate body to deal with the matter.

3. The types of terms the TIO sees tend to involve providers wanting to mitigate their exposure to financial loss and the costs of complaints handling by passing all the risk on to the small business customer

The TIO sees some common themes arising from the systemic matters we concluded in 2018:

- lack of awareness, particularly among smaller and less well-resourced telecommunications retailers of their Australian Consumer Law obligations, including that their standard form contracts for small business customers should contain fair and reasonable terms;
- smaller providers tending to operate a business model that focus on providing telecommunications products and services to consumers who are also small businesses;
- terms in standard form contracts appearing directed at mitigating the retailer's exposure to financial loss and the costs of complaints handling by passing all the risk on to the small business customer.

A possible motivation for these terms may be these retailers are actively seeking to protect their profit margins through contractual terms, because of the consequences for the viability of their business.

The types of terms we have discussed with providers because they raised concerns include:

- terms that seek to charge a fee or directly transfer to the small business consumer the provider's costs of responding to their complaint, if the consumer complains to the provider's internal dispute resolution process or accesses the TIO. In discussing these terms with providers, we drew their attention to the term being inconsistent with the requirements of the *Telecommunications Consumer Protections Code*². Such a term would also be inconsistent with the ACMA's recently made enforceable rules that set minimum requirements for an accessible complaints handling process³;
- terms that seek to limit the provider's exposure to financial loss by passing the risk on to the small business customer, such as not having to refund the small business customer unless they raise a billing dispute within 12 months of receipt of their bill, or terms that restrict the small business customer from claiming compensation for business loss.

¹ Australian Consumer Law, Part 2 – 3, in Schedule 2 of the *Competition and Consumer Act 2010*

² *Telecommunications Consumer Protections Code (C628:2015, incorporating variation No. 1 2018)*, clause 8.1

³ *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*, section 8(d)

4. Telecommunications providers could benefit by good practice guidance that includes illustrative examples

The TIO supports the development of good practice guidance for telecommunications retail providers that includes illustrative examples to clarify unfair terms.

This can assist in educating retail service providers about their Australian Consumer Law obligations; and be referred to when new retail service providers enter the market and develop their customer contracts.

Possible examples for inclusion in the guidance could cover some of the types of terms we have raised in discussion with smaller retailers, discussed above at 3.

The TIO has called for the Australian Government to introduce a registration requirement administered by the ACMA so the regulator knows which retail service providers are doing business in the telecommunications sector⁴. If such a registration regime were introduced, the good practice guidance could be included in an information-pack to newly registered retail service providers.

5. In our experience, there can be complexity in verifying whether a consumer is a small business by reference to an annual turnover test

Our preference is for the headcount approach to remain part of the definition of small business for unfair contract term protections.

The definition of small business the TIO applies to assess whether a business can access our dispute resolution service has regard to both a head count test (currently up to 20 full-time employees) and an annual turnover test (up to \$3 million in annual turnover)⁵.

In our experience, we find that independently verifying annual turnover can be complex and subjective, because the amount in turnover may vary depending on the point of reference applied (e.g. calendar year, financial year, when the small business consumer experienced service disruption or complained) and there are questions about whether regular expenses should be deducted from annual turnover.

The TIO is in the process of reviewing whether to update the definition of small business it applies as part of modernising our Terms of Reference.

⁴ TIO Submission to Consumer Safeguards Review Part A, 49. See: https://www.tio.com.au/_data/assets/pdf_file/0020/257231/Consumer-Safeguards-Review-TIO-submission.PDF

⁵ TIO Terms of Reference (version published on 25 October 2017), clause 2.2(a) and (b) and our Policy about businesses who can complain to us. See: <https://www.tio.com.au/about-us/terms-of-reference-and-company-constitution>; <https://www.tio.com.au/small-business>.