

31 August 2015

Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

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To the Senate Standing Committee on Economics

### **Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015**

Telstra Corporation Limited (**Telstra**) appreciates the opportunity to comment upon the legislative design of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Bill)*. Telstra supports the extension of the unfair contracts regime to low value contracts with small businesses. We have already been operating under an unfair terms regime for small business customers pursuant to the Telecommunications Consumer Protections Code (**TCP Code**) for many years.

#### ***The 'Upfront price' concept is problematic***

Our key concern with the proposed drafting of the Bill is that it will capture high value contracts well in excess of the prescribed thresholds. This is because of the use of the term "upfront price" to define the transaction thresholds, as this does not properly identify the true overall value of a contract. Accordingly, the Bill as it stands is likely to capture high value contracts and as such will run the risk of significantly increasing compliance costs and failing to achieve the Government's objective of limiting the regime to low value transactions.

Under the current drafting, a small business contract will be caught by the regime if the "upfront price payable under contract" does not exceed the prescribed thresholds. The term "upfront price" is already defined in section 26(2) of the Australian Consumer Law (**ACL**). The sole purpose of this definition is to *exclude certain terms* from the operation of the consumer unfair terms regime. The concept is not, and never has been, used to determine the value of a contract, nor was this its purpose.

In our submissions to date<sup>1</sup> and in the Schedule attached, we have provided a number of examples demonstrating that using "upfront price" to define the value of a contract is inappropriate and erroneously undervalues contracts. The concept fails to work in a number of commercial constructs, including in the context of high value consumption-based contracts, agreements where payments are made on a commission basis and contracts where royalties are payable. We have also highlighted the problems with the exclusion of contractual payments that are "contingent upon the occurrence or non-occurrence of a particular event".

We believe the concept of "upfront price" does damage to the legislative construct of the Bill. The concept does not work in ascertaining the true value of a contract and seeking to use it in this way is inconsistent with its intended legislative purpose under the ACL. Instead, a threshold test based on the actual or estimated value of the contract would be more appropriate, as it would reduce the scope for regulatory error and increase business confidence and certainty. The solution is to amend the definition of a small business contract in sections 8 and 31 of the Bill as follows:

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

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<sup>1</sup> For example, see

<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Extending%20unfair%20contract%20term%20to%20small%20businesses/Submissions/PDF/Telstra.ashx>.

- (c) *either of the following applies:*
- (i) *the ~~upfront price payable under total annual value of the contract does will not, or is estimated on reasonable grounds not to, exceed \$100,000;~~*
  - (ii) *the contract has a duration of more than 12 months and the ~~upfront price payable under total value of the contract does will not, or is estimated on reasonable grounds not to, exceed \$250,000;...~~*

### ***The TCP Code and Regulation in the Telecommunications Industry***

The Government has made a number of statements acknowledging that the telecommunications industry is one of the most highly regulated in this country.<sup>2</sup> We commend the Government for its commitment to reducing red tape for businesses, including those within this sector.

It is important to ensure that the extension of unfair contract terms to small business operates efficiently within the existing regulatory safeguards present in the telecommunications sector. 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.

In our view, the characterisation of the TCP Code as 'voluntary' fails to recognise the way in which the industry and TCP Code operate. While the TCP Code was a product of consultation among industry, the regulator and other key stakeholders, the TCP Code is now *registered* and *enforceable* (meaning that 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>3</sup>).

The ACMA also has the power to issue formal warnings for contravention of the TCP Code.<sup>4</sup> Industry experience demonstrates 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 ACL.

To reduce regulatory overlap, Telstra is therefore of the view that 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 reasonably comparable protection, even if it is not equivalent in all respects.

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<sup>2</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>3</sup> Section 121 of the *Telecommunications Act 1997* (Cth).

<sup>4</sup> Section 122 of the *Telecommunications Act 1997* (Cth).

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

Yours sincerely

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## Schedule

### Examples of how the use of the 'upfront price' concept will capture high value contracts

#### Energy supply agreements with large corporate customers

*Example clause:* You agree to pay us the charges for the energy services we supply to you.

*Issue:* Charges for energy services are based on a consumption methodology and there is no upfront 'consideration' disclosed at or before the time the contract is entered into. Instead there is a price per kWh/GJ, and a connection fee (typically a nominal fee forming a small percentage of the overall contract value). As the fees payable are contingent on the corporate customer's actual electricity or natural gas usage, high value contracts will be caught.

#### Distributor agreements

*Example clause:* As part of the distributor fee, we agree to pay you a royalty, which will be [X]% of the revenue earned by us as part of this arrangement.

*Issue:* For a number of agreements (e.g. software, food and beverage and cosmetics distribution), remuneration arrangements include a royalty fee payable to a distributor. The royalty is commonly calculated as a percentage of revenue earned. This fee, which can be substantial but not ascertainable at the outset of the contract, would not fall within the meaning of 'upfront price'. This has the result that an agreement with a value in excess of \$100K (annually) or \$250K will be captured by the legislation.

#### Brokerage agreements

*Example clause:* The credit provider will pay the Broker a Brokerage Fee upon the occurrence of each Transaction, which is settled in accordance with [X] requirements. The Brokerage Fee will be calculated on the basis of [X]% of the amount financed in the case of a Facility that is a hire purchase agreement, finance lease, operating lease, rental, or mortgage.

*Issue:* In brokerage arrangements, fees or commissions are paid 'contingent' upon certain events occurring (i.e. a mortgage being entered into and funds being advanced to a customer) and are often calculated as a percentage of the loan amount. These 'contingent' commissions (which are expected to be paid) are often substantial and are not disclosed at or before the contract is entered into. This will lead to high value contractual arrangements being subject to the 'small business' protections.