

21 September 2021

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
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Dear Sir/Madam

Submission to Treasury – Strengthening protections against unfair contract terms

Introduction

The Australian Credit Forum (**ACF**) welcomes the opportunity to make a submission to Treasury in respect of the strengthening of protections for consumers and small businesses against unfair contract terms.

The ACF was established in the early 1970's by a group of senior credit professionals. The group recognised the need to develop an association where members could meet on a regular basis to exchange thoughts and ideas to strengthen their own knowledge but also the standards of the industry.

The association meets on a regular basis to discuss and review existing and proposed changes to the Federal and State Governments legislation that might have an impact on their company's credit policies and practices in their day-to-day role as credit professionals.

The members of ACF are drawn from all areas of the credit profession across a range of industry groups including but not limited to senior credit managers, members of the legal profession, insolvency practitioners, credit insurance underwriters and brokers, mercantile agents and credit reporting agencies. The depth and diversity in experience of the members ensures that a broad cross section of the credit industry considers the impact of all relevant legislation.

Overview

The ACF, in collaboration with its members, will give professional insight for the exposure draft legislation and explanatory materials.

The ACF previously made submissions on the draft Regulation Impact Statement. The submissions made by the ACF and position taken at that time remain unchanged.

The ACF provides further submissions on the proposed amendment to the *Competition and Consumer Act 2010* (the **CAC Act**) and *Australian Securities and Investment Commission Act 2001* (the **ASIC Act**).

The ACF has reviewed the submission prepared by the Australian Institute of Credit Management (**AICM**). The ACF agrees with the submissions contained therein and seeks to endorse the contents.

Imposition of pecuniary penalty

1. The ACF is not opposed to the imposition of a penalty if there is a contravention of the relevant sections in the CAC Act and the ASIC Act provided that the unfair contract term:
 - (a) has actually been relied upon by a party and resulted in a significant imbalance between the parties into the contract;
 - (b) that the unfair term was as actually applied to the contract;
 - (c) the unfair term was not reasonably necessary to protect the legitimate interests of the party advantaged by the terms; and
 - (d) the term has caused financial or otherwise detriment.
2. The ACF does not agree that the mere existence of an unfair term in a contract should result in a penalty unless the above criteria is met.
3. The ACF is concerned that parties will seek to rely upon a potential penalty or allege an unfair term to avoid payment of an outstanding debt, dispute an obligation owing or frustrate a commercial transaction.
4. The consequences of not addressing the above could include some credit providers choosing not to extend credit terms to certain customers. For small businesses this has the potential to offset the intention of this relationship by increasing the disadvantages of small business compared to large businesses where credit terms will still be extended.
5. Additionally, customers actively seeking to avoid their obligations may use the potential penalty to obtain an advantage despite the term not being relied on in the transaction.
6. The ACF has concerns that penalties for mere existence of an unfair term could impact the efficiency of contractual arrangements. Specifically, where:
 - (a) it is not reasonably efficient for a supplier to have custom contracts or multiple versions of contracts to meet varying needs for their customer base; and/or
 - (b) a term may not be required for initial supplies to the customer but may be required for future supplies with that customer.
7. In these scenarios a supplier achieves efficiencies by including terms that may not be needed in all arrangements but are required in a relevant section of their customer base or supplies. These efficiencies ensure customers can access the supplies and credit needed. Specifically for small businesses it ensures they can access the supplies on credit terms without delay and expense associated with contract negotiations or paying before delivery.

Small business contract if one party employs fewer than 100 employees or turnover less than \$10,000,000

8. The ACF note that the monitoring of thresholds for small business is significantly complex and frustrating due to the lack of publicly available information to verify company size.
9. The lack of financial information creates barriers and inefficiencies for small business access to credit which the ACF provided extensive background on in relation to the 2018 changes to reporting thresholds.
10. The ACF disagrees that the threshold should be 100 employees. The ACF believes that the threshold of 100 employees does not in reality equate with a small business and the threshold should remain at the current number of 20 employees.

Remedies and streamlining court orders

11. The ACF understands that under draft legislation in circumstances where a court has declared a term of a contract to be unfair the court can make orders it considers appropriate to prevent or reduce loss or damage that has or may be caused by the unfair term. The ACF understands that these can be made on application of a person or by the regulator on behalf of a person.
12. While the ACF understands the purpose of the above it has concerns with the circumstance that an application may be made when an existing standard form contract contains a similar term to the term that has been declared as unfair. The reason for the concern is this approach will likely impact the ability for the individual circumstance to be considered on its merits and there may in fact be circumstances which render the term of the contract fair.
13. The ACF also notes that it is proposed that additional injunctive powers can bind future contracts that contain a term that is similar and has been declared unfair. This can be done without again proper consideration of the individual circumstance and the manner in which the parties have entered into the contract.
14. The ACF also notes that this would have the effect of preventing the declared term from ever being used again. This would again fail to consider the unique circumstance of each matter on the merits.
15. The ACF further notes that a vast majority of members organisations have updated standard form contracts and ACF members note that the proposed extension is likely to result in:
 - (a) Customers challenging a term that is reasonably necessary which creates inefficiencies and costs for the supplier.
 - (b) Costs being incurred to defend the use of the term in court by demonstrating the different circumstances that apply and the reasonableness of term.

Presumption

16. The ACF understands that a contract term will be presumed unfair in a proceeding unless another party proves otherwise if that term is the same or similar in effect as a term that has been found to be unfair in another proceeding.

17. Whilst it appreciates that this presumption occurs when the contract term is proposed by the same person or in the same industry, the ACF feels this presumption goes well beyond what is reasonable and does not again appreciate the circumstance and negotiation of each individual contract.

Effective negotiation

18. The proposed amendments regarding an effective opportunity to negotiate the terms of the contract are unreasonable.
19. The ACF wishes to note since the introduction of the unfair contract regime in 2016 most businesses amended their standard form contracts to ensure that when trading with any business the terms were fair and balanced.
20. The ACF believes that most businesses when dealing with small business have either adopted new terms which comply with the legislation or implemented additional credit management practices to provide the small business with an opportunity to negotiate the terms of the contract.

Observations

21. In summary, the ACF members support the intent of the reforms but strongly recommend the reform limit application of penalties to circumstances where there has been a breach of the principles of the unfair contract terms regime and the term has been relied on or there is clear intention to rely on the term.
22. Additionally, ACF strongly recommends that the actual circumstances of each occasion where a term is used is considered before penalties apply or a term is deemed void.
23. The ACF observes that the purpose of the proposed changes is to ensure that small business is not disadvantaged, however any further imposition or regulatory changes for larger businesses may have the opposite effect.

Anna Taylor
Chairperson - Legislative Sub-Committee
Australian Credit Forum