



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

17 September 2021

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

via email: UCTprotections@treasury.gov.au

Dear Sir/Madam

Strengthening protections against unfair contract terms

Thank you for the opportunity to comment on the exposure draft on Unfair Contract Terms (UCTs) reform. We welcome a more robust system to address UCTs in order to allow small businesses to access justice and help prevent them from being subject to contract terms deemed to be 'unfair'. The removal of contract limits; the new definition of a small business; and, clarification about standard form contracts will help provide greater certainty for all parties.

Small business definition

The proposal to increase the small business definition to fewer than 100 employees or an annual turnover of under \$10 million is necessary. Our Office has seen many examples where the current definition does not cover small businesses as intended, due to the limiting definition. This leaves many small businesses unprotected and undermines the intent of the UCT provisions, which should be an effective tool to aid appropriate access to justice for small business owners.

As such, we welcome the proposed definition, which will help to combat the power imbalance faced by small businesses when they sign standard form contracts. The definition to include fewer than 100 employees is already used by our Office and the Australian Financial Complaints Authority (AFCA) and the \$10 million annual turnover is used by the Australian Taxation Office (ATO). This consistent definition that encompasses small businesses appropriately will enable UCT provisions to be used more effectively.

Enforcement and determinative powers

The rebuttable presumption clauses will assist in streamlining decisions and create more certainty. However, the necessity to determine the term is 'unfair' through the court still creates a cost barrier to small businesses that seek to defend their personal economic interests.

As such, we suggest including provisions to make appropriate terms deemed 'unfair' automatically void and replaced with a suitable term. This would improve upon the proposed suggestion to issue an injunction to prevent a party from relying on a term in any existing contract. It would also help ensure clarity to an affected small business that the term is 'unfair' and should be void, helping to address the imbalance of power.

In order to assist small business access justice, the UCTs would be complemented by a more robust system that allows small businesses to defend their own commercial interest and seek affordable determinations.

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As such, we suggest the creation of a Small Business, Franchising and Industry Code List in the Federal Circuit and Family Court. This would allow an appropriate mechanism to determine 'unfair' terms automatically void or help provide determinations to assist with an affordable and accessible outcome.

The Court List should be a determinative and more timely 'smaller claims' type List in the Federal Circuit and Family Court to handle small business, franchising and industry code related disputes and ACCC enforcement cases where the penalty being sought is commensurate with the jurisdiction.

It should be priced to be accessible for all parties, with each party responsible for their own costs, including a filing fee. The Court Book of evidence should be limited and the rules of evidence simplified. The cases should be timed so that they are resolved within one month, ensuring it is an efficient process that adds value and is worth the time and effort of all parties. It should have stream-lined evidentiary rules that produce more affordable access to justice than is currently available through the Federal Court of Australia.

It will grant greater access to justice by allowing small business owners to pursue and defend their own commercial interests, reduce the reliance on ACCC litigation and free the smaller party of the 'cost order gorilla'. This measure would also encourage the ACCC to pursue more responsive litigation with regard to systemic and repeated misconduct.

Awareness

These actions should also aim to help publicise UCTs and their impacts, but more importantly, highlight what expected standards should be and how to achieve them. This should show small business owners that UCTs are not appropriate and help inform businesses relying on UCTs that they are not appropriate and will result in consequences.

Further, a party found to have an 'unfair' term should be required to communicate this matter to other parties that are covered by the same or similar terms. This will help to more effectively make impacted businesses aware that the term is 'unfair'. However, even with increased awareness the requirement for a court ruling will always limit UCT provision effectiveness.

Business protected by UCT provisions would also benefit from greater awareness of what UCTs and standard form contracts are. We are keen to work with the Treasury, ACCC and ASIC in order to improve knowledge and help inform small businesses of their rights, for example, through a joint webinar, potentially as the subject at one of the Federal Regulatory Agency Group (FRAG) webinars.

Government Contracts

It is appropriate that if legislation requires private entities to abide by certain standards then the same rules should apply to government contracts. As such, we suggest the inclusion of a clause to ensure UCT provisions are applied to government contracts. This will help to set the tone that the new UCT provisions are important and necessary.

Implementation

The consultation period for these amendments has been a long process, with many businesses unable to receive appropriate remedies due to the delays. As such, we suggest that there is a high priority on implementing these changes in a speedy manner.

Yours sincerely

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman