



20 January 2022

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
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By email to UCTprotections@treasury.gov.au

Dear Consumer Policy and Currency Unit

Submission to the Treasury – Strengthening protections against unfair contract terms

Thank you for the opportunity to comment on the Treasury's latest consultation on protections against unfair contract terms.

We welcome the proposed amendments to the *Australian Consumer Law* and the broader regulations of the *Competition and Consumer Act 2010*.¹ These amendments introduce strong new deterrents and more flexible remedies for unfair contract terms. They also help clarify the existing protections for businesses and consumers, and expand these protections for a wider category of small business consumers.

We are pleased to see the proposed amendments are largely consistent with the feedback we provided during the previous consultations in 2018² and 2020.³

We offer the following comments about the complaints received by our office, the strengths of the proposed new protections, and an additional way to encourage businesses to avoid unfair terms.

1. We receive complaints involving small business consumers and unfair contract terms

During the first three quarters of financial year 2020-2021, we received over 15,000 complaints from small businesses about their telecommunications providers.⁴ Approximately 30% of these complaints involved disputes over service or equipment fees.

Small businesses only directly raised concerns about unfair contract terms in a small proportion of these complaints. However, consumers (including small businesses) may have little awareness of what constitutes an unfair contract term. Consumers are not likely to read

¹ We also support in principle the amendments to the *Australian Securities and Investments Commission Act 2001*, although we do not engage with that Act in our daily operations.

² [Treasury consultation – Review of Unfair Contract Term Protections for Small Business](#), dated December 2018.

³ [Submission to the Treasury's consultation on Enhancements to Unfair Contract Term Protections](#), dated March 2020.

⁴ See our annual reports for Q1, Q2 and Q3.

the terms of standard form contracts in detail. They also may not fully understand the implications of those terms until they experience adverse effects. This makes consumers particularly vulnerable to unfair contract terms.

Common types of potentially unfair contract terms observed in our complaints data include:

- terms which seek to limit the liability of providers to their small business consumers, and
- onerous termination clauses which are not reasonably necessary to protect the interests of providers.

2. The proposed amendments provide clearer and more effective protections against unfair contract terms

We support the broad suite of amendments proposed in this consultation because they help clarify ambiguous aspects of the current protections and allow courts to find more appropriate remedies for both parties. The amendments also make it easier for the regulator to enforce these protections.

We offer the following comments in support of the proposed amendments.

2.1 The amendments provide greater clarity when identifying unfair contract terms

The proposed amendments make it easier to establish what is, and is not, an unfair contract term by:

- clarifying what factors to consider, and to disregard, when determining whether a contract is a standard form contract
- expanding the definition of a small business contract to accommodate a wider number of business types, and
- creating a presumption that unfair terms continue to be unfair when repeatedly used in similar circumstances.

These changes assist consumers, regulators, and complaint-handling bodies such as our organisation to identify, and respond to, unfair contract terms.

2.2 The amendments offer more appropriate remedies for consumers

In our 2020 submission, we suggested introducing flexible remedies for unfair contract terms. This included empowering courts to grant alternative remedies that may be more appropriate than voiding parts of the contract.

We are pleased to see the proposed amendments are in line with our suggestions. The amendments allow courts to make orders to prevent or reduce the damage caused by unfair terms. This change may lead to more effective outcomes for telecommunications providers and consumers. For example, a consumer may want to remain with their internet provider, so an order to vary the contract may be preferable to an order to void it.

2.3 The amendments grant more effective powers of deterrence to courts and regulators

Our 2020 submission suggested that regulators should have the power to issue infringement notices and make determinations about unfair contract terms. We suggested this because individual businesses may struggle to challenge unfair contract terms in court, and regulators will not have the capacity to pursue every individual unfair contract term.

The Treasury has proposed new powers for regulators. This includes powers to ask courts to prevent unfair terms from being used repeatedly, and to prevent further damage to other consumers from similar unfair terms. While the proposed amendments do not wholly adopt our suggestions, we support the amendments as they empower the regulator to take efficient action against unfair terms.

3. The amendments could achieve stronger deterrence when coupled with stronger education of businesses

The 2018 Review of Unfair Contract Term Protections for Small Business found current consumer laws were not adequately deterring businesses from using unfair contract terms. One purpose of the proposed amendments was to strengthen this deterrence. The amendments largely achieve this goal through pecuniary penalties and court orders to stop the repeated use of unfair terms.

However, the introduction of these new protections alone may not deter businesses from using unfair terms. As we outlined in our 2020 submission, the telecommunications sector has many service providers who are themselves small businesses. These small telecommunications providers may lack the legal knowledge required to learn about these new protections and improve their standard form contracts.

To maximise the deterrent effect of the new amendments, the Treasury could consider coupling these amendments with an education campaign for businesses. This may help businesses pre-emptively improve their contracts before these new amendments, and stronger penalties, come into effect.

We look forward to seeing the outcome of this consultation.

Yours faithfully

Judi Jones
Telecommunications Industry Ombudsman
