November 2023

Unfair trading practices

SUBMISSION TO TREASURY

Consult Australia

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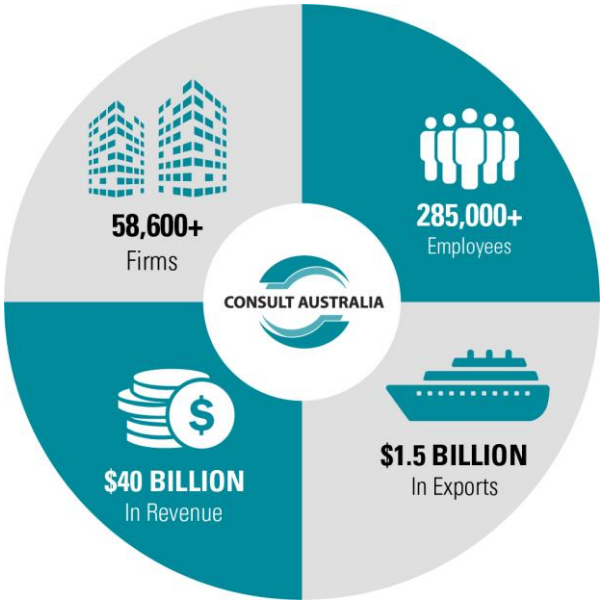

ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering, and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:

AECOM, ARCADIS, ARUP, aurecon, BG&E, CGC Civil Geotechnical Consultants, Douglas Partners, gamcorp Relationships built on trust, GHD, HDR, Jacobs, KBR, mlei Consulting Engineers, NORTHROP, pitt&sherry, Porter Consulting Engineers, pritchard francis, RED Fire Engineers, RLB Rider Levett Bucknall, SLR, SMEC Member of the Surbana Jurong Group, Stantec, tonkin, turnbull, umwelt

A full membership list is available at: https://www.consultaustralia.com.au/home/about-us/members

Executive summary

Consult Australia welcomes the opportunity to contribute to the consultation by Treasury on the proposal to introduce an unfair trading practices prohibition into the Australian Consumer Law. We welcome the proposal as it recognises the current limitations of the unfair contract term protections in the ACL and particularly the unconscionable conduct element.

Having considered the options presented in the Consultation Regulatory Impact Statement (CRIS) and noting the various approaches of other OECD countries (including Singapore, the European Union, and the United Kingdom) Consult Australia supports **option 4** being the introduction of a combined general and specific unfair trading practices prohibition. The prohibition must protect consumers as well as small businesses and we support consistency with the definition of small business with how it is framed for the unfair contract term protections.

In this submission we provide case studies from our members that are primarily business-to-business behaviour (rather than business-to-consumer) as we believe the ACL currently (and should continue to) plays an important role in supporting small businesses in such transactions. We are of the view that option 4 has the potential to address many of the unnecessarily combative behaviours that our members experience when contracting with much bigger corporate entities to provide engineering, design, and advisory consultancy services.

Unfortunately, the Australian construction sector is plagued by disputation, often cited as being one of the more combative supply chains across the globe. In this mix, 97% of consultancy businesses in Australia are small businesses. Therefore, power imbalances are common and often exploited in business-to-business transactions, deteriorating the opportunity for collaborative contractual relationships from the start.

Consult Australia is a passionate advocate on risk and procurement, with a solutions mindset. We see a direct correlation between reducing unnecessary disputation and bringing balance back to the professional indemnity insurance market. The proposed unfair trading practices prohibition could be a positive mechanism to address negative business behaviours currently alive in the market and reduce disputation.

Throughout this submission we have drawn out case studies from the real experience of our member businesses, particularly our small member businesses to inform the type of specific prohibitions we would like to see addressed in the ACL.

Support for option 4: combined general and specific prohibition

General prohibition

We understand the general prohibition would provide a general protection for small businesses and consumers from unfair trading practices. Consult Australia supports the introduction of a general prohibition supplemented by specific prohibitions.

As documented in the CRIS, a general prohibition may enable the following behaviours to be captured:

- exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice
- non-disclosure of contract terms including financial obligations (at least until after the contract is entered into)
- providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter contracts.

Protection against these behaviours is important and supported by Consult Australia. However, we believe that more specific prohibitions to supplement the general prohibition will provide the best protection, especially for small businesses.

Specific prohibitions

Having considered the specific prohibitions from the international examples provided in the CRIS, as well as the behaviours faced by member businesses regularly, Consult Australia has developed a list of specific unfair business/trading practices that should be prohibited:

1. Misrepresentations about rights, remedies or obligations.
2. Misrepresentations about authority to negotiate final terms of agreement.
3. Aggressive commercial practices including undue influence to enter a transaction and wrongfully claiming endorsement or authorisation by a public or private body.
4. Would lead a consumer/small business to breach countervailing obligations.
5. Could materially distort the economic behaviour.

We believe that this list includes specific instances of conduct that commonly results in small business harm. Below we have set out our reasoning for each of these specific prohibitions as well case studies drawn from the Consult Australia membership to demonstrate the real-world impact of these behaviours.

Suggested specific prohibitions

1. Misrepresentation about rights, remedies, or obligations

In the CRIS, it was noted that Singapore has a specific prohibition on misrepresentations about rights, remedies and obligations (that fits under the broad category of 'taking advantage of consumers').

Consult Australia supports this specific prohibition to apply to protect to both consumers and small businesses as our members have had clients, including very large corporations, misrepresent the rights, remedies or obligations of either the client or the member supplying the services.

Case study 1: Client denies payment until another contract is signed

In 2022, a Consult Australia member was engaged by a client to provide engineering consulting services to the value of $5,000. Both parties signed a written contract for the services and the member business started work.

The business completed the services and requested payment by the client (as per the terms of the contract), noting there were no obvious residual risk issues to be addressed. The client refused payment until the business signed a new written contract which was approximately 100 pages long. The business has as an internal business process requiring new contracts to be reviewed by external lawyers, to ensure appropriate risk identification and management. The cost of seeking initial external legal advice on the new contract would have exceeded the value of the services delivered by the business.

It is arguable, that:

- the client misrepresented that it had the right to demand a new contract be signed by the business.
- The client misrepresented that the business had an obligation to sign the new contract.
- The client misrepresented that the business had no remedies against it for this delay and unreasonable request.

2. Misrepresentations about authority to negotiate final terms of agreement

In the CRIS, it was noted that Singapore has a specific prohibition on misrepresentations about the authority to negotiate final terms of agreement (that fits under the broad category of 'taking advantage of consumers').

Consult Australia supports this specific prohibition to apply to protect both consumers and small businesses as our members have had clients, including very large corporations, misrepresent about the authority to negotiate final terms of agreement.

Case study 1 (as above)

It is arguable that in case study 1 (above) the client misrepresented its authority to negotiate final terms of agreement, even though the services had already been provided by the business under an executed written contract.

Case study 2: Client claims that the principal would not accept any negotiated terms between the client and the consultant

Consult Australia member businesses regularly contract with construction company clients who in turn are contracted to the 'principal client' to deliver the project. In these situations, the construction company client often refuses to accept any negotiated terms proposed by the Consult Australia member claiming that the principal client would not accept such terms.

However, in discussion with Consult Australia it is revealed that the principal client is unaware of blocked negotiations and may be flexible on some of the issues in dispute.

It is therefore arguable that the construction company clients in these instances are misrepresenting that they do not have the authority to negotiate final terms of agreement.

3. Aggressive commercial practices including undue influence to enter a transaction and wrongfully claiming endorsement or authorisation by a public or private body

In the CRIS, it was noted that Singapore has a specific prohibition on undue influence (that fits under the broad category of 'taking advantage of consumers'). It was also noted in the CRIS that the United Kingdom has a specific prohibition against aggressive commercial practices, which includes 31 specific commercial practices including undue influence and wrongfully claiming endorsement or authorisation by a public or private body. Further, the European Union includes a prohibition of aggressive commercial practices as well as undue influence.

Consult Australia supports this specific prohibition to apply to consumers and small business as our members have had clients, including very large corporations, misrepresent about the authority to negotiate final terms of agreement.

Case study 1 (as above)

It is arguable that in case study 1 (above) the requirement by the client on the business to sign a new contract for services already delivered under an executed written contract is an aggressive commercial practice. Further, by withholding payment for the services already provided, the client used undue influence over the business.

Case study 2 (as above)

It is arguable that in case study 2 (above) the construction company client was engaged in aggressive commercial practice including undue influence and wrongfully claiming endorsement or authorisation by a public or private body by claiming the principal client would not agree to amendments.

Case study 3: Requiring payment on every contract to cover 'administration of contract' without evidence of panel contract being used

Consult Australia is aware of an arrangement where Entity A has established a panel-type arrangement requiring Consult Australia members participants to pay a percentage of each engagement fee with each client to Entity A. Consult Australia has been advised that the fee paid by members is to cover the administration of the panel contract. However, Entity A collects the fee on all contracts entered between the participating businesses and the participating clients, even where the parties do not use the panel contract.

It is arguable that this is an aggressive commercial practice.

Case study 4: "Take it or leave it" or "every other business accepts it" or "you are the only ones that have an issue with this"

Consult Australia is aware of clients taking advantage of commercial power imbalances to secure contract provisions without authentic negotiation. For example, in response to reasonable contract deviations requests, businesses have being told to *"take it or leave it"* or "*every other business accepts it*" or "*you are the only ones that have an issue with this*."

The commercial power imbalance between clients and design consultants in business-to-business transactions is often demonstrated by unilateral obligations in contracts. This behaviour sees the client position the business to believe they are being difficult in attempting to negotiate fair and balanced contractual terms. To continue to operate in the market and secure work, businesses are then forced to accept the risks presented.

It is arguable that this behaviour is an example of aggressive commercial practice including undue influence to enter a transaction. This practice is often seen in conjunction with the behaviour detailed in case study 2 (above).

4. Would lead a consumer or small business to breach countervailing obligations

Having considered the examples provided in the CRIS as well as member experience, Consult Australia proposes a specific prohibition on behaviour that would lead a consumer or small business to breach countervailing obligations. Example case studies are provided below.

Case study 5: Breach of confidentiality of insurance arrangements

It is common in contracts for design and/or engineering services for there to be conditions relevant to insurance. This could include requirements on the level of insurance the design/engineering business must hold or requirements on documentation of that insurance.

Consult Australia has seen many instances of clients in business-to-business transactions imposing unreasonable obligations on businesses relevant to insurance.

For example, a client's contract may require the business to provide full copies of the business' insurance policies and details of exclusions which are commercial-in-confidence documents between the business and their insurer.

Another example is a client having the right to review and approve insurance.

Consult Australia members cannot meet such obligations, not just for practicality reasons but also because there are other countervailing obligations the business has with its insurer. Therefore, meeting such contractual requirements would require the business to breach a countervailing obligation.

Case study 6: Appointing client as attorney

Consult Australia has seen contracts for consulting design and engineering services in business-to-business transactions that include a requirement for the member business to 'irrevocably appoint' the client to be the business' attorney. This is usually contained within a novation clause so that the client can execute a deed of novation on behalf of the business if the business fails to do so within strict timeframes.

Many member businesses cannot appoint a client as the business' attorney as it would breach the businesses constitution. Therefore, meeting such contractual requirements would require the business to breach a countervailing obligation.

Case study 7: Client to unilaterally require the termination of staff

Consult Australia has seen contracts for consulting design and engineering services in business-to-business transactions that include a unilateral right for the client to direct the member business to remove staff from a project without reason.

In the current market, member businesses find it particularly hard to staff projects and this contractual clause could impact the business' compliance with workplace rules. Therefore, meeting such contractual requirements would require the business to breach a countervailing obligation.

5. Materially distort the economic behaviour

In the CRIS, it was noted that the European Union includes a prohibition on commercial practices likely to 'materially distort the economic behaviour' of an identifiable group of consumers.

Consult Australia supports a specific prohibition to protect consumers and small businesses from commercial practices that materially distort the economic behaviour of the small business or consumer.

Case study 8: Unnecessarily high insurance requirements

Consult Australia is aware of many clients requiring businesses to hold unnecessarily high insurance requirements, that is amounts higher than the risk of likely loss. Such a requirement distorts the insurance market as well as the economic behaviour of the business as businesses are seeking more insurance than is necessary given the risk of their work – but instead driven by client requirements.

We recommend the Treasury consider this issue of overprotection; the Insurance Council of Australia would likely have material relevant. Further, Business NSW's Insurance at the speed of business highlights the issue in NSW at least.

Case study 9: Insurance carve-outs to limited liability provisions

Consult Australia is aware of clients requiring businesses in business-to-business transactions to accept insurance carve-outs to limited liability provisions in contracts which exposes the business' entire insurance policy which can be higher than the risk of likely loss. Such carve-outs distorts the economic behaviour of businesses.

This illustrates that a risk assessment commensurate to the project is not being performed. Consult Australia's preferred approach is for liability to be capped commensurate to the consultant's role in the project, coupled with a genuine assessment of the risks likely to arise as a direct result of the consultant's services and the consultant's ability to manage those risks.

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