



Australian Government
The Treasury

TSY/AU

Enhancements to Unfair Contract Term Protections

Consultation Regulation Impact Statement

December 2019

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Consultation Process

This consultation paper invites interested parties to provide feedback on options to enhance the unfair contract term protections for small business, consumers and insurance contracts. Treasury is seeking submissions from a wide range of groups and individuals, including businesses that issue standard-form contracts to other businesses, as well as small businesses and consumers. If you would like to make a written submission, please provide it before the closing date.

Throughout this paper there are questions for you to consider in your submission. There is no obligation to answer any or all of the questions. There is no limit to the length of submissions. For accessibility reasons, please upload submissions in a Word, RTF or PDF format.

Submissions should be uploaded using the consultation page on the Treasury website.

Closing date for submissions: 16 March 2020

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All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submissions to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Glossary of terms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFCA	Australian Financial Complaints Authority
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
CAF	Legislative and Governance Forum on Consumer Affairs
RIS	Regulation Impact Statement
UCT	Unfair contract term

1. Introduction

1.1. Unfair contract term protections for consumers

On 1 July 2010, protections for consumers against unfair contract terms (UCTs) in standard form contracts were introduced into the *Trade Practices Act 1974* (now contained in the Australian Consumer Law (ACL) which is Schedule 2 to the *Competition and Consumer Act 2010*) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). The ACL provisions address UCTs for goods, services and land, and the ASIC Act provisions address UCTs for financial products and services.¹ This formed part of the response to the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.²

1.2. UCT protections for small business

In November 2016, the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (the Act) extended the UCT protections to small business contracts that meet certain criteria:

- the contract is a standard form contract;
- at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- the upfront price payable under the contract does not exceed \$300,000, or \$1 million if the contract runs for more than 12 months.

Generally, a term of a small business contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.

The extension of the UCT protections to small business recognised that small businesses can often face the same challenges as consumers in a contractual relationship.

¹ Main provisions for unfair contracts terms are included in Part 2-3 of the ACL (which is in Schedule 2 to the *Competition and Consumer Act 2010*) and Subdivision BA, Part 2 of the ASIC Act.

² Available at: <https://www.pc.gov.au/inquiries/completed/consumer-policy>

1.3. Review of UCT protections for small business

During the passage of the Act through Parliament in late 2015, the Government agreed to undertake a review of the extension of the UCT regime for small business within two years of its commencement. On 21 November 2018,³ the Government released the *Review of Unfair Contract Term Protections for Small Business: Discussion Paper* (the discussion paper). The discussion paper sought the views of small businesses and other stakeholders on the impact of the UCT protections, the thresholds at which the protections apply, the clarity of the term ‘standard form contract’, and the appropriateness of current exemptions. The paper closed for submissions on 21 December 2018. A broad range of stakeholders made formal submissions.⁴

When the review was conducted there was limited quantitative data available, noting the extension of the protections to small businesses had only been operating for two years. However, qualitative information gathered through the review suggested that while the UCT regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using UCTs in their standard form contracts. A number of submissions to the review supported this, arguing that UCTs are still prevalent in small business standard form contracts. Additionally, the review found that some aspects of the current regime appear to have created ambiguity, uncertainty and practical difficulties for businesses to comply with the law. For example, some submissions noted the practical difficulties in using the headcount approach for defining a small business and the uncertainty around whether a contract met the definition of a ‘standard form contract’. Some submissions to the review also highlighted the need for regulators to promote awareness of the UCT protections and assist with compliance with the law by improving the guidance they provide to businesses.

In light of the findings, the Government announced its intention to strengthen the UCT protections for small businesses, including through a range of legislative amendments where appropriate. As the proposed legislative amendments will have an impact on businesses and require amendments to the ACL, this Regulation Impact Statement (RIS) seeks stakeholders’ views on a range of options. It should be noted that, as the ACL is jointly administered by the Commonwealth and the states and territories under an Intergovernmental Agreement, any amendments to the ACL (including making UCTs illegal and attaching penalties for a breach⁵) are subject to agreement from the states and territories through the Legislative and Governance Forum on Consumer Affairs (CAF).

Further, to ensure the UCT regime continues to be applied across the whole economy consistently, this RIS seeks views on whether any enhanced protections for small businesses should be extended to consumer and insurance contracts where appropriate.

³ Available on Treasury’s Consultation Hub: <https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/>

⁴ Non-confidential submissions were published at: https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/consultation/published_select_respondent

⁵ <http://ministers.treasury.gov.au/ministers/stuart-robert-2018/media-releases/further-strengthening-unfair-contract-term-protections>

Under the current law, contracts between governments and small businesses are generally not covered by the UCT regime. Alongside this RIS, the Government will undertake further work on the option of extending the UCT protections to apply to government contracts, including consultation with the states and territories.

1.4. Other related work

Insurance contracts

While the UCT provisions in the ASIC Act apply to most financial products and services, they do not currently apply to insurance contracts governed by the *Insurance Contracts Act 1984* (IC Act). The IC Act specifies that contracts it regulates cannot be reviewed for unfairness under another Act. The general exclusion of remedies under other legislation is on the basis that the IC Act consumer protections should be the sole source of remedies in relation to insurance contracts.

On 4 February 2019, the Government reaffirmed its commitment to extend the UCT protections to insurance contracts in its response to the *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (the Financial Services Royal Commission). An Exposure Draft to extend UCT protections to insurance contracts⁶ was released on 30 July 2019 for consultation. On 28 November 2019, the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019, which will extend the current UCT protections to insurance contracts, was introduced into Parliament.

Extending the UCT regime to insurance contracts will ensure consumers and small businesses that purchase insurance have access to the same UCT protections as they do for contracts for other financial products and services.

Franchising

On 14 March 2019, the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) released its *Fairness in Franchising Report*,⁷ which contained 71 recommendations, including 6 recommendations proposing actions to address UCTs in the franchising sector. The Government has established an inter-agency Franchising Taskforce (Franchising Taskforce) to examine the feasibility and implementation of the Committee's recommendations and oversee consultation and coordination of matters relating to these recommendations. As an initial step, the Franchising Taskforce determined that those recommendations relating to UCTs should be considered through this Consultation RIS process, with the aim of achieving consistency of regulation across franchised and non-franchised businesses. The Franchising Taskforce includes representatives from Treasury, the Department of Employment, Skills, Small and Family Business and the Department of the Prime Minister and Cabinet.

⁶ Available at: <https://treasury.gov.au/consultation/c2019-t372650>

⁷ Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/Report

Also, in late 2018 and early 2019, the Department of Industry, Innovation and Science consulted on a RIS canvassing possible options to address concerns with franchise relationships between car manufacturers and new car dealers.⁸ During the consultation, several industry stakeholders suggested extending UCT protections to all automotive franchising agreements. When automotive dealers fall into the definition of small business, their dealership agreements are already likely to be protected by the UCT regime, depending on the contractual value.

Franchising agreements are discussed further in section 11 of this RIS.

Digital Platforms Inquiry

In December 2017, the Government directed the Australian Competition and Consumer Commission (ACCC) to inquire into the impact of digital search engines, social media platforms, and digital content aggregators on the state of competition in media and advertising services markets. The inquiry formed part of a package of reforms to modernise and update Australia's media laws.

In July 2019, the ACCC provided its final report to the Australian Government.⁹ The report outlines 23 recommendations to respond to the substantial market power that has arisen through the growth of digital platforms, their impact on competition in media and advertising markets and the implications for news media businesses, advertisers and consumers.

One of the recommendations (Recommendation 20) is to amend the *Competition and Consumer Act 2010* to prohibit UCTs in any standard form consumer or small business contract and attach civil pecuniary penalties. These matters are canvassed in this RIS.

1.5. Structure of this Consultation RIS

A range of elements of the UCT regime are discussed in this paper. To address the problems identified by the review, several policy options are presented for each element, including the proposed legislative amendments that have been announced by the Government.

Stakeholders lodging formal submissions are encouraged to refer to the paper's focus questions in their submissions. Where possible, Treasury encourages you to provide examples, data and evidence to support your views. However, you are not constrained by the questions and can provide other information you consider relevant.

⁸ Available at: <https://consult.industry.gov.au/industry-growth/franchise-relationships-between-distr/>

⁹ Available at: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

2. Problem

The extension of the UCT protections to small businesses in 2016 was intended to reduce the incentive to include unfair terms in standard form contracts with small businesses, providing for a more efficient allocation of risks in these contracts. However, despite the introduction of the UCT protections for small businesses, stakeholders that provided submissions to the review reported that UCTs are still prevalent.

For example, the majority of contracts for which small businesses had sought the assistance of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) still contained clauses that the Ombudsman considered to be unfair.¹⁰ The Victorian Small Business Commission and the Office of the NSW Small Business Commission reported they provided dispute resolution services in 61 cases in 2018 where UCTs were cited as the issue.¹¹ These cases likely represent only a small proportion of small business concerns on unfair terms, as many small businesses may not report, or not be aware of, potentially unfair terms.

Regulators have also continued to investigate many complaints relating to the possible inclusion of UCTs in small business contracts. The ACCC received 1,238 UCT-related contacts between January 2017 and June 2019, of which a large proportion was believed to be related to small business complaints.¹² Since the commencement of the UCT protections for small business, the ACCC has successfully litigated several businesses and resolved a number of UCT concerns through public administrative resolutions, including court enforceable undertakings.

Table 1: ACCC action on UCT protections

<ul style="list-style-type: none"> • October 2017 – JJ Richards contract terms declared unfair and void • November 2017 – Australian Post to revise its contracts • December 2017 – WA building company amends unfair contracts • March 2018 – AWB amends contract terms following ACCC concern • March 2018 – Cardtronics to amend unfair ATM contracts • July 2018 – Warrnambool Cheese and Butter amends contract terms • July 2018 – Servcorp’s business contract terms declared unfair • August 2018 – Husqvarna Australia Pty Ltd – enforceable undertaking • December 2018 – Dairy processors agree to amend farmer contract terms • December 2018 – Visy Recycling, Cleanaway and Suez remove potentially unfair contract terms • April 2019 – DP World, Hutchison Ports and VICT remove likely unfair contract terms • June 2019 – Red Rich Fruits amends contracts with growers after ACCC concerns • July 2019 – Uber Eats amends its contracts • August 2019 – Court penalises potato wholesaler for breaching the Horticulture Code and declares unfair contract terms void
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Source: ACCC.

¹⁰ ASBFEO, submission, December 2018.

¹¹ Victorian Small Business Commission, submission, December 2018.

¹² ACCC.

ASIC has also taken regulatory action since the commencement of the UCT protections for small business. In September 2018, following an ASIC review, Prospa Advance Pty Ltd amended terms in its standard form small business loan contract which were considered unfair to borrowers and guarantors.¹³

UCTs have been found in contracts in a broad range of industries, including waste management, building construction, agriculture, dairy, franchising, transportation, and other service sectors. In the past two years, terms found to be unfair included:

- terms that allow businesses to unilaterally cancel or terminate an agreement without cause;
- terms that allow an issuing business to unilaterally increase its prices or alter the terms and conditions of the contract;
- automatic renewal terms binding small businesses to subsequent contracts unless they cancel the contract within an unreasonably narrow window of time;
- terms that broadly limit a business's liability towards a small business, or which require a small business to indemnify a business in an unreasonably broad range of circumstances; and
- terms that restrict selling produce to alternative buyers.

The Master Plumbers' Association, the Air Conditioning and Mechanical Contractors' Association, the National Fire Industry Association, the National Road Transport Association, Screen Producers Australia¹⁴ and several others also provided many examples of contract terms they consider to be unfair.

By controlling the essential elements of a contract, such as termination, renewal and indemnities, these unfair terms grant issuing businesses with the ability to allocate risk to small businesses who are less able to manage such risk. When these terms are enforced or relied upon by the issuing businesses, this can result in financial and business opportunity losses to the detriment of small business.

The existence of UCTs in standard form contracts for small businesses can be detrimental to small businesses, which form an integral part of the wider Australian economy. Where small businesses bear an unfair proportion of risks or costs, this can result in lacklustre investment and business activities, as these entities may have less confidence in contracting. Given the significant contribution that small businesses make in terms of employment and services provided, this could have a dampening effect on the Australian economy. As at end of June 2018, small businesses (employing fewer than 20 persons) employed more than 4.9 million people or 44.2 per cent of total employment

¹³ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-262mr-prospa-removes-unfair-loan-terms-for-small-business-borrowers-and-guarantors/>

¹⁴ Submissions from these stakeholders, December 2018.

in Australia. They contributed to approximately \$414 billion or 34 per cent to the total Industry Value Added.¹⁵

Currently, there is limited data on how many standard form contracts have potentially unfair terms, how many unfair terms might be enforced to cause damage to small businesses and the extent of that damage. It is therefore challenging to quantify the detriment caused by UCTs to small businesses and the wider economy. These limitations have been previously noted by the Productivity Commission¹⁶ and Consumer Affairs Australia and New Zealand (CAANZ).¹⁷ In 2014, CAANZ conducted a survey which suggested losses for a small business from unfair terms ranged from \$1,200 to \$20,000.¹⁸ However, the survey noted that only a small number of respondents answered the question related to losses from UCTs.

Based on the reported existence of possible UCTs by regulators, government agencies and industry stakeholders, harm to small businesses is likely to be common. However, given the inclusion of a UCT in a contract could have varying impacts on a business depending on the size of the business, the nature of the UCT and the size of the contract, it is not possible to accurately quantify this impact in monetary terms. This consultation RIS is seeking data from businesses to generate a more precise estimation of the costs of UCTs to small businesses and the wider economy.

¹⁵ ABS, *8155.0 – Australian Industry, 2017-18*. Industry Value Added is an estimate of the difference between the market value of the output of an industry and the purchases of materials and expenses incurred in the production of that output.

¹⁶ <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

¹⁷ <http://treasury.gov.au/consultation/extending-unfair-contract-term-protections-to-small-businesses-legislation>

¹⁸ *Ibid.*

3. Key questions

Legality and Penalties

1. Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.
2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.
3. Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).
4. As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.
5. Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.
6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.
7. Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.
8. What do you consider are the additional costs and benefits for each of the proposed options?

Flexible remedies

9. Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?
10. If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.
11. Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.

Definition of a small business

12. What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc.
13. If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.
14. If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?
15. Do you consider \$10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.
16. If the annual turnover threshold were to be adopted, how might this impact your business? Include any estimates of potential costs and savings.
17. In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.

Value threshold

18. Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?
19. Please provide information on how the current contract value threshold has impacted your business.
20. Are there likely to be any negative impacts if the current contract value threshold were to be increased to \$5 million? Please provide details.
21. Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.

Clarity on standard form contracts

22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.
 23. If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?
 24. In addition to the types of actions outlined in option 4, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?
 25. Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.
-

Minimum standards

26. If minimum standards under state and territory laws could be challenged as being unfair, what impact is this likely to have on your business (or those businesses you represent)?

Application of any enhanced protections to consumer and insurance contracts

27. What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?

28. What are the other policy options that would be appropriate to apply to consumer and insurance contracts?

29. What would be the impact on consumer and insurance contracts of applying those requirements?

Application to franchising agreements

30. How would the options for defining small business (in Section 6) apply to franchisees and franchisor businesses, and what proportion of franchisees would be a small business under each of the options?

31. Will changes to the value thresholds for contracts (section 7) apply to franchise agreements, and what proportion of franchising agreements would be captured under each option?

32. How would the options for clarifying a standard form contract (Section 8) apply to franchise agreements and what proportion of franchisee agreements would be a standard form contract?

33. How will the different penalties, infringement notices and enforcement options (Section 4) apply in the franchising sector? Would they be appropriate for franchise agreements?

34. What proportion of franchise agreements are perpetual or evergreen, and how could UCTs in these agreements be addressed?

4. Legality and Penalties

4.1. The problem – UCTs are still being used

As discussed earlier, the UCT Review found despite the introduction of the UCT protections for small businesses (which was intended to reduce the incentives to include unfair terms in standard form contracts with small businesses, providing for a more efficient allocation of risks in these contracts) UCTs appear to still be present in standard form contracts for small businesses.

The review identified several factors which may contribute to the continued existence of UCTs in small business contracts, including a lack of deterrence against using UCTs and a lack of awareness of the UCT protections among businesses, particularly small businesses.

Lack of deterrence

Many submissions to the review considered the current framework, in which a UCT is not illegal and does not attract a penalty, does not provide adequate incentive for businesses to ensure their standard form contracts are free from UCTs. Specifically, the current provisions allow a court to declare that a term is unfair and therefore void, but do not explicitly prohibit the use of UCTs. This means that a business could include a possible UCT in its standard form contract, even if the business is aware that the term is very likely to be unfair. It could then continue to use this possible UCT with little to no risk of adverse consequences, other than being unable to rely on the term if a court declares the term is unfair and therefore void.

The risk of regulator intervention in relation to a UCT is also of limited deterrence as, once proceedings have commenced or are threatened, the business can then amend potential UCTs to make them no longer unfair. For example, the ASBFEO's inquiries found that large banks have low motivation to comply with the UCT protections, noting that voidable terms are legal until found otherwise through the courts.¹⁹ Even after a declaration is made by the court that a term is unfair, the judgment only extends to the specific UCT in the proceedings. This means the business could continue to rely on the same term in other existing or future standard form small business contracts.

Before and after the commencement of the UCT protections for small business, regulators undertook education and compliance programs across different industry sectors to encourage businesses to review their standard form contracts and remove any potential UCTs. On 10 November 2016, two days before the UCT regime for small business came into effect, the ACCC released its report, *Unfair terms in small business contracts: a review of selected industries* (the ACCC UCT Report). The ACCC UCT Report highlighted concerning terms the ACCC observed across the advertising, agriculture, franchising, telecommunications, retail leasing, and waste management industries. In particular, the report noted the ACCC's concerns with terms used in the waste management industry allowing unilateral price increases, automatic rollovers, and unlimited indemnity.²⁰ However, even if the regulator has flagged potential UCTs, the lack of deterrence against using UCTs in small business

¹⁹ ASBFEO, submission, December 2018.

²⁰ Available at: <https://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts>

contracts means that the contract-issuing party may have little or no motivation to address the potential UCTs. This leaves regulators with limited means to address the inclusion of the UCT in the contract in the first instance.

In 2017, the ACCC took JJ Richards & Sons Pty Ltd, a waste management provider, to court. JJ Richards & Sons Pty Ltd was found to use UCTs in its standard form contracts for small businesses. The Federal Court declared eight terms in its standard form contract unfair and therefore void.²¹ This included terms that the ACCC UCT Report had flagged as possible UCTs used in the waste management industry.

Even after regulators have successfully challenged a UCT in court, this has had limited deterrence for other similar businesses or in other sectors to take proactive steps to remove UCTs prior to regulator intervention. The ACCC reported that, since the 2017 JJ Richards & Sons Pty Ltd decision, it has continued engaging with businesses in the waste management industry to ensure compliance. In late 2018, as a result of an ACCC investigation, three more waste management companies agreed to amend potential UCTs in their standard form contracts, which were similar to terms the Federal Court had determined were UCTs in the 2017 *JJ Richards & Sons Pty Ltd* case.²² In April 2019, following further ACCC investigation, two more waste management companies agreed to remove UCTs from their small business contracts. Following this, the ACCC wrote to waste management industry bodies reminding them of their obligations and encouraging them to check their contracts for UCTs. The ACCC also released an information network bulletin to its small business database encouraging them to check their waste management contracts for UCTs and to seek to remove them.

Lack of awareness

Despite regulators, including ASIC and the ACCC undertaking education programs on the UCT protections for small business, including guidance on how to comply with the law before and after the regime commenced in 2016, there still appears to be a lack of awareness of the UCT protections among businesses. This is especially the case with small business. In its submission, the Victorian Small Business Commission expressed its concerns with the lack of awareness among small businesses of the existence of the UCT protections and suggested that targeted education campaigns for small businesses could contribute to improvements.²³

If a small business does not know about the existence of the UCT protections when offered a standard form contract, it may tend to accept terms it considers unfair, given its relative weaker negotiating position. Also, the small business exposes itself to risk if it ultimately includes potential UCTs in its standard form contracts for its own customers. However, improved awareness of the protections will not address all of the issues above. Even if a small business is aware of the protections, in some instances they will have no choice but to accept a UCT given their weaker negotiating position on standard form contracts.

²¹ ACCC v JJ Richards & Sons Pty Ltd [2017] FCA 1224.

²² ACCC, submission, December 2018.

²³ Victorian Small Business Commission, submission, December 2018.

4.2. Options

Several options are discussed below to address the problems identified above. Options two to four (strengthened compliance and enforcement activities, civil pecuniary penalties and infringement notices) explore different approaches but are not mutually exclusive.

4.3. Option 1 – status quo

Under this option, the current laws would continue to operate. This means a UCT could still be included in a standard form contract for a small business without contravening the law or attracting a civil pecuniary penalty.

While businesses would not incur an additional regulatory burden under this option, it is inconsistent with the Government's intention to further strengthen the protections for small businesses from UCTs.

Impact analysis

By maintaining the status quo, small businesses may still face detriment from UCTs. Some larger businesses may continue to use UCTs in their standard form contracts until they are challenged through legal proceedings, especially if they gain a benefit from doing so. This means these businesses may still be able to allocate risks disproportionately to small businesses. Therefore they are able to gain an undue competitive advantage over competing businesses that are offering their small business customers more favourable or fairer contract terms. As discussed earlier, small businesses may be unlikely to challenge or question potential UCTs due to a lack of awareness, weak negotiating power, or concern about their commercial relationship with the contract-issuing party.

Regulators would also need to continue to invest significantly in compliance activities. This would be the case even when a court has already declared specific terms in one standard form contract are unfair, as businesses are not incentivised to review their other contracts and remove similar unfair terms. Despite these efforts, regulators would likely continue to encounter businesses that only rectify their potential UCTs prior to imminent litigation, or when it becomes obvious that a court will declare the term unfair. As such, regulators would need to continue endeavouring to reduce the use of UCTs through active engagement with industry and litigation in selected cases. The ACCC listed UCTs in agriculture supply agreements and the viticulture sector as one of its focus areas for 2019.²⁴ In March 2017, ASIC and the ASBFEO completed a review of small business standard form contracts and called on lenders across Australia to take steps to ensure their standard form loan agreements comply with the law.²⁵

²⁴ ACCC, *Small business in focus*, January – June 2019 available at: <https://www.accc.gov.au/publications/small-business-in-focus>

²⁵ Available at: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-056mr-asic-and-asbfeo-join-forces-to-ensure-bank-lenders-meet-unfair-contract-laws/>

4.4. Option 2 – strengthened compliance and enforcement activities

Under this option, regulators would allocate additional resources to strengthen their compliance and enforcement activities. This would enable them to investigate more reported cases of potential UCTs in small business contracts and, where appropriate, commence proceedings to challenge these terms. Regulators would also boost their education and awareness activities. This could, for example, include working with industry stakeholders, small business groups and state small business commissioners to launch targeted education campaigns to improve the awareness of UCT protections among small businesses.

Impact analysis

Allocating additional resources to strengthen compliance and enforcement activities could help raise awareness of the UCT regime and promote compliance. As mentioned above, the ACCC's targeted campaigns and investigations in the waste management industry have led to positive results with some waste management companies agreeing to amend potential UCTs in their standard form contracts. However, the effect on reducing the prevalence of UCTs in small business contracts through this option alone is likely to be limited. This is reflected in the waste management industry. Even though the ACCC had flagged certain terms it considered to be UCTs used in industry, it was not until the case was brought to court that action was taken within the industry.

It should also be noted that regulators do not have infinite resources to enforce the law. Allocating additional resources to strengthen compliance and enforcement activities in relation to UCTs would come at a cost – either through requiring additional funding, or diverting resources from other high-priority activities and therefore reducing the compliance and enforcement of those areas.

Further, despite increased awareness and education around UCT protections for small business, there will still be other factors that hinder small businesses from questioning or challenging the use of potential UCTs, including their weaker negotiation powers and the costs of pursuing litigation.

4.5. Option 3 – making UCTs illegal and attaching penalties

Under this option, a court would continue to decide whether a particular contract term in a standard form small business contract is unfair (regardless of whether the term has been relied on or enforced). If the term is found to be unfair, the court would be able to apply a civil pecuniary penalty for the contravention. The court would be able to determine the appropriate penalty amount, up to the maximum set under the law.²⁶ In imposing a civil pecuniary penalty, the court would need to be satisfied that imposing a penalty is necessary and the amount appropriate, depending on the circumstances of an individual case.

²⁶ The maximum penalty amount would be considered at a later date and take into account the current maximum penalty for similar contraventions under the ACL.

Impact analysis

General

This option is likely to be the most significant deterrence against using UCTs in a small business standard form contract. It places the onus on the contract-issuing party to ensure the contract does not contain UCTs, or risk facing a financial penalty. In turn, businesses may be more likely to take proactive action to revise their existing contracts and contract templates to remove any potential unfair terms (including those terms found by a court to be unfair) to avoid being taken to court for the same terms in other scenarios.

It is theoretically possible that the risk of facing a financial penalty for breaching the UCT protections may lead businesses to prepare and negotiate individual contracts instead of offering standard form contracts, so that they fall outside the scope of UCT protections. However, few businesses are expected to take this approach, as standard form contracts are seen as a low-cost and efficient way for businesses to enter an agreement, particularly for repeated and low-value transactions.

Small business

Improved compliance with UCT protections would help the UCT regime to achieve its goals of reducing the incentive to include and enforce UCTs in small business standard form contracts; providing a more efficient allocation of risk in these contracts; and supporting small businesses' confidence in agreeing to contracts. Also, the reduction of UCTs in standard form contracts would likely increase small businesses' confidence in dealing with other businesses, assisting them in expanding their operations and increasing their competitiveness, which would likely generate a net benefit for the whole economy.

A term that is unfair in a standard form contract may not be unfair in another contract, depending on factors such as any circumstances unique to the particular industry sector and the context in which the contractual term exists. As such, the current legislation provides a list of examples for the court to consider, instead of a definitive list of unfair terms. These uncertainties could be mitigated to an extent through updated guidance and proactive consultation provided by regulators.

The inclusion of UCTs in standard form contracts is a cost on small business. This option is likely to reduce this cost to small business because the risk of including a UCT will rest with the party better able to mitigate these risks (usually the contract-issuing party). However, making UCTs illegal may result in some businesses repricing the value of their contracts, as they would no longer be able to allocate more risk to the other party. Any increase in the upfront contract price made by larger business will at least be clear and upfront, compared to the unknown costs of UCTs. The upfront cost for small businesses under these types of contracts may increase if potential UCTs are amended or removed to comply with the law. Subsequently, small businesses could either absorb the increased cost or pass it to consumers through increased prices on products or services. However, it is difficult to meaningfully quantify the potential effect of increased costs for small businesses and the potential pass-on effect for consumers before the option has come into effect.

Contract-issuing business

When the UCT protections were extended to small business in 2016, a compliance cost of \$50 million for the first year (with no ongoing compliance costs) was estimated by CAANZ. This figure assumed, large and medium businesses would review their contracts and some would amend their contracts, and smaller businesses were unlikely to review their contracts and those that did would utilise standard industry templates.²⁷ Broken down, the compliance cost for individual businesses was expected to be modest and mainly incurred by large businesses who offer many and complex standard form contracts. Any further costs to business to ensure compliance with Option 3 would, in theory, only apply to those businesses who did not amend their approach to small business standard form contracts when the UCT regime was introduced in 2016.

Contract-issuing businesses may also incur a cost as they will no longer be able to transfer risk to small business through the inclusion of UCTs in standard form contracts.

4.6. Option 4 – strengthened powers for regulators

Option 4a – infringement notices

This option is dependent on the adoption of Option 3 as described above. In addition to prohibiting UCTs in small business standard form contracts, regulators could also be given the power to issue infringement notices to further strengthen the deterrence effect of the regime.²⁸

Infringement notices are designed to provide a timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the law. Under the ACL, regulators may issue an infringement notice where they have reasonable grounds to believe that a business has engaged in conduct that is prohibited by the law. In addition, regulators may be more likely to issue an infringement notice where the facts are not in dispute or where they consider the circumstances giving rise to the allegations are not controversial.

Impact analysis

Given the issuing of an infringement notice is less resource intensive compared to court proceedings, expanding the current ACL infringement notice regime to include the (proposed) civil pecuniary penalty for including a UCT in a small business contract could lead to UCTs being addressed more quickly. However, compared to civil pecuniary penalties available in the law, the amount of an infringement notice is relatively low.

While infringement notices offer regulators a quick enforcement tool to respond to allegedly unlawful conduct, their effectiveness is limited by their purpose. For example, if a party is issued an infringement notice and they pay the amount in the notice, the matter is considered addressed and

²⁷ DRIS for *Extending Unfair Contract Term Protections to Small Businesses*, CAANZ, 2015. Available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-021_Extending_UCTs_RIS.pdf

²⁸ If this option were to be progressed, consideration would need to be given to how this might be applied given the different infringement notice regimes in states and territories and the limitations around some of these regimes.

regulators would be prevented from taking future court action in relation to conduct set out in the infringement notice. Only one infringement notice would be able to be issued per UCT. Also, a regulator is less likely to issue an infringement notice when the matter raises complex questions about the interpretation of a provision of the ACL.

During consultation, a number of stakeholders expressed concerns that regulators may choose to exercise their infringement notice powers without a warning. However, a regulator will generally contact a business before issuing an infringement notice. For example, the ACCC's *Guidelines on the use of infringement notices*²⁹ state that prior to issuing an infringement notice, the ACCC will raise its concerns with the business, outlining what they are and the options it considers appropriate to resolve its concerns. The business will then be able to provide any information or documents to the ACCC to explain its conduct and/or suggest any action to address the ACCC's concerns.

Option 4b – regulator determinations

Some submitters to the review proposed that regulators could be given the power to determine whether a contractual term is unfair and request the contract-issuing party to vary the term. If a business wished to appeal a decision made by a regulator, they would still be able to appeal to a court or tribunal for merits or judicial review of the decision. This option would require further careful consideration of potential legal and practical implications.

While several stakeholders suggested giving determination powers to a dedicated authority, this is not considered a viable option, given the costs and significant resources required. While the cost of any such new bodies could be recovered from industry, this would ultimately put a cost burden on businesses. In addition, determining whether a contractual term is unfair involves an exercise of considerable interpretation and judgement. It is possible that different independent authorities (presuming that one is required for financial products and services, and another is required for non-financial products and services) could potentially make inconsistent decisions on the same or similar contract terms, which would lead to uncertainty for businesses.

Impact analysis

Small businesses are likely to benefit from this option as it could improve small businesses' access to justice and may be useful to address more rapidly the situations where there has been repeated use of a UCT in multiple contracts. Several submitters to the review argued regulators should have a determination role as they have the knowledge of marketplace developments and are arguably in a position to make a well-supported judgment on whether a term is unfair. However, some other submitters to the review argued that it would be inappropriate for regulators to take on the role of making determinations themselves, as the determination process of a contractual term is subjective and situational, demanding considerable interpretation and judgment, and therefore something that may be better undertaken by a court. If contract-issuing parties decided to appeal the adjudications given by these authorities in court, this could substantially delay the decision process.

²⁹ Available at: <https://www.accc.gov.au/accc-book/printer-friendly/29446>

It should also be noted that, as mentioned above, regulators do not have infinite resources to enforce the law. Allocating resources to allow regulators to make a determination would come at a cost – either through requiring additional funding or diverting resources from other high-priority activities and therefore reducing the compliance and enforcement of those areas. Even if resources were reallocated, it is likely that regulators would still be unable to investigate and manage all the requests they would get relating to UCTs, or that this approach would be significantly faster than if the small business had sought dispute resolution or litigation.

Further, as regulators currently try to negotiate with businesses using possible UCTs before regulators initiate court action, requiring a business to undergo a regulator determination before they can appeal to a court may add a further step in the process rather than expedite the matter.

Additionally, the public nature of court processes and the detailed public judgments that are produced may act as a deterrent and as a guide for other businesses seeking to avoid UCTs.

Questions

UCTs – use, prevalence and impacts

1. Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.
2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.
3. Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).
4. As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.

Education and awareness

5. Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.

Legality and penalties

6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.

Increasing regulator powers

7. Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.

Other

8. What do you consider are the additional costs and benefits for each of the proposed options?

5. Flexible remedies

5.1. The problem – voiding an unfair term may not address the underlying concern

UCTs automatically void

Under the current law, if a court declares that a particular term in a standard form contract is unfair, then that term is automatically void. If the contract is capable of operating without the void term, the rest of the contract continues to bind the parties. However, challenging a potential UCT may not always be in the best interests of the small business party. The ACCC has commented that, ‘in consideration of potential uncertain or harmful outcomes, the ACCC has, at times, declined to take action against potential UCTs, as the outcome may be worse for the small businesses than the effect of the term itself.’³⁰ Specifically, if a court were to determine a certain term is unfair and therefore automatically void, the entire contract could be unworkable, with the impact felt by both contractual parties. For example, the contract-issuing business could lose revenue from the contract falling through, while the small business may lose access to critical goods and services. While the small business could seek to enter a new contract, there is no guarantee that another party would be willing to enter a new contract or that a new contract would be any more favourable than the original one.

Remedies beyond voiding UCTs

Where a court determines that a term is unfair, and a party has sought to apply or rely upon the unfair term, the court may grant remedies including:

- an injunction preventing the party from attempting to enforce the term or terms that have been declared unfair;
- an order to compensate one or more persons who have suffered, are likely to suffer, loss or damage as a result of another person applying or relying on, or purporting to apply or rely on, the term or terms that have been declared unfair;
- an order to provide redress to ‘non-party consumers’ where the term has caused, or is likely to cause, a class of persons loss or damage and that class includes persons who are not party to the proceedings; and/or
- other orders that the court thinks are appropriate.

The orders that a court makes must be ones that it thinks will compensate, in whole or in part, or prevent or reduce, the loss or damage suffered by the small business party, and can include:

- declaring all or part of a contract to be void;

³⁰ ACCC, submission, December 2018.

- varying a contract or arrangement as the court sees fit;
- refusing to enforce all or any of the terms of a contract or arrangement;
- directing the respondent to refund money or return property to a non-party consumer;
- directing the respondent, at their expense, to repair or provide parts for a product provided under a contract;
- directing the respondent, at their expense, to provide specified services to the non-party consumer;
- in relation to a contract creating or transferring an interest in land, directing the respondent to vary, terminate, or otherwise affect the operation of that contract.

As already noted, in some instances it will be preferable for one or both parties to the contract to have the court provide some other remedy rather than declaring a term unfair and therefore void. The law currently presents two barriers to achieving this outcome, even in circumstances where the order would be mutually beneficial.

First, the current law is silent on whether a regulator or small business may apply to a court for a remedy to vary a contract that has already been declared to have an unfair contract term but the contract is no longer able to survive without the declared term. This is because a court may not be in a position to vary a contract that no longer exists or binds the parties.

Second, even if the contract can survive the voiding of the declared term, the law requires a small business or regulator seeking an order for a remedy such as variation to quantify its financial loss or damage before the court. While this requirement is reasonable where the small business is seeking financial compensation, it may be less appropriate when seeking orders for the contract-issuing party to vary the contract to remedy the harm to the small business. This is particularly the case when the regulator or small business will already have to prove that the contract term is a UCT, which includes proving the potential detriment of the UCT if it was relied on.

Additionally, the current law is not clear whether, or the extent to which, the definition of 'non-party consumer' covers non-party small business and therefore whether remedies would be available to a small business that is not a party to proceedings brought by a regulator, but can demonstrate it has suffered or is likely to suffer loss or damage caused by an unfair term or terms.

The same unfair terms can be used repeatedly

In addition, under the current law, even if a court declares a term in a standard form contract is unfair, it only applies to that one contract. This means the same (or similar) terms could continue to be used in other small business contracts. This applies even if businesses within the same industry frequently use the same standard form contract template when drawing up contracts. Essentially this allows for unfair terms to exist in standard form contracts unless and until a court determines they are unfair in that individual contract.

5.2. Options

Several options are discussed below to address these issues. Options two to four are not mutually exclusive but rather are being canvassed to address the multiple facets of the issues identified above.

5.3. Option 1 – status quo

Under this option, a small business or regulator could challenge a possible UCT and a court could declare whether that particular term is unfair and therefore void. The small business or regulator could also apply to the court for an order for a remedy if the small business has proof it has suffered or is likely to suffer loss or damage caused by the terms the court has declared unfair. However, this is not always a viable option for a small business and does not prevent UCTs from being included in another similar standard form contract, even if that term or similar term has already been declared unfair in almost identical circumstances.

Impact analysis

Under the status quo, there is the potential that a UCT, if challenged and declared void, could put the small business into a worse situation than if the unfair term were to remain. This could discourage small businesses or regulators from challenging potential unfair terms, which may then encourage other businesses to include such terms in their standard form contracts.

5.4. Option 2 - UCTs not automatically void

This option involves amending the current law to provide that when a court declares a small business contract term 'unfair', that term is not automatically void. The court would then have the power to determine appropriate remedies (e.g. that the term is void or is to be varied).

Impact analysis

This option would give courts the flexibility to order an appropriate remedy for small businesses once it declares a contract term unfair. For example, the court could void a UCT or could order the contract-issuing party to vary the unfair term and other related terms. This acknowledges that automatically voiding could potentially result in a worse outcome for the small business. In turn, this could encourage small businesses and regulators to challenge potentially unfair terms and discourage the contract-issuing party from including them in the first place.

This option may also benefit the contract-issuing party, who may be disadvantaged by a term or terms being automatically void upon a court declaring them unfair, especially where voiding the term or terms would make a contract unworkable.

While a small business would still need to prove the potential detriment that they may suffer in order for a court to determine the term is unfair, this would be a lower bar compared to the current requirement to demonstrate loss or damage, which can be a time-consuming and costly exercise for the small business.

5.5. Option 3 – align remedies for non-party small businesses

As per the justification for extending UCT protections to small business contracts, small businesses and consumers share similar characteristics, including limited financial resources and negotiation powers. This option would put beyond doubt that the remedies available for ‘non-party consumers’ would also apply to ‘non-party small businesses’.

Impact analysis

As UCT proceedings are on a case-by-case basis, contract-issuing parties are generally not motivated to remove or revise potentially unfair terms in standard form small business contracts that are not subject to proceedings. By putting beyond doubt that the remedies available for ‘non-party consumers’ would also apply to ‘non-party small businesses’, this option would enable a regulator to commence court proceedings on behalf of a class of small businesses on the basis that a declared unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage. This in turn could motivate contract-issuing parties to review their standard form contracts and remove any terms a court has already declared unfair, or may be likely to declare unfair.

5.6. Option 4 – UCTs used in similar circumstances

This option involves amending the current law to prevent contract terms that a court has declared ‘unfair’ from repeatedly being used in similar small business contracts. This would involve creating a rebuttable presumption provision where a contract term would be declared unfair if, in a separate case, the same or a substantially similar term has been used by the same entity or in the same industry sector and declared by a court to be unfair. Similar to the current rebuttable presumption for the determination of a standard form contract, the onus of proof would sit with the contract-issuing party to show a court that a term is not unfair in light of the whole contract, where the term or a substantially similar term used by the party or other parties in the same industry sector has previously been determined as unfair by the court. Subdivisions of the Australian and New Zealand Standard Industrial Classification could be used to determine whether businesses are in the same industry sector.

This option would require careful consideration of potential legal and practical implications.

Impact analysis

This option could help prevent the repeated use of the same UCTs in standard form contracts. This option is likely to have a minimal impact on business who rely on standard form contract templates which have been developed by a peak industry body, as these templates would need to be amended if affected by a court decision. Those business which create their own standard form contracts could face a greater impact as they would have a greater need to be aware of court decisions that may affect standard terms in their contracts and may also need to prove to a court that the terms are not unfair in the overall context of their contracts.

Questions

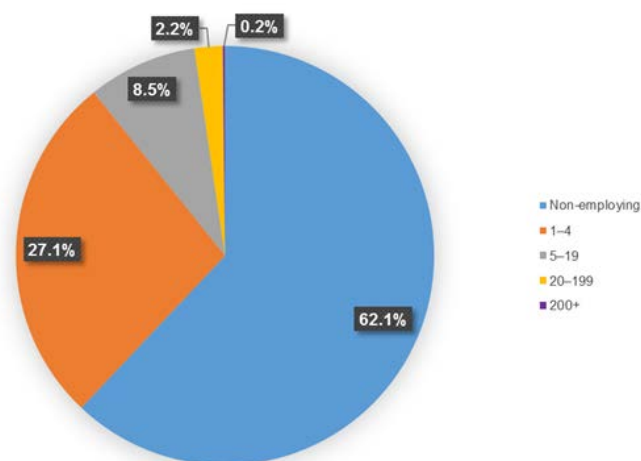
9. Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?
10. If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.
11. Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.

6. Definition of a small business contract

6.1. The problem – headcount threshold doesn't capture all small businesses

Under the current law, one of the requirements for a contract to be considered a small business contract is that at least one party to the contract employs fewer than 20 persons at the time the contract is entered into. While this covers just under 98 per cent of Australian small businesses, some businesses are unintentionally excluded from the coverage. For example, small businesses with seasonal labour demand. It is common for agriculture, hospitality and road transport businesses, for example, to engage a large number of casual employees on a regular or cyclical basis. While these businesses are small in nature as they have small business operations, limited financial resources and negotiation powers, they may become ineligible for the UCT protections during their busy period when they employ 20 or more employees. It is common for these seasonally high labour demand businesses to have close to 100 employees from time to time.

Chart 1: Businesses by employment type



Source: ABS 8165.0

In addition, it can be practically difficult for contract-issuing parties to determine if a contract would meet the definition of a small business contract based on employee numbers. The Business Council of Australia argues that the headcount approach is not transparent and can fluctuate significantly over time, creating challenges for contracting parties to identify which of their standard form contracts are subject to the UCT protections.³¹ This can be particularly difficult when businesses who respond to seasonal labour demands are involved, due to the fluctuation of their employee numbers. This includes, for example, backpackers employed for agricultural peak seasons.

While the Australian Bureau of Statistics, the *Corporations Act 2001* and Section 12BC of the ASIC Act all define a small business as having less than 20 employees, the ASBFEO and the Australian Financial

³¹ Business Council of Australia, submission, December 2018.

Complaints Authority (AFCA) both define a small business as an organisation with less than 100 employees.

An additional or alternative approach to considering employee numbers when classifying a business as a 'small business' is to consider the annual turnover of a business. For example, the Australian Taxation Office (ATO) uses an aggregated turnover of less than \$10 million to categorise a small business for various tax concessions. Similarly, the Australian Banking Association Banking Code of Practice, defines a business as a 'small business' if at the time it obtains the banking service, it had an annual turnover of less than \$10 million in the previous financial year, had fewer than 100 full-time equivalent employees, and less than \$3 million total debt to all credit providers.

6.2. Options

Three options are presented below: maintaining the status quo; defining 'small business contract' by annual turnover rather than headcount; and defining 'small business contract' by either headcount or turnover (that is, a business would need to meet either the headcount or turnover threshold in order for the contract to be considered a 'small business contract').

6.3. Option 1 – status quo

Under the status quo, at least one party to the contract must employ fewer than 20 persons at the time the contract is entered into in order for the contract to be considered a 'small business contract' and covered by the UCT protections.

Impact analysis

Businesses who employ more than 20 but less than 100 persons, including those who may only do so at certain times of the year (e.g. agriculture, hospitality and road transport businesses who respond to seasonal demand) would continue to have difficulties accessing the UCT protections for contracts entered when their employee numbers reach 20 or more. This could create unnecessary confusion, inconvenience and cause businesses to adjust their business practices to ensure they are covered by the UCT protections. This periodical exclusion from the UCT protections for small business could leave such businesses vulnerable to costs associated with a contractual risk should such a risk eventuate.

The status quo would also continue to impact contract-issuing parties, who would continue to face uncertainty as to whether certain contracts are 'small business contracts' based on the employee numbers of the other party.

6.4. Option 2 – replace headcount threshold with turnover threshold

Under this option, a contract would be considered a small business contract if at least one party to the contract is a business with an annual turnover of less than \$10 million, regardless of the number

of persons the business employs. Either the previous or current financial year’s turnover figure could be used when parties enter into the contract.

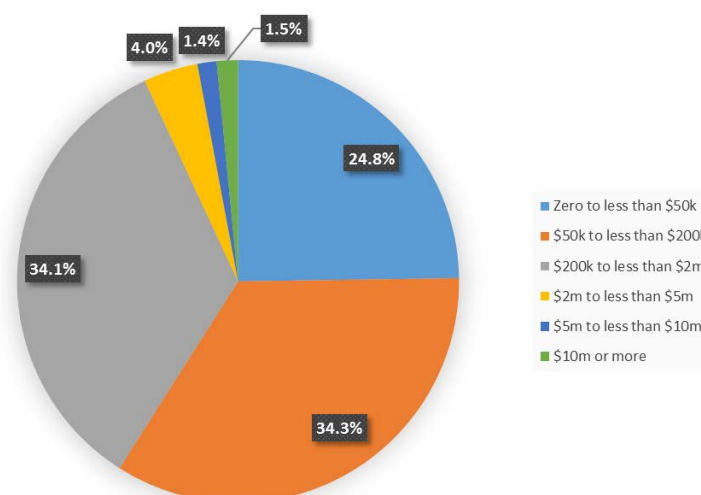
Impact analysis

This option would make it easier for contract-issuing parties to identify whether a contract would be considered a ‘small business contract’ for the purposes of UCT protections, as the turnover of a business is normally readily available, compared to sometimes fluctuating employee numbers. For example, the contract-issuing party could enquire whether the other party is a ‘small business’ for tax purposes (which has a \$10 million turnover threshold set by the ATO). This option may also mean a small business would not need to deliberately restrict its employee numbers to ensure it is covered by the UCT protections.

Conversely, this option could prevent some businesses that are currently covered by the UCT protections for small business from being covered in the future. Specifically, while replacing the headcount threshold with an annual turnover threshold may resolve the seasonal or ad hoc high employee demand issue, it may also unintentionally exclude small businesses with a high annual turnover but low profit margin, for example, an independent petrol station. This would be inconsistent with the original justification for extending UCT protections to small business contracts.

When the UCT regime was introduced in 2016, the compliance cost for individual businesses was expected to be modest and mainly incurred by large businesses who offer many and complex standard form contracts. Any further costs to business to meet to expand definition of ‘small business contract’ would, in theory, only apply to those businesses who differentiate between their approach to small business standard form contracts and other standard form contracts and/or who did not amend their small business standard form contracts when the UCT regime was introduced. Based on consultation with industry stakeholders, most businesses do not normally differentiate between standard form contracts for businesses with less than 20 employees and those with more than 20 employees.

Chart 2: Businesses by annual turnover



Source: ABS 8165.0

6.5. Option 3 – headcount threshold or turnover threshold

Under this option, a contract would be considered a small business contract if at least one party to the contract is a business that employs less than 100 employees or has an annual turnover of less than \$10 million.

Impact analysis

This option would extend the number of businesses captured by the protections, helping to ensure they are accessible to those businesses who are vulnerable to UCTs in standard form contracts, due to weaker negotiation power and less resources. It would mitigate some of the downsides of the use, in isolation, of Options 1 and 2.

This option would make it easier for contract-issuing parties to identify whether a contract would be considered a ‘small business contract’ for the purposes of UCT protections, as the turnover of a business is normally readily available and employee numbers would only need to be considered if the turnover threshold is exceeded.

As per Option 2 above, any costs to business to meet an expanded definition of ‘small business contract’ would, in theory, only apply to those businesses who differentiate between their approach to small business standard form contracts and other standard form contracts, and who did not amend their small business standard form contracts when the UCT regime was introduced. Based on consultation with industry stakeholders, most businesses do not normally differentiate their standard form contracts for businesses with less than 20 employees and those with more than 20 employees.

Questions

Current headcount threshold (less than 20 employees)

12. What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc.

Increased headcount threshold (less than 100 employees)

13. If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.

Annual turnover threshold

14. If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?

15. Do you consider \$10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.
16. If the annual turnover threshold were to be adopted, how might this impact your business? Include any estimates of potential costs and savings.

6.6. Related bodies corporate

While the current law provides that a contract is a small business contract if at least one party to the contract employs fewer than 20 persons at the time the contract is entered into, it is silent on whether employees of ‘related bodies corporate’³² are to be included in the count. This means that a subsidiary or special purpose entity of large a business could be unintentionally covered by the protections if they were to meet the headcount threshold. As the Shopping Centre Council of Australia (SCCA) argues, providing protections to these businesses is inconsistent with the objective of the UCT protections as they are essentially ‘large’ businesses and have strong negotiating positions.³³ Specifically, these subsidiaries and special purpose entities are ultimately funded and supported by their parent companies and have the capacity and resources to appropriately negotiate a contract, should they wish to do so. The UCT regime was not intended to interfere with commercial dealings between large businesses.

In addition, a large business could theoretically adjust its business structure to avail itself of the UCT protections for small business by having one corporate entity which employs all or most of its employees and another corporate entity (with less than 20 employees) that enters into contracts. This kind of practice could have a dampening impact on a competitive negotiation environment.

Two options are presented below: maintaining the status quo or aggregating employee numbers or annual turnover (if turnover is adopted under Options 2 or 3 above) of the corporate group as a whole in defining a related body corporate (e.g. subsidiary) as a small business.

6.6.1 Option 1 – status quo

Under this option, at least one party to the contract must meet the headcount threshold at the time the contract is entered into in order for the contract to be considered a ‘small business contract’ and covered by UCT protections. This could capture subsidiaries or special purpose entities of a large business that employ fewer than 20 persons (under the current headcount threshold) or 100 persons (under the proposed revised threshold presented above).

Impact analysis

The status quo acknowledges that operating decisions of a business may vary – in some cases a subsidiary may rely on its own staffing resources or need to seek its own legal advice. Some large businesses may continue to benefit from this arrangement. While their subsidiaries have the finance

³² Related bodies corporate is defined in Section 50 of the *Corporations Act 2001*.

³³ Shopping Centre Council of Australia, submission, December 2018.

and resources to effectively negotiate a contract, they may choose to rely on the UCT protections to gain an advantage when contracting with other large businesses. They may state that they are protected by the UCT protections as a small business and therefore that the other party must not include possible UCTs in their contracts.

However, effective negotiations on contractual terms between businesses are generally beneficial for a competitive environment, ultimately benefiting consumers through lower prices or broader availability of products and services. It could be argued that the UCT protections should not be utilised as an obstacle for businesses to negotiate effectively, particularly for business parties that have similar market or negotiation powers.

6.6.2 Option 2 – aggregation

Under this option, at least one party to the contract must meet either the headcount or annual turnover threshold at the time the contract is entered into in order for the contract to be considered a ‘small business contract’ and covered by UCT protections. Any related bodies corporate would be considered relevant in determining employee numbers and annual turnover. That is, where an entity is part of a large corporate group, the corporate group will be considered as a whole, rather than just that entity.

Impact analysis

This option supports the original justification for extending UCT protections to small business. Small businesses, like consumers, are vulnerable to UCTs in standard form contracts as they are often offered contracts on a ‘take it or leave it’ basis, lack the resources to understand and negotiate contract terms and there is potential for detriment to the small business if UCTs are enforced. This option also acknowledges that if a business is part of a large corporate group, the UCT protections should not be available to that business because it presumably has the financial means or support to take measures to protect itself when entering into contracts.

Questions

17. In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.

7. Value threshold

7.1. The problem – value threshold may be too low

The UCT protections currently apply to contracts that have an upfront price payable not exceeding \$300,000, or if the contract runs for longer than 12 months, \$1 million. This threshold is considered too low for certain industry sectors. For example, farming businesses tend to be capital intensive, with high revenue but low profit margins. In addition, the value of contracts for heavy farming equipment or supply of produce is normally higher than the current value threshold. This inadvertently excludes small businesses in this industry who, like other small businesses may lack the time, expertise, or negotiating power to properly assess or negotiate terms in standard form contracts that could be unfair. Another example of where the threshold may be too low is where small retail businesses have entered contracts that run for many years, pushing the value of the contract well above \$1 million.

Upfront contract prices can vary

A number of industry stakeholders and regulators have reported the difficulties in determining if a contract is covered by the protections, due to the uncertainty around the determining of the upfront price payable. Often contracts may include an indicative contract price or estimate, which is subject to change depending on market condition, making it difficult to determine whether the contract will fall above or below the UCT protections threshold. These pricing models are commonly used in various industries, particularly agriculture.

Furthermore, there is significant variation in the threshold applicable to small business finance related contracts, depending on the context in which it arises. For example, AFCA can consider complaints relating to a loan of up to \$5 million and the Banking Code of Practice provides protections against UCTs for small businesses that borrow up to \$3 million (i.e. a total credit exposure of \$3 million with all credit providers). These thresholds are not only higher than the current UCT thresholds, but are also creating different thresholds for small businesses to consider. The discrepancy between the UCT protections and the financial dispute resolution jurisdiction creates an inconsistency of protections offered to small businesses.

The current value thresholds offer large businesses an opportunity to avoid the protections by deliberately increasing the contract value. ASIC reported that some lenders to small business borrowers might aggregate or 're-document' loans as one overall loan facility so that they are treated as a single loan.³⁴ For example, a lender may repackage two separate loans of \$500,000 and \$600,000 into a single loan of \$1.1 million, which would push the contract outside of the scope of the UCT protections. While there could be legitimate reasons to package or repackage loans, such as for administrative simplicity, it could exclude the contract from UCT protections. Some submitters claimed that contract-issuing parties may also choose to increase the contractual value by a marginal amount over the thresholds to avoid being captured by the regime.

³⁴ ASIC, submission, December 2018.

7.2. Options

Three options are discussed below: maintaining the status quo; increasing the value threshold to \$5 million; and removing the value threshold completely.

7.3. Option 1 – status quo

Under the status quo, the value threshold would remain at \$300,000, or if the contract runs for longer than 12 months, \$1 million.

Impact analysis

This option provides the least amount of certainty for small business as it enables a contract-issuing party to avoid the UCT protections by raising the upfront contract price above the threshold, including by combining multiple items into a single contract. Uncertainty would also remain around those contracts that do not have a clear up front price payable.

7.4. Option 2 – increase the value threshold

Under this option, the value threshold would be increased to \$5 million per contract, regardless of the duration of the contract.

Impact analysis

Raising the threshold to \$5 million would likely enable a much larger proportion of small business contracts to be covered by the UCT protections. While the contract-issuing party would still be able to group multiple items into a single contract, the likelihood of a contract falling outside the scope of UCT protections would be lower, given the significant increase to the value threshold. The increased threshold would also reduce uncertainty for many small business contracts that do not have an upfront price payable and which are likely to exceed the current threshold.

The \$5 million threshold would also align with that used by AFCA, reducing small business borrowers' confusion around the various thresholds.

This option could impact a greater number of businesses that offer standard form contracts, as the increase to the value threshold would mean that a greater number of contracts would be considered 'small business contracts'

7.5. Option 3 – remove the value threshold

This option would remove a value threshold altogether.

Impact analysis

This option would significantly benefit small businesses, who are not normally in a position, or given an opportunity, to negotiate standard form contracts, regardless of the contractual value. This option also provides the most certainty that a small business contract will not be excluded from UCT

protections based on value threshold alone, especially where the upfront contract price may not be clear at signing.

As per the previous option, this option could impact a greater number of businesses that offer standard form contracts, as the removal of the value threshold would likely mean a greater number of contracts would be considered 'small business contracts'.

However, those businesses who already offer 'small business contracts' normally use the same standard form contract template, regardless of whether the contractual value is below or above the current thresholds.

Questions

Current contract value threshold (\$300,000 or \$1 million for contracts greater than 12 months)

18. Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?
19. Please provide information on how the current contract value threshold has impacted your business.

\$5 million contract value threshold

20. Are there likely to be any negative impacts if the current contract value threshold were to be increased to \$5 million? Please provide details.

No contract value threshold

21. Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.

8. Clarity on standard form contracts

8.1. The problem – not always clear if a contract is a standard form contract

The UCT protections for small business apply to standard form contracts only, which are usually offered on a ‘take it or leave it’ basis, where the receiving party has limited or no opportunity to negotiate the terms. The current law provides a rebuttable presumption, such that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise. The current law also provides several factors a court must take into account in determining whether a contract is a standard form contract, including:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction; and
- any other matter prescribed by the regulations.

These factors focus on relative negotiating powers and negotiation opportunities. However, it is not always clear at the time of entering into a contract whether an effective opportunity to negotiate has been given. This is especially the case where the parties have negotiated or amended one or two minor contractual terms.

Uncertainty around the types of terms that can or cannot be negotiated adds further confusion. Some businesses consider that one-off and limited instances of consultation, negotiation or amendment should satisfy ‘an effective opportunity to negotiate’. For example, ASIC has reported that some lenders assert that their loan contracts should not be treated as standard form contracts because there is some scope for certain terms to be negotiated with small businesses. However, others strongly oppose this reading, as this is seen as being against the intent of the UCT protections to protect vulnerable contractual parties. The ACCC notes that a narrow reading would exclude a significant number of contracts from the operation of the UCT regime and could be easily used by parties to circumvent the UCT provisions.³⁵

³⁵ ACCC, submission, December 2018.

While the onus of proof is placed on the lender to prove that a contract is not a standard form contract where a small business borrower claims a contract is a standard form contract, the lack of clarity to identify an effective opportunity to negotiate creates potential confusion for contracting parties.

In addition, limited judicial precedents means it can be difficult for regulators and legal practitioners to rely on the existing settings to clearly determine whether a contract is a standard form contract. Legal practitioners may also have differing views on whether a particular contract meets the definition of a 'standard form contract', possibly leading to further confusion and uncertainty for businesses.

The Law Council of Australia also considers the repeated use of a contract could be a factor for businesses and legal practitioners to consider, but this is not a criterion listed in the legislation.³⁶ While the court makes decisions on an individual contract basis, 'repeat usage' could be useful to provide a more objective criterion in addition to the existing factors.

8.2. Options

In addition to the status quo, two options are presented below to clarify further what is a standard form contract: specifying 'repeat usage' as one of the relevant matters to identify a standard form contract; and providing better clarity on what constitutes an effective opportunity to negotiate.

8.3. Option 1 – status quo

There would be no change to the current definition of 'standard form contract' under the ACL.

Impact analysis

Under this option, there may continue to be uncertainty around whether a contract is a standard form contract, particularly when the parties have had some limited negotiation on the contract terms or have agreed to minor changes to the agreement. Regulators could better promote, and where necessary, enhance current guidance on what constitutes a 'standard form contract', which could help to partly address these issues.

8.4. Option 2 – repeat usage

This option would make 'repeat usage' a factor a court must consider in determining whether a contract is a standard form contract.

Impact analysis

While a court may have already considered 'repeat usage' as one of the factors it considers relevant in determining whether a contract is a standard form contract, this option ensures 'repeat usage' is a factor a court *must* consider. Compared to the current factors a court must consider, 'repeat usage'

³⁶ Law Council of Australia, submission, December 2018.

is considered more objective as it takes into account instances where a business has issued a contract with the same terms and conditions, or the same core terms and conditions, to multiple parties. However, a court is expected to give appropriate consideration to all mandatory factors before determining if a contract is a standard form contract, so 'repeat usage' would be no more important than any of the other existing factors.

Broadening the factors a court must consider in determining whether a contract is a small business contract could impact the contract-issuing party who is required to prove that a contract is not a standard form contract.

8.5. Option 3 – clarifying 'effective opportunity to negotiate'

The current law already notes that negotiation on terms relating to the main subject matter of the contract, the upfront price payable under the contract, and terms required or permitted by a law does not constitute an 'effective opportunity to negotiate'. This setting will remain.

Under this option, the law would be amended to further clarify the types of actions which do not constitute an 'effective opportunity to negotiate'. This could include:

- a. opportunities for a small business to negotiate minor amendments to a contract, which are amendments that would not alter the intent and essence of the original term;
- b. opportunities for a small business to select, from a pre-existing list of possible terms, which term they would prefer, rather than an opportunity to actually negotiate the substance of the term; and
- c. opportunities for a subset of parties to negotiate on behalf of all small business parties without their permission.

Impact analysis

This option would clarify that certain situations which may appear to be 'negotiation' do not meet the definition of an 'effective opportunity to negotiate' for the purposes of determining whether a contract is a standard form contract. While the three actions proposed above may not cover all negotiation scenarios, they cover most of those scenarios reported by business where there is dispute around whether a contract is a standard form contract.

This option could impact contract-issuing parties who may need to adjust their negotiation approaches in order to successfully prove a contract is not a standard form contract.

Questions

Repeat usage

22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.

Effective opportunity to negotiate

23. If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?
24. In addition to the types of actions outlined in option 4, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?

Education and awareness

25. Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.

9. Minimum standards

9.1. The problem

The current law provides that a term in a small business contract cannot be declared unfair to the extent that the term:

- a. defines the main subject matter of the contract; or
- b. set the upfront price payable under the contract; or
- c. is a term required, or expressly permitted, by a law of the Commonwealth, a State or Territory.

Similarly, the UCT protections do not apply to contracts that are:

- a. subject to equivalent and enforceable protections under a law that is prescribed by regulation;
- b. of marine salvage or towage, and ship charter parties;
- c. for the carriage of goods by ship; or
- d. the constitution of a company, managed investment schemes or other similar bodies.

The exclusion of terms that define the main subject matter ensures that a party cannot challenge a term concerning the basis for the existence of the contract.

The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair. Having agreed to provide a particular amount of consideration when the contract was made, which was disclosed at or before the time the contract was entered into, a person cannot then argue that that consideration is unfair at a later time. The upfront price is a matter about which the person has a choice and, in many cases, may negotiate.

The exclusion of terms ‘required, or expressly permitted, by a law of the Commonwealth or a State or Territory’ ensures that a Court is not required to determine the fairness of terms that are required to be included, or expressly permitted to be included, in contracts as a matter of public policy.

To date, no contracts have been made exempt from the UCT protections under a law that is prescribed by regulation. Industry self-regulation is not exempted as it is not enforceable.

In its submission to the review, the SCCA argued that the current exemptions do not reduce the risk of inconsistencies between the UCT law and retail leasing legislation.³⁷ The SCCA specifically refers to ‘minimum standards’, which are industry-specific requirements included in state and territory laws. While these minimum standards are commonly adopted by businesses and inserted into their standard form contracts, they are not necessarily ‘required or expressly permitted’ by state and territory laws due to the way they are drafted in state legislation. This means the UCT protections

³⁷ SCCA, submission, December 2018.

most likely apply and the terms could therefore be determined as unfair by a court and therefore void.

The SCCA argues that to remove uncertainty for businesses, minimum standards should be exempted from the UCT regime as these standards are legislated by states and territories and therefore should not be subject to UCT determination.³⁸ For example, if a demolition clause that meets the minimum standards of state or territory leasing law is challenged in courts as unfair, it may result in a significant delay of a proposed redevelopment, causing disruption and uncertainty for developers and other affected tenants.

The premise for exempting minimum standards is that state and territory law makers have already considered and consulted on any minimum standards before including them in state legislation, including the fairness of those standards. The SCCA argued that the potential capture of minimum standards by the UCT regime could lead to a legal paradox, whereby a court declares a standard prescribed by a state or territory as unfair. It is the view of the Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia that a state or territory minimum standard should not be assessed as an unfair term.³⁹

The SCCA acknowledges that there is no current evidence to prove this is happening or has happened, but considers this is a potential risk to its members.⁴⁰

9.2. Options

Two options will be discussed below in light of the problem identified above: maintaining the status quo; or clarifying that minimum standards under state or territory laws cannot be declared unfair.

9.3. Option 1 – status quo

Under this option, minimum requirements or standards under state and territory laws could possibly be challenged as being unfair.

Impact analysis

This option would not have an impact on businesses, except for the continuation of uncertainties around whether a court might determine minimum standards as UCTs.

If a minimum standard appears to be unfair, small businesses currently benefit from having the option to challenge it under the UCT regime. An exemption for minimum standards would remove this protection for small business.

The Law Society of Queensland (LSQ) and Professor Jenny Buchan made submissions opposing exempting minimum standards prescribed by state or territory laws (i.e. in favour of the status quo).

³⁸ SCCA, submission, December 2018.

³⁹ LCA, submission, December 2018.

⁴⁰ SCCA, submission, December 2018.

The LSQ argued that there is already sufficient protection for minimum standards under the protection of mandatory provisions imposed by law.⁴¹

9.4. Option 2 – exempt minimum standards under state and territory laws

Under this option, minimum standards under state and territory laws would not be able to be declared unfair.

However, the exemption would only apply to the minimum standards that were already in force when a contract is signed. That is, the exemption would not apply to minimum standards that are changed or are newly prescribed by states or territories during the contract period.

Impact analysis

Some large businesses, such as large real estate developers, would benefit from the certainty offered by this option. There would no longer be any ambiguity about whether the minimum standards included in their standard form contracts could be challenged by regulators or small businesses as unfair. As the risk of these minimum standards being tested and determined as unfair terms is remote, the benefits offered by certainty is unquantifiable.

The National Fire Industry Association argued that where minimum standards cause uncertainty for businesses, they should be exempt from the UCT protections.⁴² The Swimming Pool and Spa Association shared the similar view that minimum standards prescribed by state and territory laws should be exempt as small businesses do not need more and unnecessary complexity.⁴³

Small businesses may be negatively impacted by the exemption as they would be no longer able to challenge minimum standards under the UCT protections.

The Australian Institute of Quantity Surveyors argued that exempting minimum standards from the UCT regime may put small businesses at a higher level of risk than they had contemplated when the contract was signed, should the local authorities decide to revise the legislated minimum standards making it more costly for contracting businesses to comply.⁴⁴ However, this concern could be mitigated by ensuring the exemption for minimum standards would not apply to minimum standards that are changed or are newly prescribed by states or territories during the contract period.

⁴¹ Submissions, December 2018.

⁴² National Fire Industry Association, December 2018.

⁴³ Swimming Pool and SPA Association, December 2018.

⁴⁴ Australian Institute of Quantity Surveyors, submission, December 2018.

Questions

26. If minimum standards under state and territory laws could be challenged as being unfair, what impact is this likely to have on your business (or those businesses you represent)?

10. Application of any enhanced protections to consumer and insurance contracts

While the UCT provisions in the ASIC Act apply to most financial products and services, they do not currently apply to insurance contracts regulated under the *Insurance Contracts Act 1984* (IC Act). As noted in the introduction to this RIS, on 28 November 2019, the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019*, which will extend the current UCT protections to insurance contracts, was introduced into Parliament. These protections are similar to the existing protections for consumers and small businesses in the ACL and the ASIC Act.

The regulators and several submitters have argued that any strengthened protections for small business contracts should also apply to both consumer and insurance contracts, since otherwise there would be significant inconsistency. Similar to small business contracts, the protections afforded to consumer contracts lack strong deterrence for businesses not to use UCTs in their standard form contracts.

The rationale for expanding the UCT regime by making UCTs illegal, providing for a penalty, enabling regulators to issue infringement notices, giving courts the ability to apply more flexible remedies and clarifying standard form contracts could apply equally for consumer and insurance contracts.

The UCT protections for consumers have been in place since 2010. The ACCC has obtained outcomes in consumer UCT matters in a handful proceedings and court enforceable undertakings since the protections commenced. The UCTs declared by courts or addressed by businesses mainly related to terms allowing businesses to unilaterally terminate or vary a contract, or providing that consumers are liable for loss or damage regardless of the reason. It is difficult to determine the prevalence of UCT issues faced by consumers because, similarly to potential UCTs faced by small businesses, many consumers may not report, or not be aware of potential unfair terms, so complaints and reports received by the regulators likely represent a small portion of consumer concerns about unfair terms.

Should governments decide to apply any enhanced protections to consumer contracts, the regulatory costs for businesses are estimated to be small and a positive net benefit would be produced. Similar to the UCT protections for small business, contract-issuing businesses should have already reviewed their contracts to ensure compliance with the existing legislation. The marginal cost of doing so in response to civil penalties applying to the use of UCTs should be low. Further, if any change results in the removal of UCTs from business to consumer contracts, this would likely result in a more efficient allocation of risk and mitigate detriment to consumers, ultimately raising fairness in consumer contracting across the economy. This would likely result in a net positive benefit.

For insurance contracts, businesses will need to comply with the new UCT requirements when they are legislated and come into effect. As relevant businesses will need to review and adjust their standard form contracts regardless, there should be no additional regulatory costs for businesses offering insurance contracts in complying with new requirements making UCTs illegal and attaching penalties.

Questions

27. What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?
28. What are the other policy options that would be appropriate to apply to consumer and insurance contracts?
29. What would be the impact on consumer and insurance contracts of applying those requirements?

11. Application to franchising agreements

The presence of UCTs in franchising agreements has been identified in related reform processes underway. To ensure consistency, this RIS considers UCT reform options across the economy. The franchising sector is an important contributor within the wider economy. This section considers the application of UCT protections to franchise agreements.

The Parliamentary Joint Committee on Corporations and Financial Services made a number of recommendations about application of UCT protections to the franchising sector in its inquiry report *Fairness in Franchising*. These recommendations included:

- a. prohibiting UCTs in all franchise agreements, notwithstanding any other terms in a franchise agreement or other agreement (recommendation 9.1 and 9.5);
- b. applying civil pecuniary penalties and infringement notices where a standard form contract to a small business contains a UCT (recommendation 9.1);
- c. resourcing the ACCC to appropriately investigate UCT reports (recommendation 9.3); and
- d. addressing the existence of UCTs in perpetual franchise agreements (recommendation 9.6).

The options considered in this RIS apply to all small businesses operating in the franchising sector, rather than all franchise agreements. Similar to the other general protections offered in the Australian Consumer Law, the UCT protections apply across the whole economy and are not intended to provide protections for specified sectors.⁴⁵ In addition, the UCT protections do not intend to interfere in the normal conduct of commercial dealings nor undermine the ‘sanctity of contract’ principle.

The definition of small business contract, as considered in Section 6, considers options to use headcount or turnover to define a small business. Further information is sought on the proportion of franchise businesses that would be covered under the options of the definition.

Section 7 of the RIS considers what the appropriate value threshold of contracts is for UCT protections, and if they should be changed from \$300,000, or \$1 million for contracts longer than 12 months. Evidence is sought on how any changes in contract value thresholds may impact on franchising agreements.

In Section 8, a range of options to clarify the scope of the standard form contract definition are presented. Further information is sought on the application of the definition of a standard form contract to a franchising agreement.

This RIS has considered civil pecuniary penalties, infringement notices, regulator resourcing and enforcement in section 4. Further information is sought on how the options might apply in the

⁴⁵ Other general protections under the ACL include misleading or deceptive conduct and unconscionable conduct.

franchising sector and whether they would provide sufficient deterrence for the use of UCTs in franchise agreements.

Perpetual or evergreen franchise agreements are franchise contracts without an expiry date and which are renewed or rolled over every year. The number of perpetual franchise agreements in use has not been determined, though the Parliamentary Joint Committee heard evidence it is a small proportion.

Questions

30. How would the options for defining small business (in Section 6) apply to franchisees and franchisor businesses, and what proportion of franchisees would be a small business under each of the options?
31. Will changes to the value thresholds for contracts (section 7) apply to franchise agreements, and what proportion of franchising agreements would be captured under each option?
32. How would the options for clarifying a standard form contract (Section 8) apply to franchise agreements, and what proportion of franchisee agreements would be a standard form contract?
33. How will the different penalties, infringement notices and enforcement options (Section 4) apply in the franchising sector? Would they be appropriate for franchise agreements?
34. What proportion of franchise agreements are perpetual or evergreen, and how could UCTs in these agreements be addressed?