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Dear Toby

Enhancements to unfair contract term protections – consultation regulation impact statement

The ACCC welcomes the opportunity to make a submission in response to the Enhancements to Unfair Contract Term Protections consultation regulation impact statement. Our submission is attached to this letter.

The ACCC's principal recommendation is that the inclusion of an unfair contract term in a standard form contract should be a contravention of the Australian Consumer Law, and subject to civil pecuniary penalties and other remedies commonly available for contraventions of the Australian Consumer Law.

An express prohibition backed up by effective remedies will not only provide a direct incentive for compliance, it is also fundamental to promoting an ongoing culture of compliance to ensure that consumers and small businesses receive the protections of the unfair contract terms laws.

If you wish to discuss any aspect of the attached submission, please contact Rami Greiss, Executive General Manager, Enforcement Division on (02) 6243 1226 or rami.greiss@accc.gov.au.

Yours sincerely

Delia Rickard
Deputy Chair



Enhancements to Unfair Contract Term Protections

Consultation Regulation Impact Statement

ACCC submission

March 2020

1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) welcomes the Government's commitment to enhancing the unfair contract terms (**UCT**) regime, and the opportunity to make a submission in response to Treasury's consultation regulation impact statement (**CRIS**).

The ACCC is an independent Commonwealth statutory authority responsible for enforcing the *Competition and Consumer Act 2010* (Cth) (**CCA**), which includes the UCT regime in the Australian Consumer Law (**ACL**). By doing so, we promote fair trading, consumer protection, and competition for the benefit of all Australians.

Parliament introduced the UCT regime in 2010 to protect consumers entering standard form contracts. In 2016, the protections were extended to some business-to-business contracts, given that small businesses, in a similar way to consumers, often lack the bargaining power, expertise, and ability to negotiate or assess the standard form contracts they enter. UCTs often allocate risks to the party that is least able to manage them. The UCT provisions are intended to deter the inclusion of UCTs in standard form contracts, but in the ACCC's view, they have not fully achieved this objective.

This submission will address the following key points:

- *The need for an express prohibition and effective remedies* – The ACCC considers that the most important change needed to increase the effectiveness of the UCT regime is to expressly prohibit the inclusion of UCTs in standard form contracts and provide for civil pecuniary penalties. This will provide a significant and ongoing incentive for businesses offering standard form contracts to ensure their contracts do not contain UCTs. It will also provide the ACCC, State and Territory Fair Trading agencies, and contract recipients a broader range of effective tools to address UCTs. The ACCC also supports UCTs not automatically becoming void, and aligning the remedies for non-party small businesses with those available to non-party consumers.
- *Clarifying the UCT regime* – This section provides the ACCC's views on clarifying the application and operation of the UCT regime, including our support for replacing the current headcount threshold with a turnover threshold, removing the value threshold for small business contracts, and making 'repeat usage' of a contract a mandatory factor for a court to consider in determining whether the contract is a standard form contract.

The ACCC is happy to discuss any of the views put forward in this submission.

2. The importance of an express prohibition and effective remedies

Unfair contract terms are causing real detriment to consumers and small businesses around Australia. However, the lack of an express prohibition and effective remedies significantly limits the protections that the current UCT regime provides. Currently, businesses have little incentive to proactively ensure their contracts do not contain UCTs. An express prohibition backed up by effective remedies will not only provide a direct incentive for compliance, it is also fundamental to promoting an ongoing culture of compliance.

2.1. Making the inclusion of UCTs a contravention

The ACCC strongly supports making the inclusion of UCTs in both business-to-consumer and business-to-business standard form contracts an express contravention of the ACL and subject to civil pecuniary penalties.¹ This is our principal recommendation, as it was in December 2018.²

The ACCC agrees with the statements in the CRIS that a central reason that UCTs remain widespread is that the current regime provides little incentive for businesses to ensure that their standard form contracts do not contain UCTs.³

The ACCC has taken a range of compliance and enforcement actions under the UCT laws. There has been minimal action taken by private litigants. Based on our experience, the majority of UCTs go undetected and are readily relied upon by the businesses offering them. In relation to those matters where the ACCC takes action, the only real consequences for the contract-issuing party is the inconvenience of engaging with the ACCC to amend the unfair terms or, in a small number of cases, having a court declare a term unfair and therefore void, and then having to amend the contracts.

This places a significant burden on regulators to detect and take action in relation to UCTs, while providing no incentive for contract-issuing businesses to proactively assess their standard form contracts. The contract-issuing business, as the drafter of the standard form contract, is best placed to ensure that the contract is free from UCTs, and is in the best position to:

- determine what risk allocation is efficient and fair under the contract
- align the obligations under the contract with its own business practices
- know which contract terms it is willing to negotiate
- foresee whether it or a small business customer or consumer should carry the risks incurred by a potential UCT, and
- know other risk mitigation strategies that could be adopted.

Amending the ACL to allow the court to impose civil pecuniary penalties against contract-issuing businesses would not produce unreasonable outcomes. The ACCC (and other relevant regulators, and consumers or small businesses who may take action alleging a term is a UCT) would still be required to establish that the term causes a significant imbalance in the parties' rights and obligations, that it is not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and that it causes or would cause financial or other detriment to the other party to the contract if it were relied on.

Further, as with all other pecuniary penalties, the court would need to be satisfied that imposing a pecuniary penalty is appropriate in the circumstances of any individual case, and determine the appropriate penalty.

As noted above, this is our principal recommendation on the issues raised in the CRIS. Without changes to expressly prohibit the inclusion of UCTs in standard form contracts and provide for civil pecuniary penalties, in our view the other changes discussed in the CRIS will be of limited utility. However, the ACCC has set out views on these other changes below on the assumption that these changes may be made *in addition to* an express prohibition with civil pecuniary penalties attached.

¹ Chapter 4, Option 3 of the CRIS.

² ACCC, [Review of Unfair Contract Term Protections for Small Business](#), submission, 21 December 2018, p.2.

³ CRIS, p.13.

2.2. Infringement notices

The ACCC supports giving regulators the power to issue infringement notices to further strengthen the deterrence effect of the regime.⁴ Infringement notices can provide a timely and cost-effective enforcement outcome in relation to potential contraventions involving isolated or non-systemic conduct and less severe levels of consumer or small business detriment. Infringement notices can also be combined with court-enforceable undertakings offered by businesses under section 87B of the CCA in order to effect changes to businesses' practices, in addition to addressing past conduct. Infringement notices add flexibility to the regulatory toolkit, allowing regulators to proportionately and appropriately tailor enforcement responses to the full array of circumstances. The power for the ACCC to issue infringement notices for alleged UCTs should be consistent with the ACCC's current infringement notice provisions in sections 134-134G of the CCA, noting that parties issued with infringement notices are able to challenge their validity in the courts.

2.3. Automatic voiding of UCTs

The ACCC supports amending the UCT regime so that a UCT is not automatically void.⁵ Automatic voiding can result in uncertain or unintended consequences for the parties. As such, the ACCC supports the court having the power to determine appropriate remedies, including whether the term is void or whether it should be varied.

For example, where there is a potential UCT in relation to the termination of a contract, such as imposing unreasonable or disproportionate costs to terminate the contract or an unreasonable notice period, it is currently unclear how the contract would operate if the term were declared a UCT and therefore void, i.e., whether it would continue indefinitely, which could result in a contract that is even more unfair for the consumer or small business.

While in such circumstances, a court may determine that the relevant contract is not 'capable of operating' without the void term, there has been little judicial consideration of this. This creates uncertainty for all parties to the contract.

Similarly, if the entire contract is found not 'capable of operating' without the void term, this can also have a detrimental impact on all parties to the contract, but particularly to the parties that are small businesses or consumers. There can be meaningful transaction and administrative costs involved in signing up to a new contract and the business imposing the standard form contract may refuse to supply critical goods or services to a consumer or small business (or acquire critical goods or services from a small business) until they sign a new contract.

Removing the automatic voiding of a UCT and empowering the court to determine the appropriate remedy, including the power to vary the term, would allow for a more just, flexible, and mutually beneficial outcome.

2.4. Non-party small business remedies

The ACCC supports aligning the remedies for non-party small businesses with those that currently exist for non-party consumers,⁶ in particular through providing courts with the ability to make orders relating to non-party small businesses that have had a UCT included in their contract.

⁴ Chapter 4, Option 4a of the CRIS.

⁵ Chapter 5, Option 2 of the CRIS.

⁶ Chapter 5, Option 3 of the CRIS.

This option would not require a significant change to the legislation, but could be achieved with a simple amendment to section 239 of the ACL, and would benefit small businesses and make enforcement action more effective, increasing the efficacy of the UCT regime.

2.5. Rebuttable presumption for re-used UCTs

The ACCC supports creating a rebuttable presumption that a contract term in a standard form consumer or business contract would be considered a UCT if it were the same or substantially similar to a term which had been used by the same entity or in the same industry sector and had previously been declared a UCT.⁷ This presumption would give greater certainty to consumers and small businesses and make it easier for them to effectively enforce their rights under the UCT regime. Further consideration will need to be given to how to appropriately frame any such rebuttable presumption to ensure the scope is appropriate.

3. Clarifying the UCT regime

Some aspects of the UCT regime have created ambiguity, uncertainty, and practical difficulties for business to comply with the law, as noted by the CRIS.⁸ The ACCC supports a range of enhancements to ensure that the UCT regime aligns with its original policy intent of providing for more efficient contracting and risk allocation, including by ensuring the small business thresholds appropriately and clearly protect those small businesses who need its protection. The ACCC considers that the UCT regime should be as clear and simple to understand as possible so that large and small businesses alike can easily understand their rights and obligations.

3.1. Definition of a small business

The ACCC supports replacing the current definition of a small business based on headcount with one based on turnover, where a party will be a “small business” for the purposes of the UCT regime if it has an annual turnover of less than \$10 million.⁹

In the ACCC’s experience, the current headcount threshold has not successfully captured the full range of small businesses that need the protections of the UCT regime. In our experience, there are a number of industries, such as hospitality and agriculture, where unfair terms in standard form contracts are common and cause real detriment, yet some affected small businesses are excluded from the protections of the UCT regime due to the high number of seasonal or casual workers that they employ. The exclusion of these businesses is often inappropriate, because, regardless of their employee numbers, they have the characteristics which the UCT protections were designed to mitigate: limited or no countervailing bargaining power and limited or no ability to effectively negotiate a standard form contract.

Further, the current headcount threshold has led to uncertainty about the coverage of the UCT regime. This uncertainty hinders compliance with the law. It is difficult for a contract-issuing party to determine the other party’s employee numbers, and it is often not easy for a small business itself to determine whether its seasonal or casual workers meet the UCT regime’s test of being ‘employed on a regular and systematic basis’.¹⁰

⁷ Chapter 5, Option 4 of the CRIS.

⁸ CRIS, p.4.

⁹ Chapter 6, threshold Option 2 of the CRIS.

¹⁰ Section 23(5) of the ACL.

The ACCC considers that replacing the current headcount threshold with a \$10 million annual turnover threshold will provide a clearer and more effective threshold. Firstly, since the \$10 million threshold aligns with the ATO's small business tax concessions threshold, a small business is more likely to already know whether it meets that threshold for tax purposes. Secondly, the ACCC considers that a turnover threshold will more appropriately align the UCT protections with those businesses who need the protection, including small businesses that operate in labour-intensive but low-revenue industries.

3.2. Contract value threshold

The ACCC supports removing the value threshold for small business contracts to be covered by the UCT regime.¹¹ Instead, we consider the UCT regime should rely on whether the contract-receiving party is a small business (under the turnover threshold discussed above) and whether the contract is a standard form contract.

The original rationale for including a contract value threshold was the 'moral hazard' problem, where a small business might deliberately not conduct appropriate due diligence (principally, seeking legal advice) for a high-value contract, knowing that they may later be able to rely on the UCT protections.

The ACCC considers that this concern is misconceived. The UCT regime is intended to protect consumers and small businesses who have no meaningful choice about whether or not to enter a standard form contract and no power to negotiate the terms of that contract. Where the consumer or small business is able to meaningfully negotiate the terms of a contract, the UCT regime is not engaged, regardless of the value of the contract.

Where a small business has no effective opportunity to negotiate a standard form contract and has no meaningful choice about whether to enter into the standard form contract, then regardless of the value of the contract, the ACCC considers the UCT protections are necessary and appropriate.

Due diligence steps, such as seeking legal advice, do not change the position of a small business where it has no effective opportunity to negotiate a standard form contract. This position is particularly exacerbated in concentrated industries where small business suppliers or acquirers lack viable alternatives.

Further, we have seen no evidence that the UCT regime has disincentivised consumers or small businesses from conducting appropriate due diligence. If there is any disincentive, we expect it comes from the lack of an effective opportunity to negotiate and the lack of a meaningful choice about whether or not to enter the contract, rather than from the existence of a UCT regime.

3.3. Consideration of 'repeat usage'

The ACCC supports including 'repeat usage' by a business of the same, or substantially the same, contract as a mandatory factor that a court must consider in determining whether business-to-consumer and business-to-business contracts are standard form contracts.¹²

3.4. Application to insurance contracts

The ACCC supports extending any enhanced protections in the UCT regime that result from this CRIS process to insurance contracts as appropriate.¹³

¹¹ Chapter 7, Option 3 of the CRIS.

¹² Chapter 8, Option 2 of the CRIS.

¹³ See also, ACCC, [Extension of unfair contract terms protections to insurance contracts](#), submission, 23 August 2018.

The ACCC welcomes the commencement, on 5 April 2021, of the extension of UCT protections to insurance contracts.¹⁴ The harms from UCT protections not applying to insurance contracts were noted in our Northern Australia Insurance Inquiry, and the extension of the UCT regime was a recommendation in the ACCC's first interim report.¹⁵

3.5. Clarity on whether a contract is standard form

The ACCC considers there could be better clarity in the list of matters for a court to consider when determining whether business-to-consumer and business-to-business contracts are standard form contracts, including but not limited to the 'effective opportunity to negotiate' factor.

The ACCC considers that a simple way to clarify the list of matters would be for sections 27(2)(c), (d) and (e) of the ACL to be amended to remove the phrase "another party", and the sections be redrafted to make it clear that those factors must be assessed in the context of the relationship and negotiations between the contract-issuing party and the specific consumer or small business in question in the proceedings.

¹⁴ *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020*, Schedule 1.

¹⁵ ACCC, [Northern Australia Insurance Inquiry - First Interim Report](#), 18 December 2018.