

## Clubs Australia Submission Enhancements to Unfair Contract Term Protections

Clubs Australia welcomes the opportunity to provide feedback on The Treasury's Consultation Paper, *Enhancements to Unfair Contract Terms*.

Clubs Australia represents 6,400 not-for-profit licensed clubs, which serve as social hubs for 13.2 million club memberships.

Clubs Australia estimates 76% of clubs enter into small business contracts pursuant to section 23 of *The Australian Consumer Law* (The ACL), and thereby have the protections of the unfair contract term (UCT) scheme.

Licensed clubs have previously been affected by the UCT scheme. Many clubs have used ATMs supplied under contracts which were automatically renewed for a multi-year period if notice of cancellation was not provided several months before the contract's expiry. In 2018, the ACCC formed the view that such contracts may be UCTs depending on the timeframes for the automatic renewal period and notice period.

Clubs Australia has responded to some of the Discussion Questions on the following pages.

In summary, Clubs Australia recommends the following amendments to the framework:

- Apply the UCT protections to insurance contracts;
- Make UCTs in small business contracts illegal;
- Increase the size threshold for a small business to \$10 million annual revenue.

Should you wish to discuss further, please contact Anthony Trimarchi, Manager of Public Affairs on (02) 9268 3072, or by email at [ATrimarchi@clubsaustralia.com.au](mailto:ATrimarchi@clubsaustralia.com.au).



## Discussion Questions

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

Clubs Australia supports applying the UCT scheme to insurance contracts.

The UCT scheme mitigates a small business' risk of detriment stemming from certain types of contracts.

By their nature, insurance contracts are a risk mitigation mechanism. Therefore, from a policy standpoint, the UCT scheme is largely incomplete without extending to insurance contracts.

Members of Clubs Australia – primarily located in NSW's Mid North Coast, South Coast and Southern Highlands – have been significantly affected by the recent summer bushfires.

Many clubs were required to be evacuation or refuge centres. These clubs shut down their trading for up to three weeks to provide hospitality and accommodation to residents who evacuated their homes.

Some other clubs were forced to temporarily close because roads, electricity or other vital infrastructure was damaged, thereby preventing trade.

Given that summer is the peak trading period for many affected clubs, the shutdown in trade severely affected their cash-flow and revenue, with some clubs losing up to 50% of revenue relative to the same time in 2018-19.

Despite holding business interruption insurance, many of these clubs were instructed that certain language and conditions in the insurance contract precluded the insurance provider from compensating the club.

For instance, a club on NSW's South Coast was forced to shut down when the Princes Highway was closed throughout periods of December 2019 and January 2020. The club's business interruption insurance compensated for losses arising from "prevention of access". The club was instructed that the prime condition of the contract was met, because the bushfires constituted a requisite crisis event and the club incurred financial losses arising from that event.

However, the club could not claim compensation pursuant to the contract for reasons including:



- the underlying damage which caused the club's closure was bushfire damage to grass and trees, and the insurance contract expressly excludes those property types;
- the insurance contract only covers prevention of access where there is damage on the premises of the insured's property, and there was no bushfire damage on the club's property.

Clubs Australia considers that the language and conditions which prevented the club from claiming insurance under the contract are clearly contrary to expectations and should be illegal unfair contract terms.

**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).**

Clubs Australia has observed the following terms:

#### Licences to use personal data

In most Australian jurisdictions, clubs must maintain registers recording personal details of their members, including full name, occupation and physical address.<sup>1</sup>

To comply with these legislative requirements, clubs establish a register of members.

In the course of carrying out their contracted work, various suppliers to clubs have access to the register. These include:

- providers involved in creating a loyalty program for club members, including the providers of the loyalty program and point of sale providers;<sup>2</sup>
- database management providers, whose services clubs may contract to maintain their register;

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<sup>1</sup> *Registered Clubs Act 1976* (NSW) s 31. Similar requirements in other jurisdictions include *Liquor Control Reform Act 1998* (Vic) s 10(4)(b), and *Liquor Act 1992* (Qld) s 79(1).

<sup>2</sup> If the loyalty scheme involves discounts at the club, the point of sale system will commonly form part of the scheme.



- software or information technology providers, who may incidentally gain access to member information if the register is digital.<sup>3</sup>

These suppliers may capitalise on their access to member information by proposing contracts under which the supplier has the right to copy, use or disclose the data. The legal form that such a right takes may either be a licence, given by the club to the supplier, to copy, use or disclose the data, or an assignment of the data.

Data licence and assignment terms are rarely detected by clubs for the following reasons.

First, the terms are not the primary feature of the transaction. Contracts to which clubs are a party typically involve a supplier providing a good or service to the club in exchange for payment. Most clubs do not contemplate that, in addition to this primary transaction, the contract also features a secondary transfer under which the club licenses or assigns valuable intangible property to the supplier.

Second, the terms are mostly buried in the contract, separated from other clauses pertaining to exchange of property, and are written in brief and general language.

Clubs Australia has observed the following term:

*[The club] grants to [the provider] a royalty free, non-exclusive, perpetual licence to use, copy and modify the Data:*  
*(a) to provide the Services to [the club] or to its other obligations under this agreement; and*  
*(b) to use the Data in Aggregated Form for the purpose of providing services to other licensees, customers and potential customers of [the provider].*

### Limitation of liability

Clubs have been exposed to significant legal risks due to their counterparty supplying a product which may infringe the intellectual property of a third party. In these circumstances, Australia's intellectual property statutes generally do not prevent the third party from directly taking action against the club. Accordingly, the club must rely on its contract with the supplier to recover any losses or damages resulting from the legal action.

Clubs Australia has observed contracts which expressly limit the supplier's liability for the club's losses arising from the product infringing the intellectual property of another party.

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<sup>3</sup> For instance, a cloud service or cyber-security provider may gain direct access to the patron register.



These contracts may also provide that the club limits its liability to the supplier for any infringement of intellectual property. Such a contract may appear “balanced”, because both parties limit their liability to the other. However, the club bears a far greater risk of intellectual property infringement by the counterparty and such a contract is therefore imbalanced in substance.

#### Power to unilaterally change price

Clubs Australia has observed contract terms which provide:

- if the club terminates the contract during the contract period (e.g. 12 months), the club must pay a cancellation fee corresponding to the remainder of the period; and
- the provider may increase the price during the period of subscription if it provides notice to the customer, and the customer does not cancel its service following the notice.

These contracts afford the supplier with certainty, by restricting customers from terminating the contract during the specified period. However, clubs are not afforded the same certainty because the provider may raise its price at any time, including during seasonal periods of high demand.

#### **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.**

Clubs Australia supports this recommendation.

The Explanatory Memorandum to the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* states that the UCT scheme will “reduce the incentive to include and enforce unfair terms in small business contracts, providing for a more efficient allocation of risk in these contracts and supporting small business’ confidence in agreeing to contracts”.<sup>4</sup>

Clubs Australia does not believe this objective has eventuated because the UCT scheme does not sufficiently deter exploitative conduct.

If an entity includes an unfair term in a small business, standard form contract, the primary consequence is that the term may be voided.<sup>5</sup>

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<sup>4</sup> Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth), paragraph 2.6.

<sup>5</sup> Section 246 of the ACL also contains a range of non-punitive orders, including establishing a compliance program.



This consequence lacks the severity to reflect the low likelihood of a small business successfully voiding the term. Most small businesses do not have the resources to identify, or take action to void, an unfair term.

By failing to sufficiently deter businesses from using unfair terms, Clubs Australia does not believe that the current UCT scheme offers appropriate levels of protection to small business.

The UCT scheme can better protect small business by recognising the incentive structure facing entities that may wish to include an unfair term. Clubs Australia recommends achieving this objective by providing that it is illegal to include an unfair term in a consumer or small business, standard form contract.

#### **Definition of a small 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.**

Clubs Australia supports this recommendation. An annual turnover of \$10 million is consistent with the definition of small business applied by the Australian Taxation Office.<sup>6</sup>

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<sup>6</sup> *Income Tax Assessment Act 1997* (Cth) s 328-110.