

Spier Consulting - Legal

4 Waller Cres, Campbell, ACT, Australia 2612

02 62812030- 0419 239 755

spierconsulting@netspeed.com.au

**Mr Toby Robinson
Manager, Consumer Policy Unit
Consumer and Corporations Division
The Treasury
Langton Crescent
Parkes ACT 2600**

27 March 2020

Dear Sir,

ENHANCEMENT OF UCT LEGISLATION

The extension to small business of UCT protections has in my view been one of the most valuable protections to small business. Not to mention the initial UCT law relating to consumer contracts.

Many unfair contract terms have or are or will be eliminated. The ACCC has done a good job my experience is that the law has been used in a self-enforcing fashion. I have extensively used the law in relation to suppliers' various sector.

Industry needs to more itself to challenge UCT and not totally rely on public bodies.

I have retainers with small business groups and act on their behalf to challenge UCT issues. We in that way challenge more than the ACCC does as it understandably initially challenges the most blatant and builds on Court precedents and that takes time.

However, there are still major gaps in compliance plus a view by many small businesses that the UCT law should cover all small business ills.

The major issue in my view is that the UCT does not cover a lot of businesses that it should and that is due to the limited thresholds. Many small businesses simply are still at the mercy of large suppliers, who are often also competitors.

Examples of such businesses are,

- Independent liquor merchants.
- Mortgage brokers.
- Independent supermarkets.
- Financial advisors.
- Hotels with large function areas.
- Agricultural enterprises.
- New car dealers.

In many cases these businesses fall foul of the employee and contract value thresholds.

I would even suggest that now that there has been appropriate regulatory and market experience of the law it is time to move to not simply enhancement but to have universal application of the law. Unfair is unfair.

I realise that such a move will no longer relate to consumer contracts but all.

In my experience in many instances big business is treated the same as small.

An example of this is when I did the first non-agricultural sector collective bargaining application to ACCC on behalf of hotels dealing with Sky Channel racing broadcast.

ACCC initially objected to Fosters, who owned hotels, being in the collective bargaining group. I then looked into the Sky/Fosters dealings and Fosters had to accept the same contract terms as any other hotel.

My views re proposed options

Issue	Preferred Option
Legality and Penalties	<p>Option 2- this is off course what we all want but I doubt that ACCC/ASIC can do much more. A few strong Court precedents are needed and no doubt that will happen in time.</p> <p>Throwing more resources at the issue is not the answer. In my view trade association can do a lot more and not simply rely on regulators. Both need to complement each other.</p> <p>Option 3 - Make the inclusion of, or failure to remove, UCT's in SFCs unlawful and attach civil penalties. Authorise ACCC/ASIC to define and list key UCTs, while maintaining court power to decide as between parties to an SFC whether a term is unfair.</p>

	<p>Option 4 - Strengthen power for regulators by introduction of infringement notice power.</p> <p>Am not all that in favour of regulator determinations, guidance off course but regulators are not Courts.</p>
Flexible remedies	<p>Option 2 - Courts including Tribunals to determine the appropriate remedy after determining a contract term to be unfair, or if a defined and listed key UCT has been included or not been removed - UCTs not automatically void .</p> <p>Option 3 – Align remedies for non-party small business .</p> <p>Option 4 – Introduce rebuttable presumption for UCTs used in similar circumstances by a party, or by another party in the same or a similar industry.</p>
Headcount threshold	<p>Option 3 – if there is to be any such threshold at all I prefer the employee’s category and then at say 200. The Turnover threshold will cut out a lot of those businesses listed above.</p>
Contract value threshold	<p>Option 3 – Remove the contract value threshold .</p>
Related bodies corporate	<p>Option 1 – Maintain the status quo .</p>
Standard form contracts	<p>Option 2 – Make ‘repeat usage’ a factor which courts must consider (para 8.4) but not mandatory. Gets into arguments what is ‘repeat’.</p> <p>Option 3 – Clarify ‘effective opportunity to negotiate’ to remove sham negotiation.</p>

Some further comments.

Legality and penalties

Law is about conditioning behaviour. Litigation is a poor measure of the success of any law.

Apart from ACCC actions there are few if any Court action but there is an arbitration matter, I am involved with where UCT will be an issue.

I have used the UCT law extensively to change supplier contracts and have initiated some ACCC inquiries.

I am aware of UCT being used in Commercial Tribunal and most have ended in settlements. The problem with Commercial Tribunals is that the jurisdictions vary from State to State to Territories.

The law has been welcome but has shortcomings. In particular many SME's are not covered and that is anomalous. Retailers who resell are in particular disadvantaged.

I represent a number of these groups,, some are franchises and the removal of thresholds may overcome my concerns but there are still supermarkets, car dealers, chemists and liquor merchants that fall outside the thresholds.

Flexible remedies

The Court should be able to impose any relevant outcome in relation to UCT conduct. I do have some concern about criminal penalties as Court often read down criminal cases and this may limit the scope of UCT law. Hence, I favour civil penalties and remedial orders.

The ACCC already does this through undertakings and that is often a great outcome.

I am strongly in favour of flexible outcome, but Courts are a last resort.

The goal should be to foster market outcomes and not be bound by rigid dogma that uses litigation as any measure.

Definition of small business/ Value Threshold.

Generally, I oppose any thresholds, they lead to sterile arguments.

UCT law already has substantive filters such as bargaining situation, legitimate commercial interests, standard form contracts and lack of negotiation

If there are to be any thresholds the employee threshold should be substantially increased.,

Clarity on standard form contracts.

I welcome clarity of what is a standard form contract but do not agree with cementing in a 'repeat usage' as the issue is really whether there is 'effective opportunity to negotiate'

What does "repeat usage" mean? Is repeat 2 times or 5 Or 50?

The real issue is "can I negotiate"?

Minimum standards

If there are unfair State or Territory standards, these should be able to be challenged under UCT unless the State or Territory can show that the unfair contract clauses are in the public interest and then exempted by regulation.

Under National Competition Policy jurisdictions had to justify anti-competitive law or practices based on a public interest test, this process could be adopted.

Application of enhanced protection to consumer and insurance contracts.

Such contracts should not be exempt in any way. Small businesses have for a long time been hurt by such contracts.

There are no downsides in this enhancement.

In fact, there is a strong case that UCT law applies to current such contracts and not wait until new contracts are entered into. After all the Insurance Contracts Act should have made sure that insurance contracts were fair.

Application to franchise contracts.

There should be no thresholds for UCT to apply to franchise contracts.

Such contracts are inherently one sided and no matter the size of the franchisee the contracts are take it or leave it.

In relation to evergreen or perpetual contracts UCT law should apply immediately the law is enacted or such contracts are deemed to be for set periods and renewed say every two years.

An additional issue.

The UCT law exempts the upfront price of contracts. I long suggested that that exemption does not apply to renewal of contracts. At a renewal stage, weaker parties cannot in many cases walk away. They have invested sunk costs and are really in a captive situation. In the renewal situation upfront price can be used to fold into that provision some possible unfair contract terms.

Timing

I understand that the proposed enhancements to the UCT laws are to be considered by Consumer Affairs Ministers in August 2020. Might I suggest that the whole issue of UCT and small business will become a serious issue in our post pandemic economy. That being the case I suggest that, at least the thresholds, be increased as a matter of urgency.

I hope that the above is helpful and will be happy to discuss the submission.

Yours truly,

A handwritten signature in black ink, appearing to read "Hank Spier". The signature is written in a cursive, flowing style.

Hank Spier

Principal

