BCA
Business Council of Australia

Submission on proposed changes to strengthen protections against unfair contract terms

September 2021

Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide a submission in response to the exposure draft legislation and explanatory materials for proposed changes to strengthen protections against unfair contract terms. The changes proposed in this submission seek to reduce compliance costs, uncertainty and complexity around the proposed changes, while maintaining the policy intent.

Key issues

Small business identification

The proposed changes add to the at least six existing tests/definitions of small business, and the revised employee count definition will continue to be challenging for companies to comply with. The process to readily identify the number of employees may be difficult and costly, and may be prone to error. In turn, it may be challenging for contracting parties to identify which of their standard form contracts are subject to unfair contract term (UCT) laws.

The proposed turnover test may alleviate some of these concerns but a more efficient approach could be achieved by allowing for the turnover test to also be verified through the Small Business Identification tool introduced as part of the Payment Times Reporting Scheme. While there are still some issues with the Small Business Identification tool in practice, it continues to be improved and should have much wider applicability and support other policies targeted at small business.

- Businesses should be able to use the Small Business Identification tool to identify small businesses for the purposes of applying UCT laws.

Clarity on key terms

The draft legislation introduces several key terms that increase uncertainty as they are ambiguous or differ from similar terms used in other parts of the *Competition and Consumer Act 2010* (CCA) and *Australian Securities and Investments Commission Act 2001* (ASIC). This increased uncertainty is combined with the introduction of substantial penalties, meaning it is even more critical that businesses can readily comply with the proposed changes. This is particularly the case where changes to any of these terms would not undermine the policy intent they seek to achieve. The references below are to the CCA provisions, but apply equally to ASIC Act provisions.

- Section 23(2A) creates a liability when the issuer of a contract "enters into" the contract. The term "makes a contract" is used in other parts of the CCA and ASIC Acts and is better understood. It is unclear if the two terms have different meanings or applications, and this should be clarified.
  - The term is also proposed for section 23(4)(b)(i) of the CCA.
- Section 23(2C) uses the term "applies or relies on" in relation to a term of contract. It is unclear what conduct is intended to be caught by this term. The CCA typically uses terms such as "giving effect to" which may be more appropriate to describe conduct that would be the basis of a contravention. This could be clarified through the Explanatory Memorandum.
  - To illustrate a potential issue, "applies" could mean the creation of a new right. Alternatively, "applies or relies on" could include providing a consumer or small business a copy of a standard form contract and reminding them of a term – which could create a contravention of the law.
- Section 24(5)(c) and s243B(1)(a) refer to a contract term being "the same, or substantially similar" but it is unclear what degree of similarity is required for terms to be "substantially similar". This should be explained

and clarified through the Explanatory Memorandum, particularly whether the key concept is that the legal effect of the terms must be the same.

- Section 24(5)(d)(ii) references the "same industry" but the term is not defined or used in a similar way elsewhere in the CCA and ASIC Acts. These Acts typically reference "industry codes". This clause sets up a rebuttable presumption and has far reaching consequences, meaning certainty and clarity around the definition is critical.
- Given the uncertainty around key terms and the introduction of substantial penalties, consideration could be given to a 'warning system'. Under such a s system, pecuniary penalties apply where a business has failed to make the necessary amendments to address the concerns of the regulator.

Implications of "declared terms" on future contracts

The current UCT regime seeks to remove unfair terms in existing contracts, and the proposed changes seek to prevent the use of some terms in future contracts. This is achieved through the newly proposed section 243B which allows a court to make orders based on "declared terms" in future contracts, having been deemed unfair based on their use in an existing contract. This deviates from the typical approach where this issue would be assessed under a fact-specific inquiry required by section 24 of the Australian Consumer Law.

The Decision Regulation Impact Statement (RIS) explains this change was recommended as the reliance on precedent as a deterrent under the current regime was not considered enough to prevent the emergence of UCTs.[1] It goes on to recommend this problem be addressed by clarifying that small businesses could also be "non-parties" within the terms of the regime (Flexible Remedies – Option 3) and by introducing a rebuttable presumption.

The draft legislation goes beyond these solutions by empowering a court to declare terms as unfair based on their application in one contract and make orders relating to their use in different contracts and in different contexts. The effect is there will be a list of banned terms – an approach not supported by the Decision RIS. Compliance would also be highly onerous as companies would have to continuously monitor UCT court decisions to ensure their own contracts comply, while there is further complexity for companies that operate across multiple industries.

- The proposed changes should better align with the Decision RIS, which in turn will ensure the reforms are fit-for-purpose, recognising the unique circumstances and context of different contracts. This would still achieve the policy intent of the proposed change, while minimising unnecessary compliance costs and complexity. This could be achieved through either:
  - retaining the power to make the orders under section 243B, but including a requirement that a court consider the factors in section 24 before making the orders, or
  - leaving this work to be done by the rebuttable presumption in section 24(5).

Post-implementation review

The BCA supports the suggestion from the Decision RIS for a post-implementation review within three years from the changes coming into effect. This will help determine the effectiveness of the proposed changes in delivering on the policy intent, while also ensuring the changes do so in a way that minimises compliance costs and that there have not been any unintended consequences.

- The legislation should include a requirement for a post-implementation review within three years.

[1] https://treasury.gov.au/publication/p2020-125938

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