



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:DH1b1621945

21 December 2018

Manager
Unfair Contract Terms Review
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Sir/Madam,

Review of Unfair Contract Term Protections for Small Business

The Law Society of NSW appreciates the opportunity to comment on the 'Review of Unfair Contract Term Protections for Small Business' Discussion Paper. The Law Society's Business Law Committee contributed to this submission.

Our responses to the questions in the Discussion Paper are set out below.

Thresholds

- 1. Does the headcount approach work in practice? If so, is an employee number of 20, appropriate to define a small business for the purpose of UCT protections? If not, what are alternative approaches and what would be the benefit of adopting them?**

From our members' experience, a definition of small business which limits the employee number to 20 unduly restricts the effectiveness of the extension of the unfair contract terms ("UCT") protections to small business. A major objective of extending the UCT legislation to small business was to provide a level competition playing field to provide small business with the same protections as consumers, given small businesses have the same vulnerabilities and often face the same difficulties as consumers in a contractual relationship.

Consequently, the Law Society considers it would be appropriate to change the employee number in the definition of small business to 'up to 100 employees'. This would also accord with both the definition applicable for the Australian Small Business and Family Enterprise Ombudsman ("ASBFEO") and the Australian Financial Complaints Authority ("AFCA"), both of which are high profile bodies that deal with small business dispute issues and would assist both small businesses and those who deal with them to understand when the UCT legislation applies.

2. Does the value threshold appropriately cover contracts that warrant UCT protections? If not, how should the thresholds be altered and why?

The Law Society considers that the legislation should apply to all standard form contracts, regardless of value thresholds.

We acknowledge that the inclusion of a value threshold in the application definition places the onus on small businesses to undertake due diligence for high-value transactions, to avoid a situation where a small business relies solely on the UCT protections without undertaking the necessary due diligence before signing a contract. However, we continue to prefer that the value threshold be removed.

From our members' experience, although due diligence would seem prudent for a high value contract, when the contract is in standard form, as noted in the Discussion Paper, by definition there is no opportunity for a recipient party to the contract, whether or not they are a small business, to negotiate any of the terms of the contract.

The commercial terms are always negotiable in all standard form contracts, these being the contract party name and details, the term of the contract, the price and the subject matter of the good or service being provided. Consequently, we note that these commercial terms are exempted from the application of the UCT legislation.

3. Do you have experience or are you aware of any contracting practices designed or undertaken to avoid the UCT protections?

We are not aware of such practices.

Coverage

4. In your experience, what factors and circumstances make it difficult to determine whether a contract is a standard form contract? What clarifications would assist with making this determination? Can you provide examples?

We acknowledge that the current legislation ultimately leaves it to a court to determine whether a contract is a standard form contract, with a list of criteria to be taken into account. Commercially and legally, however, what constitutes a standard form contract is fairly well understood, in particular that the terms of the contract are not negotiable (that is, it is submitted on a "take it or leave it" basis).

We consider it would provide for clearer application of the legislation if a definition of a 'standard form contract' could be included, rather than leaving it for a court to determine.

The Law Society agrees that when entering into a contract, small businesses would benefit from greater certainty as to whether the contract they intend to sign is a standard form contract, likely to fall within the protections of the UCT regime, rather than facing a potential challenge if reliance on the UCT protections is sought.

Exemptions

- 5. Are the exemptions appropriate? Can you provide examples of where the exemptions to the UCT protections have been ineffective? Is there evidence that would justify an expansion of the exemptions, for example, as a result of regulatory overlap?**

It is the Law Society's position that the current exemptions to the UCT legislation, as they apply to small business, are appropriate and do not require expansion, including for reasons of regulatory overlap.

- 6. Should industry 'minimum standards' prescribed by state and territory laws be exempt from the UCT protections? Is there data and evidence to support your opinion?**

In our view, a state or territory minimum standard is unlikely to be assessed as an unfair term.

Consequently, although we do not see the necessity of exempting such minimum standards from the UCT protections for small business, we do not disagree with doing so if it mitigates any legal debate as to legislative priority.

Overall Effect

- 7. Do you think the current UCT regime offers appropriate level of protections to small businesses?**

Generally, we acknowledge that the extension of the UCT regime to small businesses has provided an opportunity to seek a more level commercial and legal playing field for small businesses, which can only assist small businesses to prosper.

As previously noted, we are of the view that the UCT regime would benefit more entities in the small business sector if the employee number in the definition for a small business was increased from less than 20 employees, to less than 100 employees, and by removing value thresholds for contracts to be included in the regime.

In addition, we consider that the objectives sought to be achieved by the extension of the UCT regime to small business would be better met if a change is made to the remedial consequences of the inclusion of an unfair term in a contract. The current legislation provides for a court to determine whether or not a term is an unfair term, given the factual circumstances of the parties' relationship. Where a contract term is found to be unfair, the legislation provides for it to be void.

We note, however, that there may be circumstances where the remedy of voiding a term may not be the preferred outcome for small business otherwise impacted by the term.

As an alternative to the term being void, it may be preferable that a court should also be able to make other orders, if it thinks the order will provide a more appropriate and just outcome in all of the circumstances, including rewriting or varying any unfair term.

- 8. Do you think additional examples are needed to clarify unfair terms?**

The Law Society considers that as the regulators take legal action on unfair terms, each providing an additional example, the impact of the UCT regime as it applies to small

business will become more widely acknowledged. As a result, these terms will not be included in a greater number of future contracts.

9. Are there any other issues relevant to the Government's review of UCT protections for small business that impact on the effectiveness of the regime?

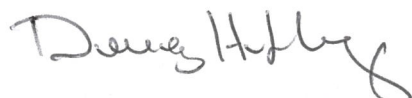
We suggest that the determinative body under the legislation should not be limited to the courts. For a small business to take action in a court to have a term in a contract assessed as void is an expensive and time consuming exercise. As a result, it is unlikely to be availed of by many small businesses who could otherwise benefit from the regime.

We note that there has been a suggestion that the inclusion of an unfair term in a standard form contract with small business should be considered an offence subject to sanctions. However, given that a degree of uncertainty will exist as to whether a term will ultimately be determined to be an unfair term, we do not consider the inclusion of such a term should be an offence, nor that sanctions should be applied for its inclusion.

Finally, we are of the view that the legislation should be amended to provide that when a term in a standard form contract with one small business has been determined to be an unfair term, the same term should also be considered to be an unfair term in all other standard form contracts used by the other party with small businesses in similar circumstances.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Doug Humphreys OAM
President