
SUBMISSION

Submission to Treasury on the review of Unfair Contract Terms

December 2018

ABOUT THIS SUBMISSION

This is the Business Council of Australia's submission to Treasury's November 2018 Discussion Paper entitled "Review of Unfair Contract Terms for Small Business". The Review will assess the impact of the extension of unfair contract terms (**UCT**) protections to small business contracts and whether any changes are required to improve the current framework. The Discussion Paper describes the operation of the UCT protections as follows:

"The UCT protections allow a court to declare a term in a standard form contract unfair, and therefore, void. Contracts between businesses are covered where one or more of the businesses employs fewer than 20 people and the upfront price payable under the contract is under \$300,000 in a single year or \$1 million if the contract runs for more than 12 months."

KEY ISSUES

Identifying a small business

The number of employees of a business at a given time under the 'head count' definition is not transparent to a contracting counterparty and can fluctuate significantly over time. This makes it challenging for contracting parties to identify which of their standard form contracts is subject to UCT laws.

Ascertaining each counterparty's status as a small business can be costly, involve imprecise estimates and be prone to error. Headcount is difficult to determine when there are part-time employees and contractors.

The Business Council makes two proposals:

- define a small business using annual business turnover which is an easier measure to apply (for example, when the UCT regime was introduced two years ago, the Explanatory Memorandum discussed defining a small business as a business with an annual turnover of less than \$2 million (excluding GST)).
- establish a 'small business register' that contracting parties can access to verify the small business status of a counterparty.

A small business register would have much wider applicability and support other small business-friendly policies and programs. The Business Council has previously recommended the establishment of a small business register to allow signatories to the Australian Supplier Payment Code to more efficiently identify the eligibility of small businesses for 30-day payment terms under the Code.

Clarify business eligibility for UCT protections

The current definition of 'small business contract' states that "at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons". Guidance published by the ACCC suggest that the word "business" only embraces the corporate entity which enters into the particular contract:

"For the purposes of this law, the relevant number of employees is the number of employees of the legal entity that is party to the contract. If a business has subsidiaries (separate legal entities), employees of its subsidiaries will not be included in the employee count."¹

ASIC has published similar guidance.²

It may be possible for a larger business to avail itself of the UCT protections by having a business structure where one corporate entity employs all or most of its employees and another corporate entity (which employs less than 20 employees) enters into contracts for the business, thereby circumventing the head-count limit. (This problem could also arise under the 'turnover' threshold proposed earlier).

To address this problem, the Business Council recommends that the threshold should be clearly stated to apply on a group-wide basis, not on an entity-by-entity basis, so that large businesses with a particular corporate structure cannot access the UCT protections.

Uncertainty if monetary thresholds will be met

The monetary value of a contract threshold has presented practical difficulties in relation to standard form contracts that run for many years but do not contain any obligation to purchase goods. Businesses (e.g. in the retail sector) regularly acquire goods under such contracts for a value well in excess of \$1 million. Although there is no obligation to purchase any goods, each party to such a contract has a reasonable expectation of this at the time of entry into the contract.

A contract of this value is important to a business, so it is fair to expect the business to carefully review the terms of the contract before entering into it rather than not reviewing it and instead relying on the UCT regime to protect it from the possible existence of any unfair term.

Given this, it is proposed that there be an exemption from the UCT regime for contracts where all contracting parties have a reasonable expectation, as at the time the contract is entered into, that the 'upfront price payable' under the contract will exceed the thresholds for a "small business contract". In practice, this would mean that contracts which are important to a business (and which a business should review before entering into them) are not subject to the UCT regime while those that are less important are captured by the UCT regime.

Guidance and enforcement

The types of contract terms that are prohibited under these relatively new laws remains unclear in some areas. The ACCC and ASIC have produced useful guidance to date and this will need to be regularly maintained to provide business with greater certainty about how the law will be interpreted and applied.

¹ ACCC, *Unfair Contract Terms FAQs* <<https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/unfair-contract-terms-faqs>>.

² ASIC, *Information Sheet 211: Unfair Contract Term Protections for Small Businesses* (February 2016) <<http://asic.gov.au/about-asic/what-we-do/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-small-businesses/>>.

The Business Council also notes the reference in the Discussion Paper to the investigative powers only recently given to the ACCC and ASIC in October 2018 “to compulsorily obtain information, documents and evidence to determine if a contract may be unfair”.

The discussion paper notes that “regulators do not have power to impose penalties for the imposition of UCTs that are ultimately voided”. A combination of improved guidance and enhanced investigative powers should be given time to address any remaining concerns about UCTs in standard form contracts before punitive enforcement measures are considered.

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