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Consumer Affairs Australia and New Zealand

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## **Submission to the Consumer Affairs Australia and New Zealand – Enhancements to Unfair Contract Term Protections**

### **Introduction**

The Australian Credit Forum (**ACF**) welcomes the opportunity to make a submission to the Consumer Affairs Australia and New Zealand (**CAANZ**) in respect of the consultation on Enhancements to Unfair Contract Term Protections (**the Consultation**).

The ACF was established in the early 1970's by a group of senior credit professionals. The group recognised the need to develop an association where members could meet on a regular basis to exchange thoughts and ideas to strengthen their own knowledge but also the standards of the industry.

The association meets on a regular basis to discuss and review existing and proposed changes to the Federal and State Governments legislation that might have an impact on their company's credit policies and practices in their day to day role as credit professionals.

The members of ACF are drawn from all areas of the credit profession across a range industry groups including by not limited to senior credit managers, members of the legal profession, insolvency practitioners, credit insurance underwriters and brokers, mercantile agents and credit reporting agencies. The depth and diversity in experience of the members ensures that a broad cross section of the credit industry considers the impact of all relevant legislation.

### **Questions for comment**

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”*

The ACF regularly advises and consults credit providers on small business contracts and the impact that unfair contract terms can have on small businesses. Some of the most common industries include the building and construction industry, and the hospitality industry and the waste disposal industry where goods and services are supplied on credit. Most of the contracts that are used by these businesses are standard form contracts, or general terms and conditions of trade (which often encompass a personal guarantee from a company director).

The use of unfair contract terms can and often does have an impact on both the customer receiving the goods and services that may be supplied on credit, and the credit providers themselves.

It is usual practice for most credit providers to provide an opportunity for small business to negotiate the terms of the contract, as commerciality is always front of mind.

2. *“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)”*

It would be normal practice for major businesses to have both short and long form contracts to cater for different complexities.

The industries in which unfair contract terms appear to be most prevalent are often the building and construction industry, or waste disposal industry, where their customers are being supplied goods and services on credit. However, from a general position many credit providers are unsure of the specifics around what in fact makes a term unfair, as there are not consistent regulations around unfair contracts and only a few decisions have been made in our courts. It is the ACF's experience that number of big and small business are unaware of the legislative changes the took place in 2016.

There are also businesses that may have written their terms and conditions prior to the legislative changes, and not had the opportunity to review.

3. *“Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed”*

The ACF considers that more regulation and educational campaigns on unfair contract terms would be of far greater benefit to the industry as opposed to harsher penalties.

Education should not just sit with credit providers on unfair contract terms but also new small business start-ups and business generally to ensure that business engaging in contracts are aware of their obligations in a running a business and accepting credit in the first instance. For small businesses it may be beneficial introducing a tool to build short form agreement templates for them to build their own. If for example you are an electrical contractor employing less than 20 employees then there should be some guidance on putting together an agreement for customers. Where they are caught out though is dealing with building contractors that have complex T&C's and little appetite to vary them.

Businesses should be automatically supplied with an information guide covering topics but not limited to the following:

- (a) the relevant laws applicable to their business;
- (b) preparing finances accordingly;
- (c) protecting your business;
- (d) debtor and cashflow management; and
- (e) continuous operations.

In the ACF's experience, when credit providers can be provided with clear and simple information about unfair contract terms in the form of presentations which are often easily understood can have a very positive impact on the industry.

ACF considers that specific education should be provided around the following:

- (a) What an unfair contract term is and providing examples of unfair contract terms.
- (b) The impacts it can have on credit providers from a legal standpoint; and
- (c) Where to seek proper legal guidance on the terms and the alternatives that can and should be used.

4. *“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”*

The ACF does not necessarily consider that making unfair contract terms illegal or introducing financial penalties will strengthen deterrence. However, certainly does support the notion that there must be more regulation around the use of unfair contract terms as they do have a negative impact on small businesses.

There needs to be an appropriate balance between regulating the use of unfair contract terms in standard form contracts, and protecting the credit providers, as it will ultimately be those credit providers who must absorb the liability.

The ACF therefore recommends, as opposed to making them illegal and attaching severe financial penalties, the regulation should be increased, especially in circumstances (as outlined for question 4 above) where some credit providers may not in fact be aware of the legislative changes that came into force.

Further, the ACF considers that most credit providers would not intentionally want to disadvantage small businesses, and therefore they should not be unduly punished and there should instead be more of a focus on regulation and education around what unfair contract terms are, and the legal impacts surrounding the use.

5. *“Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business”*

Similar to the reasons as outlined in question 3 above, the ACF does not consider that this would be an appropriate solution to the problem that unfair contract terms present.

6. *“What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc”*

The ACF considers that particularly the hospitality industry is impacted by the current headcount threshold of 20 employees. During busy periods as a seasonal business, the number of employees may increase over the prescribed 20 employees for that period. This is confusing and it is unclear as to whether they are considered a small business.

Additionally, in the transport industry it is recognised that there are a number of potential UCT, however many of the businesses employ more than 20 people.<sup>1</sup>

7. *“If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?”*

The ACF have regard to the impact certain businesses may be faced with if the annual turnover was used to determine whether a business should be protected. The problem that arises is if a small business is doing well and has an annual turnover higher than the threshold, they will not be covered by the UCT protections.

8. *“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”*

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<sup>1</sup> Rod Sims, Chair, Council of Small Business Organisations Australia's national Small Business Summit, Major changes needed to get rid of unfair contract terms, 31 August 2018 < <https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms>>.

Upon consideration of the ATO's threshold of \$10 million aggregated turnover for small businesses, the ACF considers \$10 million annual turnover to be an appropriate threshold. As it is the ACF's view that the threshold for small business originating from the ATO's threshold and should be uniform to minimise confusion for small businesses.

9. *“Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?”<sup>2</sup>*

The ACF consider the threshold may be too low for some industries, such as the agriculture industry for heavy farming equipment or the supply of produce. Additionally, the ACF recognises that in certain contracts there is a fixed volume and price for the duration of the contract, the upfront price exceeds the threshold resulting in the UCT protection not applying.

10. *“Please provide information on how the current contract value threshold has impacted your business”*

Similar to the reasons outlined in question 9 above, the ACF considers that businesses with certain limitations are restricted from benefiting from the UCT protections.

11. *“Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details”*

It is considered by the ACF that if the contract value threshold was removed completely, however the headcount and annual turnover threshold still be upheld then it would likely have minimal impact.

12. *“If the law were to be amended to set out the types of actions which do not constitute an ‘effective opportunity to negotiate’, what impact could this have on your business?”*

The ACF tend to negotiate on our contract terms with our customers where customers raise any issues they have with any clause/s.

Having greater clarity on what this means, and the types of action which do not fall in to the category would assist in reducing the current confusion by several of our members on UCT's generally.

13. *“Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a ‘standard form contract’? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed”*

The ACF consider that the best way regulators can promote and enhance guidance on what constitutes a standard form contract is to have the information provided in a simple, and easy to understand format, providing clear examples of what may constitute a standard form contract.

This information should be readily available on platforms such as the ACCC and ASIC websites and through registered industry bodies.

ACF further considers promotional guidance on standard form contracts or unfair contract terms themselves could be introduced. This could be distributed through an optional “subscription” service for credit providers or credit users to allow the industries to keep apprised of updates to the legislation or comments from government bodies.

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<sup>2</sup> <https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms>