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By email: uctprotections@treasury.gov.au

Manager, Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Manager

Treasury consultation: Enhancements to Unfair Contract Term Protections

Thank you for the opportunity to provide feedback on Treasury's Regulation Impact Statement (RIS) detailing potential options to enhance existing unfair contract terms (UCT) protections for consumers and small business.

We strongly support the proposals in the RIS to strengthen and enhance UCT protections for consumers, including in relation to contracts for insurance. We also generally support the proposal to strengthen laws relating to the application of UCTs in agreements with small businesses, however in line with our casework experience, this submission focuses on the application of UCTs in consumer contracts.

These enhancements are an essential step in protecting consumers from UCTs, and we are greatly encouraged that the Government is seeking to improve the law in this area. Making UCTs illegal and empowering the courts to impose substantial penalties and a wider range of remedies where UCTs are used would greatly increase the effectiveness of the current UCT regime.

Key points of our response

1. Nearly a decade of the current UCT legislative regime has not eradicated UCTs from standard form consumer contracts. We continue to see UCTs be used and relied on by business across a wide range of industries, despite extensive regulator education and guidance programs on UCTs for industry over the years. We have provided examples of a range of industries where we regularly see consumers harmed by UCTs.
2. Making UCTs illegal and attaching substantial penalties to breaches of UCT laws would increase the likelihood of compliance and improve the effectiveness of the laws. There is no valid argument that this change would impose any unreasonable additional compliance burden, as businesses should have already reviewed their standard form contracts for compliance with the UCT regime and it would not change the terms to which the law applies.
3. A range of remedies, including *cy præs* orders, should be available to the courts where a term in a contract is found to be unfair. An unfair contract term should not be automatically void.
4. We generally support the proposed introduction of 'repeat usage' as a factor the courts must consider when determining if a contract is 'standard form', and the proposed clarification to the meaning of an 'effective opportunity to negotiate' contained in the RIS.
5. We support Treasury's proposal at Part 5.6 of the RIS to place the burden of proof on contract issuers to show a term is not unfair where a similar term in the same industry has been deemed unfair by the courts.

6. While the current UCT regime does not apply to contracts subject to the *Insurance Contracts Act 1984* (Cth) (**IC Act**) until 5 April 2021, there is no reason that these contracts should be treated differently to other consumer contracts from that date.
7. UCT laws should also apply to group insurance contracts where the consumer is a third-party beneficiary, such as the 12 million Australians who hold life insurance through superannuation, or have travel insurance with their credit card.
8. Managed investment schemes where the investor is a consumer, particularly timeshare arrangements, should also be subject to UCT laws.
9. External dispute resolution bodies, such as the Australian Financial Complaints Authority (**AFCA**), should ensure that UCT laws are considered and determined when dealing with consumer disputes.

About the contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.

Legality and penalties

Q. 3: Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts?

The current UCT provisions contained in the Australian Consumer Law (**ACL**) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) have helped to reduce the imbalance of bargaining positions and improve fairness in many consumer contracts. However, despite these provisions being in effect for nearly 10 years, UCTs still have a considerable presence in standard form consumer contracts.

It is still relatively common in many industries for standard form contracts to contain unfair terms that exploit the bargaining power that businesses have over consumers. The extent to which we still see UCTs indicates that the law as it stands has not been effective in stopping companies from imposing such terms. UCTs are still in effect and relied upon to the detriment of consumers in many situations.

When asked about the continued appearance of UCTs, our lawyers were quick to list a range of industries where we still regularly see UCTs arise in consumer contracts. Some examples of these terms are provided below.

Gym membership contracts

Clients regularly present to us with disputes over gym membership contracts for fixed terms requiring excessive ongoing payments that are claimed to be unavoidable, or unreasonable cancellation fees that far outweigh any possible costs incurred by the gym.

The most concerning of these instances is where there has been a significant change in circumstances that warrants or necessitates cancellation of the contract. In one situation, a consumer reported that their gym refused to provide a refund for significant joining fees, despite the consumer providing a medical certificate confirming that soon after joining they had suffered an injury preventing them from using the gym at all for the contract term. This is clearly unfair as the joining fees did not reflect the true cost of the consumer terminating the contract.

In other situations, consumers have reported gyms imposing harsh cancellation fees and refusing to negotiate their position at all despite the consumers reporting substantive reasons for terminating their membership, including where the gym had to relocate to a less convenient location, or where the consumer repeatedly had their concerns over cleanliness disregarded.

Private training courses

Similar to the issues with gym contracts, we have seen a number of private colleges or other education services using terms that we consider to be extremely unfair. These courses commonly require that students commit to paying the full price for a course up front (normally thousands of dollars) and specify that the student has no right to any refund if they terminate the agreement.

Eric's story

Eric (name changed) signed up to a 12-month private life coaching course in mid-2017, after receiving repeated high pressure sales calls from the course provider. Eric had initially refused to sign up to the course because he was the sole income earner for his family and was already finding it difficult to cover general living expenses, including credit card debt.

The course provider required an upfront deposit of \$2,000 which Eric could not afford to pay. Eric tells us that the course provider encouraged him to obtain another credit card to pay the deposit, insisting that he would be able to easily pay the money back as he would soon be earning \$2,000 per week.

The course provider referred Eric to a broker to arrange a \$15,000 loan, most of which went directly to the course provider for the course fees. Eric tells us that approval for the loan took three weeks, during which time Eric was also charged a \$385/week 'pre-finance approval' fee. Under the contract Eric was required to pay more than \$16,000 in fees including the upfront deposit, the pre-finance approval payments and the course fees.

Soon after entering into the contract, a number of significant life events occurred which were outside of Eric's control and which made it very difficult for him to continue the course. Eric's requests to defer the course were refused, and after months without contact, Eric sought to terminate his contract and seek a refund of the fees he had paid.

The course provider refused to provide Eric any refund, relying on terms in the contract that specified the full amount of course fees remained payable after termination, regardless of whether the course had actually been delivered at all. The rigid application of these terms was not necessary to protect the course provider's legitimate interests. It was also unclear how the \$385/week pre-approval charge reflected any cost incurred by the course provider. We are continuing to assist Eric in relation to this dispute, nearly two years after he initially sought a refund.

Payday lending

Unsurprisingly, the use of UCTs is regularly seen in industries where products and business models are directed at consumers in more disadvantaged financial situations, and where their bargaining power is even more limited. Payday lending contracts often contain terms that reserve rights for the contract issuer that go well beyond what is reasonable or necessary to protect their rights.

A unfair term identified in a payday lending contract

"Subject to the requirements of the law, we may change some of the terms of this agreement at any time without your consent by notifying you of the change.

The changes that may be made in accordance with this clause are:

- the amount of your repayments;
- the frequency of your repayments;
- the method by which you make your repayments;
- fees and charges applicable to the agreement including the quantum and type."

The above clause is directly taken from a standard form contract used by a payday lender. It seeks to assert the right to unilaterally vary key terms of the agreement without consent, which could fundamentally change and reduce the rights of the consumer.

Pawnbroking

Pawnbrokers are often used by people experiencing significant vulnerability and financial distress. Pawnbroking contracts regularly contain unfair terms.

In one case, a person presented to our Centre having entered into a pawnbroking contract that contained standard terms which sought to allow the Victorian pawnbroker to avoid specific statutory obligations intended to protect individuals that obtain loans from pawnbrokers. One such clause in the pawnbroker's standard terms stated, "The client also requests the Pawnbroker not to advise in writing of any surplus arising from the sale of unredeemed goods".

This clause conflicts with s 23A(3) of the *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic), which requires pawnbrokers to notify a person who pawned an item of any surplus equity arising from the sale of unredeemed goods. The person who pawned the goods is entitled to any surplus in these circumstances, and it is the responsibility of pawnbrokers to provide written notice of the surplus, should it arise.

The existence of the current UCT provisions clearly was not a sufficient deterrent for the pawnbroker to remove this clause.

Storage

Contracts for storage units also regularly contain unfair terms that go well beyond what is necessary to protect the interests of the storage provider.¹ We have assisted people dealing with storage providers during times where they are particularly vulnerable, for example, when fleeing family violence or experiencing homelessness.

For example, one set of terms and conditions in a contract entered into by a large storage chain with a person we assisted last year restricted the storage of any goods cumulatively valued more than \$2,000 (unless itemised and covered by insurance accepted by the storer), or irreplaceable goods including goods of personal sentimental value, paintings, cash or jewellery. A subsequent clause specified that the sole risk and responsibility of the goods rested with the storer in relation to the risk of theft or damage for any reason, including if damage was caused by natural disaster, spillage of material from any other space and removal or delivery of the goods. If the storage provider accepts no responsibility for any loss of stored goods, why should it be able to impose conditions on what is stored in the facility? As both clauses unreasonably impinge upon the interests of the storer, we consider that at least one of these terms would be unfair.

We recently assisted another person when dealing with a different large storage chain, and identified the following term in the standard terms and conditions of the chain:

"(Change in Fees) Over time various factors (such as interest rates, inflation and the day to day operational cost of doing business) affect the profitability of a business. In order for the Operator to be able to continue to operate the business at a profitability level acceptable to the Operator, it may be necessary to increase some or all of its fees at various times after the first month of storage. The Operator may increase the Storage Fee Processing Fee or Other Fee by giving You 14 days' prior notice. You acknowledge and agree that it is reasonable for the Operator to make any such increases as part of the ordinary operation of its business."

This clause gives the contract issuer the right to essentially unilaterally increase its fees shortly after a storer takes steps to move their goods into storage. In our view, this clause exploits the disparity in bargaining power between the parties, and we therefore consider this clause to be an unfair term in this context.

¹ See for example, Kennards Standard Storage Space Hire Agreement, <https://www.kss.com.au/wpdata/files/176.pdf>, accessed 26 March 2020.

National Disability Insurance Scheme (NDIS) Agreements

Perhaps one of the most concerning contexts where there are reports of UCTs being used is in relation to agreements for services under the NDIS, which NDIS participants enter into with providers of services that are often hugely important and essential to them.

In its June 2019 report '*NDIS service agreements: making choice and control more real*' (**NDIS Report**), the Victorian Office of the Public Advocate (**OPA**) detailed a number of terms or clauses it had identified in agreements provided or proposed to NDIS participants by service providers that it considered to be unfair or unreasonable.² We agree with the OPA's assessment of many of the clauses reproduced in Part 8 of that report.

In particular, we hold serious concerns about the following types of clauses identified by the OPA, that we consider could be UCTs:

- Anti-competitive clauses claiming to impose hefty fees if a participant engages the services of a caregiver in a set period after the end of the service agreements. These terms impose unreasonable constraints on participants following the end of the agreement.³
- Terms relating to the financial aspects of agreements, where those terms appear to reserve broad rights to pass on any subsequent additional costs to participants. In particular, we refer to the service booking example, where it appears the service provider has retained a right to make decisions on behalf of the participant that impact the funding the provider receives.⁴
- The inclusion of terms under which participants agree to reimburse or indemnify service providers for any loss caused. In the circumstances and context, these broad terms unfairly seek to impose liability on participants.⁵
- The imposition of personal responsibilities on NDIS participants that go beyond what is reasonable to request, such as requiring participants to provide equipment or cleaning products.⁶

Retirement housing contracts

A common term included in retirement housing standard form contracts is a 'deferred management fee', which operates as an exit fee for people who wish to leave a retirement housing complex. Deferred management fees are calculated as a percentage of the purchase price, or the sale price, when a resident leaves. These fees can be significant. For example, in our action against retirement housing provider Willow Lodge, these fees amounted to 4% of the park home sale price every year up to a maximum of 20%. This meant that a resident, upon leaving Willow Lodge, would forgo 20% of the sale price of their home to Willow Lodge. The amount payable was not transparent when entering the contract, as the value was calculated on the eventual sale price which could not be known when signing the contract. After a lengthy dispute at the Victorian Civil and Administrative Tribunal (**VCAT**), this matter eventually settled before the scheduled hearing. We have provided more information about this dispute at page 11.

Significant exit fees have also been imposed in retirement village contracts. For example, Aveo contracts previously imposed a 40% deferred management fee after only 2 years living in the retirement village.⁷ The value

² Office of the Public Advocate Victoria, *NDIS service agreements: making choice and control more real*, June 2019, <https://www.publicadvocate.vic.gov.au/resources/research-reports/ndis/625-ndis-service-agreements-making-choice-and-control-more-real>, accessed 18 March 2020.

³ Ibid, part 8.1.

⁴ Ibid, part 8.5.

⁵ Ibid, part 8.7.

⁶ Ibid, part 8.9.

⁷ <https://www.smh.com.au/interactive/2017/retirement-racket/the-price-of-freedom/>.

of this fee did not appear to be calculated in reference to the cost of services or reduction in incoming costs. After significant public backlash against the fee model, Aveo has now changed its deferred management fee structure.

Other potentially unfair contract terms we have seen in retirement housing contracts include:

- Terms that allow operators to keep all or part of capital gains on sale, but require residents to bear 100% of capital depreciation and pay the operator's legal costs in relation to the sale;
- Limiting operator liability for repairs to common property or fixtures inside homes; and
- Providing the operator with broad powers to control sales, significantly impacting the ability of residents to find a purchaser.

Example contract term allowing a residential village operator to control sales

"Subject to the Act and Schedule 1, the Manager has the right, at all times, to control the sale of the Accommodation Unit and has the exclusive right to find a person who satisfies the requirements of a new resident to accept a new lease of the Accommodation Unit and must endeavour to do so."

General and life insurance

The current UCT regime will apply to standard form contracts subject to the IC Act from 5 April 2021.⁸ This change recognises that there is no reason to treat insurance differently to another other consumer-facing industry. The loophole for insurance contracts that existed prior to this reform was the result of industry lobbying for exemptions, not good policy.

Accordingly, we strongly submit that any enhancements to UCT laws must apply equally to general and life insurance contracts from 5 April 2021 as well. As detailed below, we see insurance contracts contain unfair terms.

Telecommunications insurance

The ongoing use of UCTs in the telecommunications industry is one area of significant concern, particularly because we see terms we consider could be UCTs regularly contained in the standard terms of some of Australia's largest market players. One example comes with Vodafone's proposed add-on insurance product, 'Vodafone Keep Talking Plus'.

This service claims to provide insurance coverage for accidental damage cover, as well as where a device is lost or stolen.⁹ At the same time, the plan excludes a variety of situations that an ordinary person would expect the plan to cover. Most concerning is that the plan does not cover loss "where Your Device has been left behind in an unknown location or You or any person using Your Device with Your permission have misplaced or forgotten its whereabouts".¹⁰ This appears to be referring to the precise situation in which one would consider their phone to be lost and one of the reasons a consumer would purchase this cover in the first place. This is an unreasonable exclusion that significantly harms the interests of the customer.

Vodafone also excludes coverage under this plan where the customer's Vodafone SIM is not in the phone, or if the incident causing loss occurs overseas and global roaming is not activated.¹¹ This could also be considered a UCT, as the exclusion clearly causes the customer detriment, and it is not clear how the exclusion is reasonably necessary

⁸ Being the date that Schedule 1 of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth) (**Hayne Protecting Consumers Act**) will come into effect.

⁹ Vodafone, *Protecting your device*: <https://www.vodafone.com.au/insurance>, accessed 4 March 2020.

¹⁰ Vodafone, *Vodafone Keep Talking Plus Insurance: Lost, Stolen and Accidental Damage Cover*: <https://www.vodafone.com.au/doc/dl-insurance-15-pds.pdf>, accessed 4 March 2020.

¹¹ *Ibid.*

to protect the legitimate interests of Vodafone. Vodafone are offering insurance coverage for a device. While the device is linked to a Vodafone mobile service, why should whether the Vodafone SIM is in it or active at the time it is lost, damaged or stolen, reduce Vodafone's liability?

Home building insurance

The following excerpt is from the terms of AAMI's Home Building Insurance policy:¹²

How to pay your excess

When you make a claim we will choose whether to deduct the applicable excesses from the amount we pay you or direct you to pay the excesses to us or to the appointed repairer or supplier. We may require you to pay the excesses in full before we pay your claim or provide any benefits under your policy. The fact we have asked for payment of your excess does not of itself mean that your claim has or will be accepted by us either in whole or in part.

In our view, this clause and similar clauses are unfair because:

- Requiring the customer to pay an excess before the claim is paid causes a significant imbalance between the individual and the insurer. Someone in financial distress, whose home or car has been damaged or completely destroyed, might not be able to afford to pay the excess.
- This requirement is not necessary to protect an insurer's legitimate business interests. The insurer could instead deduct the excess from the benefit paid or, if the insurer pays to rebuild or repair the home, they could bill the individual and/or allow the excess to be paid in instalments.
- This clause is also misleading, and may not comply with the law and the General Insurance Code of Practice (**GI Code**). Under the IC Act, an insurer cannot deny a claim based on what the insured person does after the contract is entered into, unless the person's actions cause or contribute to the loss.¹³ The GI Code also entitles people to apply for financial hardship when they make claims.¹⁴ Under Clause 123(e) of the 2020 GI Code, an insurer should deduct the excess from the claim for consumers experiencing financial hardship.

¹² AAMI Home Building Insurance Product Disclosure Statement, 1 October 2013, page 44, <https://www.aami.com.au/aami/documents/personal/home/pds-building.pdf>, accessed 5 March 2013.

¹³ *Insurance Contracts Act 1984* (Cth), s 54.

¹⁴ Insurance Council of Australia, *General Insurance Code of Practice*, Part 10.

Ella's story

Ella Ingram booked an overseas school trip, then had to cancel it several months later when she was diagnosed with depression.

Ella claimed the costs of cancelling her trip from QBE, her travel insurer. QBE declined her claim on the basis of a blanket exclusion of mental illness.

VCAT found QBE had discriminated against Ella under the *Equal Opportunity Act 2010* (Vic), which includes equivalent 'unjustifiable hardship' and lawful discrimination provisions to federal discrimination laws. QBE did not show it would suffer unjustifiable hardship without the exclusion, and did not have the data to justify it.

Ella was entitled to over \$4,000 for economic loss and \$15,000 for hurt and humiliation, and the fear QBE's decision caused her about future discrimination. However, VCAT did not make an unlawful discrimination declaration, meaning the decision did not have broader implications.

The VCAT decision against QBE's blanket mental illness exclusion described above was handed down in 2015,¹⁶ yet similar broad exclusionary clauses continue to exist in travel insurance standard form contracts, such as the example exclusion below in the current product disclosure statement for InsureandGo Travel Insurance.¹⁷

"What you are not covered for

1. Any claims if at the time you take out this insurance, and before your departure date, any of the following apply: (This is unless you have told InsureandGo Travel Insurance about your condition and we have accepted it. Phone us on 1300 401 177 to find out more).

...

- b) You, or any insured person on your policy, has in the last 5 years suffered from or received medical advice, treatment or medication for:

...

- any psychiatric or psychological condition (including anxiety or depression);"

¹⁵ Ella's Story originally published in: Consumer Action Law Centre, *Denied: Levelling the playing field to make insurance fair*, February 2018, p 14, https://consumeraction.org.au/wp-content/uploads/2018/02/180111_Denied_Digital-Report-1.pdf.

¹⁶ *Ingram v QBE Insurance (Australia) Limited* [2015] VCAT 1936 (18 December 2015).

¹⁷ InsureandGo, *One – trip Travel insurance Combined Product Disclosure Statement and Financial Services Guide*, https://www.insureandgo.com.au/images/ig-ms-pw-ot_tcm1005-157834.pdf, date 12 March 2020.

Q. 6: 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?

We strongly support making UCTs illegal and introducing financial penalties for breaches, which would deter businesses from using UCTs in their contracts. This is a step we have consistently supported over a number of years.¹⁸ The use of UCTs needs to be prohibited, and there needs to be a stronger basis to deter the use of UCTs by businesses when dealing with consumers. A decade of non-compliance with the UCT laws shows that UCTs must be made illegal if they regime is to be effective.

As set out on p 13 of the RIS, at present enforcing the restriction on UCTs requires the party impacted to seek an order from a court or tribunal. For many consumers, this is a significant barrier to access to justice. Further, where a consumer can exercise these rights and a term is found to be unfair, the court must automatically render the term void. There are no pecuniary penalties.

It is essential that any meaningful reform in relation to UCTs imposes a greater deterrent for businesses to stop using UCTs. Just as important is the need to expand the range of remedies available, and to make them far more accessible for consumers. Our specific submissions in relation to this are addressed further below at page 12.

A range of education and awareness activities have been undertaken since 2010 intended to ensure businesses understand and comply with the UCT regime. As referenced in Part 4.1 of the RIS, ASIC and the ACCC have undertaken extensive education programs, published a range of guidance, sought (and obtained) recourse against businesses using UCTs through the courts, and communicated directly with industry about the requirements. Whether concerning UCTs in small business or consumer contracts, action by regulators continues to fall on deaf ears with some businesses.

Consumer education campaigns are also unlikely to be effective – even where consumers are well-informed about their rights, they lack access to justice to enforce those rights. Even if every affected person did this, it would not be an efficient use of the court and tribunal system. It is clear the use of UCTs in consumer contracts will only be further reduced with a real deterrent.

RECOMMENDATION 1. Make UCTs illegal in all standard form consumer and small business contracts.

Q. 7: Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.

Yes. Our casework experience confirms that it is very difficult to challenge a UCT through a court or tribunal.

Seeking to have a contract term recognised as unfair by the courts can be a long and complex process, that is often impractical or out of reach of consumers, particularly those unable to afford or obtain legal representation. For vulnerable and unrepresented litigants who do brave the court system alone, court documents and processes are often confusing and complex, making the process a significant barrier to justice. In our experience in Victoria, despite consumers being able to initiate proceedings in VCAT, even the tribunal setting can result in long, stressful disputes that are hard to navigate without expert legal assistance. The case study below provides an example of the time, complexity and level of involvement that a dispute over a UCT can involve.

¹⁸ See CALC, FRLC, WestJustice, Submission to Treasury, *Extending unfair contract terms laws to insurance contracts – Exposure draft legislation*, 30 August 2019, p 6: <https://consumeraction.org.au/20190830-treasury-uct/>; Consumer Action Law Centre, *Denied: Levelling the playing field to make insurance fair*, February 2018, <https://consumeraction.org.au/denied-levelling-the-playing-field-to-make-insurance-fair/>.

Case Study – Willow Lodge

In December 2014, Consumer Action assisted 14 residents of a Victorian residential park to commence a class action proceeding in the Victorian Civil and Administrative Tribunal (VCAT) against the residential park owner and operator. All of the residents were aged from 50-84 and were either pensioners or low-income earners.

The 14 residents had entered standard form site leases with the owner, which contained a term concerning a deferred management fee (DMF). In the proceeding, the residents claimed that DMF term was (among other things) an unfair contract term.

The DMF term allowed the owner to charge an additional fee to residents, payable upon their departure from the park. The DMF accrued at a rate of 4% of the value of the home of the resident each year, up to a maximum of five years. This meant that upon vacating the park, residents of five or more years were obliged to pay the owner 20% of the sale price of the home.

The process to seek to have the DMF term deemed unfair was complex, slow and dependent upon the residents receiving free legal assistance. The matter was settled in June 2016 - one month before it was to go to trial and more than 18 months after filing proceedings.

A number of the residents faced health issues during this period. For elderly or disadvantaged consumers, justice delayed too often amounts to justice denied.

Flexible remedies

Q. 10: If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)?

Yes – please see our response from page 12 onwards, concerning standard form consumer contracts.

Clarity on standard form contracts

Q. 22: What impact do you consider 'repeat usage' would have on clarity around standard form contracts?

We support the proposed adoption of 'repeat usage' being introduced as an additional factor a court must consider when determining whether a contract is a standard form contract, as proposed by Option 2 in Part 8 of the RIS.

In general, it is uncontroversial that a contract is a standard form contract. That said, in some situations where consumers are making more involved or significant purchases (such as if buying into a retirement village), this might involve some level of negotiation or tailoring to the particular consumer.

In those circumstances, we agree that evidence that a substantially similar contract has been used in a number of similar transactions by the contract issuer would be relevant and useful information to help the court determine whether the contract is a standard form.

Q. 23: 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?

For similar reasons, we also support the proposed introduction of amendments addressing what does not constitute an 'effective opportunity to negotiate', as contemplated by Option 3 in Part 8 of the RIS. We agree that

the proposed exclusions in the RIS are useful and appropriate. Situations where consumers are predominantly locked into the substantive terms of a set contract but are given some negotiation room on minor issues should still be covered by the UCT regime. We consider that these proposed actions are appropriate and reasonable limitations on what may be considered an 'effective opportunity to negotiate'.

Application of any enhanced protections to consumer and insurance contracts

Q. 27: What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?

On the question of legality and penalties raised in part 4 of the RIS in relation to small business, we strongly support the making the use of UCTs illegal by explicitly prohibiting their use in both consumer and small business contracts, and the introduction of penalties to ensure this prohibition is effective.

As noted in Part 4.3 of the RIS, there are businesses which, under the present model, appear to intend to continue to rely on UCTs unless legally obliged to remove them. It is clear that a greater incentive is required to ensure compliance amongst standard form contract issuers.

Make UCTs illegal and attach penalties

We strongly support the adoption of Option 3 (at part 4.5) of the RIS in relation to consumer and small business contracts. There is little point in having laws unless there is a meaningful deterrent associated with breach.

Relying on UCTs should be illegal, and regulators should be empowered to seek civil penalties against businesses that fail to comply. The community expects that where breaches of consumer laws occur, this is treated seriously and with sufficient consequence.

This change would also be in line with points made by the ACCC in its 2019 Digital Platforms Inquiry, which recommended amending the *Competition and Consumer Act 2010* (Cth) so that UCTs are prohibited and civil penalties apply to their use (Recommendation 20).¹⁹ In that report, the ACCC agreed that the current UCT provisions were not a sufficient deterrence.

The potential penalties should also be of a scale sufficient to act as a deterrent to large companies. To achieve this, we recommend that the maximum penalties for breaches of UCT consumer protections reflect the maximum financial penalties available under the ACL – being the greater of \$10 million, three times the value of the benefit received or (if the benefit cannot be calculated) 10% of annual turnover in the preceding 12 months.

This might also motivate companies to enter into negotiations in goodwill when a contract term is disputed, levelling the disparity in negotiating positions, which is one of the underlying purposes of the UCT protections.

RECOMMENDATION 2. Where UCTs are used in consumer and small business standard form contracts, empower the courts to issue pecuniary penalties for breaches.

Variety of remedies far more appropriate for all parties

In relation to Part 5 of the RIS, we also strongly support expanding the options available to a court where it finds a term to be unfair.

We agree with the commentary in Part 5 of the RIS on this issue. Making a term void can leave the consumer worse off in some circumstances. If the UCT is an essential term to the contract, voiding the term renders the whole

¹⁹ ACCC, *Digital Platforms Inquiry Final Report*, July 2019, p 501.

contract void, which can leave the consumer without a good or service that they require. In some cases, it might be a less desirable position for all parties.

Where it does not render the contract void, the requirement for a consumer to quantify their loss as part of seeking a variation is also problematic, as in many circumstances the loss may not be obvious or clear in monetary terms. For example, where a UCT impacts the delivery of a service necessary for someone under the NDIS, this may have a significant impact on the living situation of that person that goes far beyond any financial interest.

Accordingly, we support amending the law to provide that terms found to be unfair by the courts are not automatically void, and expanding the range of remedies available to the court consistent with Option 2 in Part 5 of the RIS. Allowing the court to consider a range of remedies would be a far better position for all involved.

We also specifically recommend that the doctrine of *cy præs* be applied where there has been systematic misuse of an UCT by a contract issuer. The doctrine of *cy præs* (a legal doctrine meaning 'as near as possible') should be employed to indirectly effect restitution to affected consumers who are unable to be directly contacted. In such cases, damages payable by a culpable trader can be held in trust and used to fund work which aims to benefit the class that has suffered, as a whole. This can be particularly beneficial where there are many consumers who have been illegally required to pay very small amounts—*cy præs* can be adopted to prevent a wrongdoer profiting from errors or illegal conduct.

Where a term is deemed unfair by a court in a contract that has been widely relied upon against consumers who are not able to be identified, it will not be possible to directly compensate those impacted. We have direct experience of this mechanism being used in Australia in a number of different ways.

In 2014, Consumer Action received funds from insurers via the Office of the Fire Services Levy Monitor relating to the over-collection of the fire services levy from insurance customers. To date, Consumer Action has used this funding to benefit insurance customers as a whole including the following:

- investigating the sale of add-on insurance and warranties through policy reports and casework;
- setting up the website DemandARefund.com to enable consumers to seek refunds for mis-sold add-on insurance and warranties (over \$23 million to date);
- representing and obtaining redress for consumers in relation to insurance claims and mis-sold insurance; and
- advocating for law reform including extending unfair contract terms prohibition to insurance.²⁰

Adopting the doctrine of *cy pres* in these circumstances would allow the courts to make orders intended to reroute any financial benefits obtained by the contract issuer from the UCT, to other public programs or purposes that will benefit those impacted or consumers generally. Such orders should be able to be pursued by regulators such as ASIC or the ACCC.

RECOMMENDATION 3. Empower the courts to impose a wider range of remedies where it considers a contract term to be unfair, including the doctrine of *cy pres* as it applies in class actions.

Take steps to prevent use of same or similar terms found to be unfair

Consistent with Option 4 at Part 5.6 of the RIS, we also strongly support preventing use of UCTs that are the same, or substantially similar, to any term declared to be a UCT by the court. This could apply to use of the term both by the same issuer as the court's judgment concerns, and where it appears in comparable context, in another business' standard form contracts.

²⁰ See Consumer Action Law Centre, Submission to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings: Consultation Paper*, 6 October 2017, p7-8: <https://consumeraction.org.au/litigation-funding-and-group-proceedings-consultation-paper/>.

Changing the law to shift the burden of proof to the contract issuer where a term used is similar to one found to be a UCT would be an effective way of making the process for challenging a UCT more closely reflect common law decisions. If a term is found to be unfair by the court in a single contract, this finding should be applied to all such terms that are intended to operate in the same way, unless there is a reason not to do so.

RECOMMENDATION 4. Amend the law so that where a contract term a consumer challenges in court closely reflects one in the same industry previously found to be a UCT by the courts, the burden of proof is placed on the contract issuer to prove the term is not unfair.

Q. 28: What are the other policy options that would be appropriate to apply to consumer and insurance contracts?

Enhancements to UCT laws should apply to insurance contracts from the date that the general UCT regime is scheduled to apply insurance contracts.

While the insurance industry may argue it has not had an opportunity to demonstrate their ability to comply with the current UCT laws, this is no real basis for opposing the introduction of penalties or additional remedies for use of UCTs in insurance. If the industry is ready to remove UCTs, it would not be impacted by harsher penalties or a wider range of remedies for their use.

Further, the industry's ongoing use of the terms described above, and the extent of the revelations from the Financial Services Royal Commission (**FSRC**), should not give anyone confidence that this is an industry that is going to put consumers first or demonstrate outstanding fairness from 5 April 2021.

We strongly recommend against excluding insurance from any enhancements to UCTs laws, even with the intent to review compliance following their introduction. The exclusion of insurance contracts from UCT laws was the result of significant industry lobbying over many years, and it took the FSRC to finally see this loophole removed. Consumers cannot afford to be at the mercy of UCTs in insurance for any longer. Significant penalties and improved consumer remedies are needed to ensure substantial compliance as soon as possible.

RECOMMENDATION 5. Ensure that any enhancements to the UCT regime apply to general and life insurance consumer contracts from the date that the UCT regime applies to insurance contracts.

UCT laws should apply to group insurance products where beneficiaries are third party consumers

Many consumers have access to insurance as third parties under group insurance contracts. These contracts continue to be excluded from the UCT regime, even from 5 April 2021 when Schedule 1 of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth) (**Hayne Protecting Consumers Act**) comes into effect. This is because they are negotiated by a sophisticated purchaser such as a bank or superannuation trustee, and will therefore continue to fall outside the definition of a consumer contract under the ASIC Act.

This exclusion applies to the policies of over 12 million people who hold life insurance or similar products through their superannuation. It also excludes other group policies such as complimentary travel insurance policies provided with bank credit cards. The loophole in the UCT regime for group insurance policies continues to cause harm.

We acknowledge some of the policy justifications about excluding insurance products of this nature. Super funds and banks do not have a lack of bargaining power. We also appreciate the tension where trustee obligations exist to meet the best interests of members and to weigh the collective interest versus the individual, and how this could complicate determining whether a UCT is unfair.

Despite this, our position remains that the UCT regime should cover insurance through superannuation. If the system was working for consumers, this might not be needed. However, the system has not been working in the interests of consumers. The Productivity Commission has reported a raft of serious problems with life insurance in superannuation.²¹ These included:

- unnecessary, duplicate, inappropriately bundled and 'zombie' policies,
- 'extremely complex and incomparable policies',
- problems for members dealing with funds in relation to insurance,
- poor application of risk premiums, and
- little or no tailoring of policies to member cohorts.

The difficulty caused by UCTs in these products are faced by people in significant times of need, such as when someone's family relies on their life, TPD and/or income protection insurance, if struck by tragedy. Similarly, an individual might face huge problems if they discover a UCT excluding coverage in a poor-quality complimentary travel insurance that came with their credit card when making a claim.

UCTs in this context continue to cause detriment to consumers in the same way as UCTs in policies that are consumer contracts. The same reasons that the UCT regime will apply to other insurance products should also warrant the expansion to include group insurance policies with beneficiaries that are third party consumers.

Regardless of the bargaining power of the superannuation firms or bank, we still regularly see products of this nature containing terms we consider to be clearly unfair for third party consumers. These agreements are negotiated in a situation that does not achieve the protection of the end user's interests.

It is also an analogous situation to one that Treasury has proposed to exclude from constituting an 'effective opportunity to negotiate' in Option 3 at Part 8.5. The proposed exclusion at c. of situations where a subset of parties have an opportunity to negotiate on behalf all small businesses without their permission appears to be recognition that group negotiations undertaken beyond the influence of the end user should not exclude a contract from being classed as a standard form. Group insurance policies are similar – while a larger entity may negotiate the terms, it does not change the vulnerability of the end user.

We strongly recommend extending the application of all UCT laws applying to consumers to include group insurance policies where end beneficiaries are third party consumers.

RECOMMENDATION 6. Extend the application of all UCT protections to cover group insurance policies, where the end beneficiaries are consumers.

Timeshare schemes

As noted in Part 9 of the RIS, current UCT protections do not apply to managed investment schemes. We submit that as part of the enhancements to UCTs, the Government should extend the application of UCT laws to managed investment schemes, particularly in relation to timeshare schemes.

At present, managed investment schemes are excluded from the UCT regime under the ASIC Act. However, in some situations this exclusion leaves consumers or end users of products open to detriment.

We have represented a significant number of consumers who have had problems with timeshare schemes over a number of years. Timeshare is a complex financial product that is sold in a high-pressure sales environment and lock people into expensive and poor value contracts for decades. CHOICE recently assisted a couple aged 69 who

²¹ Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness—Draft Report Overview*, April 2018, pp 21-22.

were locked into a timeshare contract until 2076. The timeshare provider refused the couple's request to exit the scheme.²²

We hold serious concerns over the way timeshare arrangements are often structured and sold, and have seen a range of terms in contracts that have the potential to unfairly cause significant harm to the purchaser, for the purposes of protecting interests of the timeshare operator far beyond that which is reasonable. This is a product where consumers desperately need the protection of the UCT regime.

Case Study – Timeshare

Beth (name changed) purchased an interest in a timeshare arrangement after being invited to a seminar in her hotel, while on holiday with a friend in Queensland. At the time, Beth earned approximately \$60,000 a year and, along with her husband, supported two adult children.

Beth was told her purchase would allow her to access international travel accommodation for 2-3 weeks a year. Ongoing costs were not mentioned, and Beth was not given time to review the contract or seek professional advice about its terms. The cost to purchase her timeshare interest was over \$25,000.

Beth contacted us years later, having been charged an additional nearly \$10,000 in ongoing membership and other fees since her initial outlay. In addition, Beth had only been able to use her timeshare to stay in local accommodation for a total of 7 nights over a number of years – equating to an overnight rate of almost \$5,000 - due to the complex-booking system and the low value of the product.

Under the product disclosure statement, Beth was locked in to pay significant ongoing membership and other fees in addition to her initial payment and for an indefinite period. Due to the low value of the product, it was very unlikely Beth could recoup any of her costs by reselling her interest onto another individual.

The terms of the contract were designed in a way that exploited the disparity in bargaining power between the issuer and purchaser.

RECOMMENDATION 7. Extend the application of all UCT protections to managed investment schemes, including timeshare arrangements.

Improving access to justice

In light of our response to Question 7 above concerning the high bar that the need to seek recourse from the court imposes upon consumers, we also strongly encourage Treasury to expand the availability and ability of external dispute resolution (**EDR**) services to deal with UCTs. Effective and binding EDR mechanisms can significantly improve access to justice for consumers, particularly those experiencing vulnerability. UCT laws exist because of bargaining disparity, but requiring court intervention often keeps the remedy out of reach of more vulnerable consumers.

In the financial services space, we recommend achieving this by providing specific guidance, or confirmation, that the Australian Financial Complaints Authority (**AFCA**) has the authority to assess whether a contract term is unfair. We are aware of, and have assisted clients in, a number of AFCA complaint matters where a UCT argument has been raised. However, AFCA rarely makes a determination on this question, with most complaints normally resolved by reference to other aspects of the complaint. This limits the systemic impact of the finding that a particular term is unfair, either in other standard form contracts of that type or in similar contracts. Similar steps could be taken in other industries subject to the oversight of an ombudsman or similar entity offering EDR.

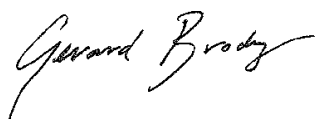
²² <https://www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case>, accessed 19 March 2020.

In the general consumer retail area, we strongly suggest consideration is given to the introduction of a retail ombudsman service for Australia. At present, this means any right of recourse for products and services falls between the gaps of existing EDR schemes, such as for financial services, energy and telecommunications. This gap has existed for a long time, and this is a service we have long advocated for many reasons.²³

RECOMMENDATION 8. Empower EDR services to make determinations concerning complaints about UCTs. Consider introducing a general retail ombudsman for complaints that fall between the gaps of existing EDR schemes.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



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Karen Cox | CEO
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WESTJUSTICE

²³ See our submission to the Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, 17 August 2018, <https://consumeraction.org.au/wp-content/uploads/2018/08/180817-CALC-Submission-to-ALRC-Class-Actions-and-Third-Party-Litigation-Funders.pdf>.

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Make UCTs illegal in all standard form consumer and small business contracts.

RECOMMENDATION 2. Where UCTs are used in consumer and small business standard form contracts, empower the courts to issue pecuniary penalties for breaches.

RECOMMENDATION 3. Empower the courts to impose a wider range of remedies where it considers a contract term to be unfair, including the doctrine of *cy pres* as it applies in class actions.

RECOMMENDATION 4. Amend the law so that where a contract term a consumer challenges in court closely reflects one in the same industry previously found to be a UCT by the courts, the burden of proof is placed on the contract issuer to prove the term is not unfair.

RECOMMENDATION 5. Ensure that any enhancements to the UCT regime apply to general and life insurance consumer contracts from the date that the UCT regime applies to insurance contracts.

RECOMMENDATION 6. Extend the application of all UCT protections to cover group insurance policies, where the end beneficiaries are consumers.

RECOMMENDATION 7. Extend the application of all UCT protections to managed investment schemes, including timeshare arrangements.

RECOMMENDATION 8. Empower EDR services to make determinations concerning complaints about UCTs. Consider introducing a general retail ombudsman for complaints that fall between the gaps of existing EDR schemes.