National Fire Industry Association

Australia

Contractors at the Frontline of Fire Protection

Submission to the Consumer and Corporations Policy Division
Treasury

Enhancements to Unfair Contract Term Protections Consultation Regulation Impact Statement

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EXECUTIVE SUMMARY

The Federal Treasury is conducting a review of unfair contract terms (UCTs) and seeks feedback on the effectiveness of the extension of unfair contract term protections to small business.

The National Fire Industry Association is an Australia-wide community of commercial fire protection contractors, their people, suppliers and industry stakeholders representing a wide and varied membership from the smallest sub-contractor through to large Australia-wide design, install and service businesses. Our members work at the frontline of fire protection with an estimated 80 per cent of the fire protection work undertaken in Australia completed by members of NFIA.

Because of the pyramidal structure within the construction industry, the bargaining power between the parties becomes more imbalanced the further one goes down the contractual chain. Often the head contractor will agree to contractual terms that will have all risks on key issues transferred to the head contractor who in turn knows that it will be able to pass on its onerous contractual terms to its subcontractors by insisting that subcontractors execute a back-to-back subcontract.

In this way, unfair contract terms and risks are transferred down the contractual chain with the sub-subcontractors at the base of the pyramid not only having the least capacity to bear the financial risks associated with the project but also being the least able to negotiate a set of more reasonable and balanced terms.

This imbalance of bargaining power within the construction industry has had a devastating impact on the most vulnerable parties.

In November 2016, the *Australian Consumer Law* (ACL) extended its unfair contract term provisions to certain small businesses. On 21 November 2018, the Government released the Review of Unfair Contract Term Protections for Small Business: Discussion Paper (the discussion paper). NFIA made a formal submission that addressed the impact of the UCT protections, the thresholds at which the protections apply, the clarity of the term ‘standard form contract’, and the appropriateness of current exemptions.

In light of the findings, the Government announced its intention to strengthen the UCT protections for small businesses, including through a range of legislative amendments where appropriate. The Government has released a Regulation Impact Statement (RIS) and seeks stakeholders’ views on a range of options.

NFIA is pleased to provide comment on the questions contained within the RIS:

- Many contracts in the building industry are based on a standard form but are riddled with amendments;
- In our submission on the Review of Unfair Contract Term Protections for Small Business in October 2018, NFIA provided over 20 separate examples of commonly used unfair contract terms. See Appendix A of this submission.
- Unfair contractual risk allocation has undoubtedly contributed to the high levels of insolvency in the Australian construction industry.

- Sadly, many of our members accept UCTs because they are reluctant to damage commercial relationships.
- The legislation should be more accessible to small businesses. A targeted education campaign should highlight specific examples of unfair contract terms withing the building and construction industry and explain the processes that business should follow when they suspect a contract contains unfair terms.
- Making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts. Our submission provides examples of UCTs that Treasury and the ACCC could deem as unfair under the Act.
- NFIA strongly supports challenging the status quo. While there will be additional costs to business arising from an extension to the unfair contract term provisions, the benefits justify the additional cost. UCTs should be illegal and appropriate penalties attached. Regulators should be given additional powers of enforcement.
- NFIA is supportive of retaining the dual approach in defining the parameters of the Act - the number of employees of the business and the monetary value of the contract. NFIA would have no objections to raising the threshold to 100 employees in line with other Australian Regulation and agrees that $10 million annual turnover is an appropriate threshold.
- Introducing the concept of "repeat usage" would assist a subcontractor to have a Court find that a contract is a standard form contract.
- If the requirement that the unfair contract term appear in a standard form contract was removed, it would greatly extend the scope of the legislation.
- The legislation does not define the expression 'standard form contract' and government is relying on the legal system to arbitrate. Most importantly, the problem unique to building and construction contracts, is not whether the contract is of a standard form; but what amendments have been made to the detriment of one party based on an imbalance in bargaining power. NFIA believes that some small businesses, when entering into a contract, may benefit from greater certainty as to whether the contract they intend to sign is likely to fall within the protections of the UCT regime where a claim that a contract is a standard form contract may be challenged.

INTRODUCTION

Besides the human risk, there is also a substantial financial cost to the community due to building fires. Fire costs Australian business millions of dollars due to property damage, fines, compensation, and insurance premiums. Many businesses find that they are not able to recover from the effects of a fire.

The Australian Fire Protection Industry

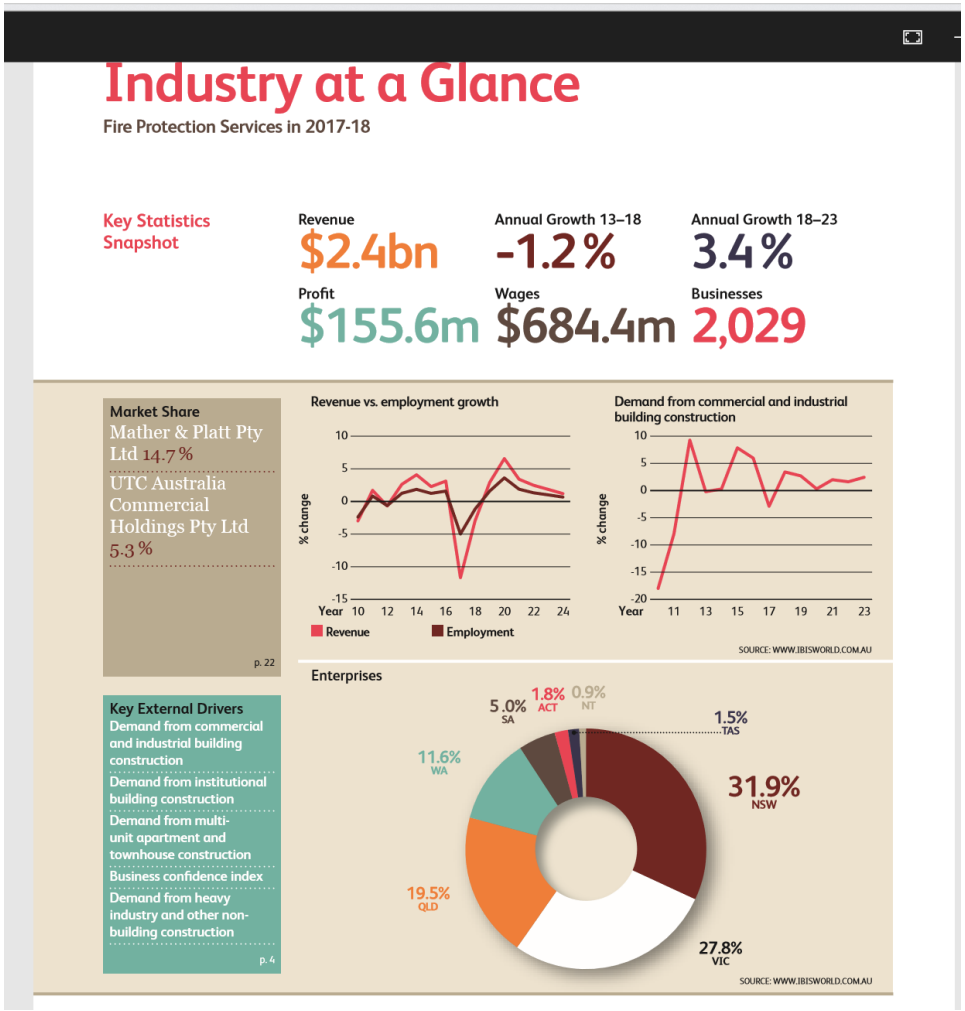
Fire protection in Australia is typically achieved via three means:

- Active fire protection (fire sprinklers, fire hydrants and fire alarm systems);
- Passive fire protection (fire rated walls, floors and ceilings and fire sealing); and
- Education.

The Fire Protection Services industry contributes over $2.4 billion to the Australian economy every year. Over 2000 businesses pay nearly $700 million in wages each year and industry revenue is projected to increase at a compound annual growth rate of 3.4% over the five years through 2022-23, to reach $2.8 billion.

The IBISWorld Industry Report OD5424 Fire Protection Services in Australia (February 2018), claims that despite the presence of vertically integrated multinational giants, the industry has a low level of market share concentration as the top four players are estimated to account for about 27.4% of industry revenue. The two major companies have a combined market share of only 20% and are both part of large multinational companies operating globally across several related industries. Twenty years ago, the two major companies are estimated to have had 80% of the market.

There are now a large number of State, regional and local players that construct, install and service fire protection systems to small, medium and major buildings across the full scope of class 2 to 9 buildings as well as higher risk facilities such as fuel depots, harbours and similar developments. Over half the industry enterprises employ between one and 19 people (53.1% in 2014-15) and a further 44.4% have no directly employed labour. As the minor players have increased their share of the total market, the industry has become more diverse and competitive while also growing substantially.



Where twenty years ago, the two major companies offered a form of institutionalised but limited "industry" training to their people, it could be argued that the industry was less in need of regulation. However, as the industry has grown substantially and its make-up evolved it is now predominately made up of many more, smaller independent contracting companies. That market growth and diversification has provided customers with better contractor choices, better outcomes and better pricing but, at the same time, raised the need for more over-arching regulation.

The National Fire Industry Association (NFIA)

The National Fire Industry Association (NFIA) is an Australia-wide community of commercial fire protection contractors, their people, suppliers and industry stakeholders representing a wide and varied membership from the smallest sub-contractor through to large Australia-wide construction and service businesses. Our members work at the frontline of fire protection with an estimated 80 per cent of the fire protection work undertaken in Australia is completed by members of NFIA.

NFIA utilises the resources of other Australian and International industry organisations and associations.

NFIA is committed to the delivery of quality fire protection practitioners across all aspects of fire protection safety. To this end, NFIA has sponsored and supported the growth of the world leading fire industry Registered Training Organisation, Fire Industry Training (FiT), which now delivers fire industry required training for all of Australia at its campuses in Brisbane, Melbourne and Sydney.

NFIA believes that an appropriate regulatory framework should be one that protects the safety of the community and property, provides adequate consumer protection, recognises and accommodates industry practice and standards, requires registration of practitioners and is linked to the national training package framework.

The Problem

The construction industry operates on a pyramid structure, with the client at the top who enters into a head contract with the head contractor, and with the head contractor subsequently entering into a series of subcontracts with subcontractors. Because of the pyramidal structure, the bargaining power between the parties becomes more imbalanced the further one goes down the contractual chain.

Often the head contractor will agree to contractual terms that will have all risks on key issues transferred to the head contractor because it knows that if it does not, then it is probable that the project will be awarded to one of its competitors who would be prepared to accept the principal's terms. The head contractor knows that it will be able to pass on its onerous contractual terms to its subcontractors by insisting that subcontractors execute a back-to-back subcontract (i.e. where the subcontract incorporates the same terms as the head contract).

In this way, unfair contract terms and risks are transferred down the contractual chain with the sub-subcontractors at the base of the pyramid not only having the least capacity to bear the financial risks associated with the project but also being the least able to negotiate a set of more reasonable and balanced terms. In all instances, the party higher up the contractual chain will present its contract documentation on a 'take-it-or-leave-it' basis.

This imbalance of bargaining power within the construction industry has had a devastating impact on the most vulnerable parties. Not only has the pyramidal structure caused the party at the lower end of the hierarchical chain to assume the risk of insolvency of the party higher up the pyramid, but it has also resulted in significant injustice, particularly where, as a result of the unfair contract conditions, the party who has carried out construction work has been unable to obtain payment for such work.

Uncertainty of income caused by unfair contractual risk allocation acts as a disincentive to business expansion and innovation, and employment. Unfair contractual risk allocation has also undoubtedly contributed to the high levels of insolvency in the Australian construction industry. In 2017/18 1642 construction companies became insolvent. This represented 22% of all insolvencies in Australia, and a far greater percentage of insolvencies than any other industry. This is because instead of the risk of cost overruns, design errors etc being properly managed by those who are able to manage and so minimise the risk, it is simply shifted onto

the subcontractors at the bottom of the contractual chain who have no real ability to manage the risk of design errors, delays and cost overruns etc, or bear the associated financial burden.

It is because of this imbalance of power that the legislatures in the various jurisdictions have felt it necessary to intervene and to provide assistance to the more vulnerable party. For example, the Queensland Government has introduced new reforms to improve security of payment in the building and construction industry. The *Building Industry Fairness (Security of Payment) Act 2017* introduces a number of measures which are designed to strengthen security of payment.

Ironically, it is often in response to these security of payment measures that onerous and unfair contract terms have actually increased; however we note that the Queensland legislation has a regulation making ability to address this. NFIA congratulates the Federal Government for its efforts to address the issue of unfair contract terms when it introduced the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (the Act) to extend the consumer Unfair Contract Terms protections in the ACL and the ASIC Act to small business contracts that meet the prescribed criteria.

However, despite the introduction of the unfair contract term protections for small businesses, unfair terms are still prevalent. The majority of contracts for which small businesses seek the assistance of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) still contain clauses that the Ombudsman considered to be unfair.

REVIEW OF UNFAIR CONTRACT TERM PROTECTIONS FOR SMALL BUSINESS

On 1 July 2010, protections for consumers against unfair contract terms (UCTs) in standard form contracts were introduced into the Trade Practices Act 1974 (now the Australian Consumer Law (ACL)) and the Australian Securities and Investments Commission Act 2001 (the ASIC Act). This formed part of the response to the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework, which recommended incorporating a provision in the consumer law to address UCT related issues.

In November 2016, the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (the Act) took effect to:

- extend the consumer UCT protections in the ACL and the ASIC Act to small business contracts that meet the prescribed criteria; and
- make provision for exempting certain small business contracts from the operation of the legislation, where those contracts are subject to prescribed laws that are deemed equivalent to the UCT protections in the ASIC Act or the ACL, and which are enforceable.

These provisions, which previously only applied to consumers, were introduced in an effort to level the playing field between small and large enterprises.

On 21 November 2018, the Government released the Review of Unfair Contract Term Protections for Small Business: Discussion Paper (the discussion paper). NFIA made a formal

submission that addressed the impact of the UCT protections, the thresholds at which the protections apply, the clarity of the term 'standard form contract', and the appropriateness of current exemptions.

In light of the findings, the Government announced its intention to strengthen the UCT protections for small businesses, including through a range of legislative amendments where appropriate. As the proposed legislative amendments will have an impact on businesses and require amendments to the ACL, the Government has released a Regulation Impact Statement (RIS) and seeks stakeholders' views on a range of options. Additionally, this RIS seeks views on whether any enhanced protections for small businesses should be extended to consumer and insurance contracts and to government contracts.

NFIA is pleased to provide comment on the questions relevant to our members that are contained within the RIS.

NFIA RESPONSE TO QUESTIONS CONTAINED IN THE RIS

Legality and Penalties

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 by UCTs.
In our submission on the Review of Unfair Contract Term Protections for Small Business in October 2018 NFIA provided over 20 separate examples of commonly used unfair contract terms. See Appendix A.

2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.
Often the head contractor will agree to contractual knowing that it will be able to pass on its onerous contractual terms to its subcontractors by insisting that subcontractors execute a back-to-back subcontract (i.e. where the subcontract incorporates the same terms as the head contract).

In this way, unfair contract terms and risks are transferred down the contractual chain with the sub-subcontractors at the base of the pyramid not only having the least capacity to bear the financial risks associated with the project but also being the least able to negotiate a set of more reasonable and balanced terms. In all instances, the party higher up the contractual chain will present its contract documentation on a 'take-it-or-leave-it' basis.

Australia's two million small businesses sign an average of eight standard form contracts a year. The ACCC has found that over 60 % of small businesses claim to have experienced unfairness due to contracts and 44% believed that they have experienced harm as a result of unfair terms in contracts.

Unfair contractual risk allocation is regarded as inefficient and not "best practice" because a subcontractor is often not in any position to control or manage the risk of (e.g.) a flawed set of design documents that they have not prepared or had any input into.

In addition, some contractual risk allocation conditions create risk that cannot be insured against, creating uninsurable risk. This is especially so for conditions providing unlimited indemnities in favour of the main contractor, particularly those that indemnify for consequential losses sustained by a main contractor. Further, unfair subcontract conditions (especially accuracy as to design warranties requiring professional indemnity insurance) have arguably contributed to an increase in the cost of insurance premiums in Australia.

Uncertainty of income caused by unfair contractual risk allocation acts as a disincentive to business expansion and innovation, and employment. Unfair contractual risk allocation has undoubtedly contributed to the high levels of insolvency in the Australian construction industry. In 2017/18 1642 construction companies became insolvent. This represented 22% of all insolvencies in Australia, and a far greater percentage of insolvencies than any other industry. This is because instead of the risk of cost overruns, design errors etc being properly managed by those who are able to manage and so minimise the risk, it is simply shifted onto the subcontractors at the bottom of the contractual chain who have no real ability to manage the risk of design errors, delays and cost overruns etc, or bear the financial burden.

If there is unlikely to be a voluntary reduction in unfair contractual risk allocation by main contractors, legislation is needed to "level the playing field". The vulnerability of subcontractors lower down the contracting chain to the actions of those above them requires regulation to ensure that main contractors carry out business in an ethical, responsible and commercially sound manner, and so reduce insolvency events lower down the contracting chain/hierarchy – for the best interests of the construction industry in Australia as a whole.

3. Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts?
The examples of unfair contract terms outlined in Appendix A of this submission are rife right across the Australian construction industry.

4. As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business.
Often the head contractor will agree to contractual terms that will have all risks on key issues transferred to the head contractor because it knows that if it does not, then it is probable that the project will be awarded to one of its competitors who would be prepared to accept the principal's terms. The head contractor knows that it will be able to pass on its onerous contractual terms to its subcontractors by insisting that subcontractors execute a back-to-back subcontract (i.e. where the subcontract incorporates the same terms as the head contract).

As an industry association that represents mostly small businesses NFIA is constantly being told of UCTs. Often these members were presented with standard contracts on a 'take it or leave it' basis and in which case they have little or no opportunity to negotiate the terms.

Sadly, many of our members accept UCTs because they are reluctant to damage commercial relationships. They fear that if they don't accept the terms they could lose that contract and the opportunity to tender for any further ones from that same head contractor. Small businesses are reluctant to damage commercial relationships.

5. 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 purpose of this Legislation is to address the imbalances in negotiating power. This is more crucial for subcontractors operating in the building and construction industry than any other sector. However, it is worth noting that these companies are currently not making adequate use of the protections contained in the Act. This could be due to a general lack of awareness and understanding about the regime and its applicability as well as ignorance of what resources are available. NFIA encourages Treasury and the ACCC to explore avenues for making the legislation more accessible to these businesses.

A targeted education campaign aimed at small business would be a good start. The campaign should highlight specific examples of unfair contract terms withing the building and construction industry and explain the processes that business should follow when they suspect a contract contains unfair terms.

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?

Australia's current laws aren't tough enough. While contracts terms that unfairly exploit a power imbalance between the two parties can be voided by a court, there's no punishment for the entity exploiting its market power in the first place. This means there's nothing discouraging the big end of town from pushing smaller dependent firms to sign onto unfair arrangements.

The Australian Competition and Consumer Commission has previously stated that making unfair contract terms illegal:
'… would act as a better deterrent. In the ACCC's view, currently there is minimal incentive for businesses to comply with [unfair contract term] laws.'

Therefore, NFIA strongly encourages Treasury and the ACCC to provide examples of contract clauses commonly found in building and construction subcontracts that could be deemed unfair under the Act. If businesses are aware of specific terms being illegal, there will be a greater incentive for large businesses to not include them in standard form contracts offered to small businesses.

NFIA suggests that the following clauses could be considered appropriate to be prohibited:

1. Clauses which confer power to assign and/or novate that contract to the detriment of the other party without that other party's consent
2. Defects rectification by third parties clauses
3. No-collusion clauses
4. Payment of deposit before the subcontractor can sue

5. Warranties for design and document accuracy
6. Termination for convenience clauses
7. Wrongful termination deemed to be for convenience
8. Indemnity clauses that excessively extend liability to the subcontractor
9. Release upon claim made
10. Deeds of release to obtain practical-final completion
11. Payment of variations on account

Clauses which may be considered appropriate to be prohibited:

1. Limited Liability-clauses that exclude or disproportionately limit the liability of the main contractor even if they are partially at fault.
2. Any statement that restricts or denies rights to implied warranties
3. Obligation to accelerate without compensation
4. Prior works warranty

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

It is our experience that when litigation is commenced, the larger contracting company with greater resources stretches out the time over which proceedings are conducted in an endeavour to exhaust the time and/or financial resources of the small business.

The current unfair contract term provisions in the ACL are complex in their application, especially in relation to the term "small business contract", and the term "unfair". If the application of the unfair contract term provisions is simplified by amendments to the ACL, more businesses will be able to rely on the provisions in their contract negotiations, and this will also improve a subcontractor's ability to rely on them in a dispute.

8. What do you consider are the additional costs and benefits for each of the proposed options?

Option 1 – status quo

NFIA strongly supports a change to the status quo. While there will be additional costs to business arising from an extension to the unfair contract term provisions, the benefit that will be achieved of more effective and efficient risk management justifies the additional cost.

Option 2 – strengthened compliance and enforcement activities

NFIA strongly favours strengthened compliance and enforcement activities. However, NFIA recognises that the ACCC cannot "go it alone", or solely bear the financial burden of greater enforcement responsibilities.

Option 3 – making UCTs illegal and attaching penalties

NFIA strongly supports making unfair contract terms illegal and introducing financial penalties. NFIA considers that this will significantly improve compliance, and make it more likely that the building and construction industry will comply with the provisions without enforcement by the ACCC being required, or court actions by subcontractors.

d. Option 4 – strengthened powers for regulators

Likewise, NFIA supports strengthened powers for regulators. The issuing of an infringement notice, or a regulator determination, will place the obligation on a contractor relying on a potentially unfair contract term to justify its fairness, and so encourage a contractor to have a careful review of its standard form contract before it is issued to make sure there are no unfair contract terms.

9. Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?
Small construction businesses avoid court action as much as possible. It is industry culture that court action will damage commercial relationships beyond repair and cause reputational damage to subcontractors right across the industry.

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)? Please detail reasons for your position, including the possible impact this might have on your business.
Although a discretionary remedy will add another layer of complexity and cost to a court action, no two cases are alike, so flexibility in the remedy ordered is supported.

11. 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.
Often the small business does not have the time and resources to pursue the matter on their own but if the unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage then the regulator should pursue the matter on behalf of a class of small businesses.

The impact of an unfair contract term class action would be widespread across an industry, and so assist in reducing unfair contract terms. The benefits to NFIA members of the example unfair contract terms being declared “unfair” would be immediate because the risk associated with them would be reduced and managed more effectively.

Definition of a small business
12. 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 current UCT protections apply to businesses that have fewer than 20 employees at the time of entering a contract where the value of the contract did not exceed $300,000 (or $1 million for contracts longer than 12 months). This effectively sets two thresholds for the application of UCT protections - the number of employees of the business and the monetary value of the contract. NFIA is supportive of this dual approach.

Over half the fire protection industry enterprises employ between one and 19 people (53.1% in 2014-15) and a further 44.4% have no directly employed labour. Therefore in relation to the fire protection industry NFIA is satisfied with retaining the current limit of 20 employees.

13. If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.
If the employee headcount threshold remains at 20, the anomalous situation will arise where a subcontractor employing 25 people will be exposed to unfair contract terms, but a sub-sub contractor that may employ five people will not be. This will result in risk being passed to some subcontractors, but not all.

There is also a perception that employing 20 or more people means that that business can afford legal advice, and that the business has sufficient bargaining position to remove any unfair subcontract terms during contract negotiations. In the highly concentrated building industry, this is not the case.

NFIA recognises that the Australian Financial Complaints Authority defines a small business as an organisation with less than 100 employees, and the Australian Small Business and Family Enterprise Ombudsman Act 2015 adopts 100 employees as one of the thresholds to define a small business. NFIA would have no objections to raising the threshold to 100 employees in line with other Australian Regulation.

14. 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?
Annual turnover does not equate to net profit. Therefore, annual turnover should never be used exclusively to define a small business because you could exclude legitimate small businesses which have a low annual income even though their turnover is high and margins are low.

15. 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.
The Australian Tax Office defines a small business as a business with an annual turnover (excluding GST) less than $2 million. $10 million annual turnover is an appropriate threshold.

16. If the annual turnover threshold were to be adopted, how might this impact your business? Include any estimates of potential costs and savings.
Again, it should not be the sole defining definition of a small business.

17. In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.
NFIA argues that the remedy is to increase the scope of the unfair contract term provisions, and simplify their application to encourage their usage. Including subsidiary employee numbers in the employee threshold test will add another layer of complexity to an already complex situation.

Value threshold
18. 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?
NFIA supports all building and construction industry contracts having legislative protections. The payment structure within our industry does not respect a value threshold. Payment

practices of developers paying builders and then builders paying subcontractors renders business size irrelevant.

20. Are there likely to be any negative impacts if the current contract value threshold were to be increased to $5 million? Please provide details.
NFIA supports all building and construction industry contracts having legislative protections.

21. Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.
Not in a building and construction context. This is the intention of the Queensland legislation and this aspect has been broadly supported by all stakeholders throughout consultation.

Clarity on standard form contracts
22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.
The Australian Consumer Law assumes that a contract is a standard form contract unless and until the main contractor establishes otherwise. A main contractor could overcome this assumption by producing equivalent contracts that do not contain exactly the same terms and conditions. Introducing the concept of "repeat usage" would assist a subcontractor to have a Court find that a contract is a standard form contract. As such NFIA supports "repeat usage".

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?
If the requirement that the unfair contract term appear in a standard form contract was removed, it would greatly extend the scope of the legislation.

25. 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 legislation does not define the expression 'standard form contract'. The courts, when determining whether a contract is 'standard form', must take into account whether:

- one of the parties has all or most of the bargaining power relating to the transaction;
- the contract was prepared by one party before any negotiations relating to the transaction occurred between the parties;
- the contract was given on a take-it-or-leave-it basis; and
- the terms of the contract took into account the specific nature of the transaction.

John Murray AM in his report "Review of Security of Payment Laws – Building Trust and Harmony" explains that it may be that a standard form of contract prepared by, say, an organisation like Standards Australia, even if presented by one party to the other on a take-it-or-leave-it basis, does not contain an unfair term because the general conditions were arrived at by consensus and with input of key industry stakeholders, but this is far from clear.

He goes on to say that 'It is however more likely that where the standard form document prepared and published by Standards Australia has been so extensively amended as to deliberately advantage one party to the detriment of the other, and where it is presented by

that party to the other on a take-it-or-leave-it basis, such a contract could well be construed as a standard form contract containing unfair terms'.

It is also far from clear whether an adjudicator has jurisdiction to determine whether a particular construction contract constitutes a 'standard form' and if it does, whether the contract contains 'unfair' terms such that a respondent is unable to rely on them as a reason for withholding payment. There appear to be two conflicting views regarding this issue. On the one hand, some may argue that because the ACL states that only a 'court' can decide if a term is unfair, this effectively would mean that an adjudicator is unable to decide such issues.

The alternative view it that adjudicators are frequently required to determine whether a particular claimant holds the requisite license prescribed under a particular legislation and therefore the task of requiring an adjudicator to determine whether the construction contract contains an unfair term under the ACL is no different. No doubt, at some stage in the near future, the issue of whether an adjudicator has jurisdiction on this area will be referred to the courts to determine.

By not defining the expression 'standard form contract' the government is relying on the legal system to arbitrate. They are basically putting the onus on small business to fight through the courts on individual cases to establish a precedent. This process would be extremely costly for a small business.

Most importantly, the problem unique to building and construction contracts is not whether the contract is of a standard form; but what amendments have been made to the detriment of one party based on an imbalance in bargaining power. NFIA believes that some small businesses, when entering into a contract, may benefit from greater certainty as to whether the contract they intend to sign is likely to fall within the protections of the UCT regime where a claim that a contract is a standard form contract may be challenged.

Additionally, many contracts in the building industry are based on a standard form but are riddled with amendments depending on the specific project circumstances (e.g. procurement models, site conditions, etc.). Subcontractors, at the bottom end of the hierarchy, are typically not informed of what amendments have been made to standard form contracts.

Some contract terms may have been included at the top of the hierarchical contract chain for a specific and reasonable purpose but because they are not adequately explained they end up being used in a different way further down the chain. NFIA believes that there should be more transparency in the drafting and explanation of the terms when they are first included.

Additionally, NFIA supports the proposed extension of unfair contract term provisions (UCT) to the insurance sector. NFIA respectfully asks that the provisions also be extended to all Australian government contracts. Recent announcements demonstrate Government's leadership in this area – such as the recent commitment to 20 day payment terms for government contracts. NFIA believes that Government should demonstrate further leadership and only issue fair standard form contracts.

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APPENDIX A: Examples of Common Unfair Contract Terms

In our Submission on the Review of Unfair Contract Term Protections for Small Business in October 2018 NFIA provided the following examples of unfair contract terms:

- Extension of time (EOT)
    - The time frames within which EOT claims must be made have come down dramatically in recent years, particularly since BCIPA. The level of detail required to be put in a claim has also been increased. If a subcontractor only has three to five days to make an EOT claim, how realistic is it then to provide a detailed breakdown of the costs, causes, estimated length of delays involved and what is planned to overcome the delays?
    - Furthermore, when an extension is granted, as often as not, that does not entitle a subcontractor to any compensation for the extra costs incurred and sometimes, even where the head contractor is the cause of the delay.
    - Commonly, if a subcontractor does not provide all that information within that limited time frame, the potential claimant is excluded from making a claim.

- Obligation to accelerate without compensation. These clauses oblige the subcontractor to accelerate works if so directed but allow no compensation for any extra costs incurred as a result. This is commercially unrealistic.

- Variation claims

- Delay claims. The right to claim damages for delays such as inclement weather or industrial action are under threat. Subcontractors are now commonly deemed to have taken into account any such delays in coming to a price and time for completion of the project. This is simply unrealistic.

- No collusion. Some contracts seek not only to prohibit subcontractors from colluding with other tenderers (which is illegal under the Trade Practices Act) but also from communicating in any way with an association or with an association of which a subcontractor is not even a member but of which another tenderer might be a member. How is a business supposed to know that some other tenderer is a member of an association? If the prohibition was for the purpose of preventing collusion, that would be acceptable but an absolute prohibition which would prevent a subcontractor obtaining useful information from its association which may assist it with the tender process (such as a legal opinion provided to the association for its members on the terms of a tender) goes too far and is not reasonable.

- Restrictions on key people. Contracts now provide that a subcontractor cannot take a key person off the job or replace them with someone else without the head contractor or the project manager's consent. Surely if a job is won it is up to the subcontractor to perform the contract and if the subcontractor fails to perform the contract adequately, the head contractor has remedies.

- Indemnities. Most contracts are now littered with provisions under which the subcontractors' indemnify the head contractor for all types of losses. For many of these, a subcontractor cannot be insured. What is worse, some contracts even provide that the head contractor is not liable for any costs which the subcontractor incurs even where it is the result of negligence on the part of the head contractor. That defies hundreds of years of accepted legal principles and is also uninsurable.

- "Design coordination problems" and inadequate "work descriptions". In many contracts, if there is a problem arising from the design undertaken by the subcontractor or design work done by someone else, or the work description has left something out, it is the subcontractor's responsibility to overcome the problem and absorb any costs caused by the problem. This is notwithstanding that the design failures may have been the design failures of the head contractor, the principal or their consultants such as hydraulic consultants or mechanical engineers. How can it be reasonable for a subcontractor to be given the contractual risk and responsibility for rectifying mistakes made by specialist consultants? These types of clauses are inevitably linked with prohibitions on the sub-contractor making any claim in relation to any such failure by the consultants, head contractor or principal.

- Prior works warranty. Subcontractors are being asked to warrant that prior to carrying out work on a part of the site where other trades have already carried out works, are "suitable" for the subcontractor to do their work. Why should a following trade carry the responsibility and potential liability of effectively certifying that something another trade has done was done properly? Is it not the job of the head contractor or the project manager or whoever the superintendent is, to ensure this?

- Intellectual property transfers & warranties. Contracts regularly provide that a subcontractor warrant that you own all intellectual property used in the works. Often a subcontractor does not. Further, they commonly provide that a subcontractor assign all rights in such intellectual property to the head contractor. A subcontractor simply can't if they do not own it.

- Right to vary down scope. Clauses which allow the head contractor to vary the scope of a subcontractor's works without limitation are common and can and are misused. In a recent example a principal sought to vary down the scope of works to almost zero using such a clause. Our opinion is that such broad clauses used in that way may not work but regardless, it places the subcontractor in a very difficult position it if is done to them.

- Defects rectification by third parties. Some contracts provide that during the defects liability period, the head contractor can have a third party carry out defect rectification without even giving the subcontractor prior notice or an opportunity to attend to it

themselves. At the same time, the head contractor has the right call on the subcontractor's bank guarantee or subcontractor's retention moneys.

- Compulsory dispute resolution before Payment Claim. The insertion into a contract of a clause mandating participation in a dispute resolution process before a subcontractor has a right to lodge a Payment Claim under the BCIPA can be used to slow down cash flow and increase legal costs. In turn, this puts more pressure on subcontractors to resolve disputes by giving up justifiable claims. That said, if the process is too convoluted and will take too long, such clauses can be struck down.

- Seizure of equipment. A right to seize a subcontractor's equipment to pay moneys allegedly owing to the head contractor, is occasionally included. Usually one needs a judgment before this becomes enforceable.

- Right to inspect records. A clause which gives the head contractor the right to inspect records at any time, could be used against a subcontractor in unexpected ways. Many of them are drafted so broadly that the head contractor could use them during a dispute to gain access to documents they are not otherwise entitled to.

- Termination for insolvency. Not many of us would object to a right in the head contractor to terminate the contract in the event of a sub-contractor's insolvency. However, "insolvency" is being defined more and more as a question of arbitrary opinion of the head contractor. We have recently seen a contract in which "insolvency" was defined to include where the head contractor "reasonably forms the view that the contractor is insolvent".

- Release upon claim made. Clauses which provide that upon submitting a Progress Claim or a request for valuation (which ultimately leads to an RCTI being issued) constitutes a bar for any further claim for any prior work, can leave the subcontractor out of pocket for expenses incurred on a job but which have not yet been billed to the subcontractor by the supplier for example. It is particularly concerning where contracts contain such a provision with respect to final Progress Claims and under which, the subcontractor is deemed to release the head contractor by the mere act of having made a final Progress Claim or submitted a request for valuation for a final Progress Claim. These clauses commonly also seek to rule out any type of legal action whatsoever by the subcontractor in relation to anything that has occurred prior to that date. Notwithstanding that, they never seek to prohibit the head contractor from making a claim against the sub-contractor in relation to any such prior work.

- Payment of deposit before can sue. We have even seen contracts where before the subcontractor can take action (court, dispute resolution or otherwise) against the head contractor, the contract requires the subcontractor to pay a sum equivalent to ten percent of the amount proposed to be claimed to the head contractor. Signing a clause

like this is effectively granting security for costs to the head contractor without a court order.

- Stat Dec's and releases. Requiring a subcontractor to submit a statutory declaration with your Payment Claim or request for valuation to the effect that all workers and all suppliers have been paid. Some even require you to declare that a sub-sub-contractors and suppliers have paid their staff. How many of these statutory declarations are made falsely or without any real knowledge as to the truth of the facts?

- Termination for inadequate progress. The concept that a head contractor should be entitled to terminate a subcontractor's contract because they are holding up the works generally is fair and reasonable. Clauses which give that right where the subcontractor fails to comply with a Project Program are also reasonable provided the head contractor cannot unilaterally change it (as they commonly can). However, clauses (which are increasingly common) to the effect that a head contractor can terminate the contract simply because the head contractor does not consider the subcontractor's progress to be "satisfactory" without any reference to any objective criteria, is simply unreasonable especially in circumstances when reference to the Project Program could be made. Such clauses are an open opportunity for the head contractor to terminate your contract without true or fair cause.

- Termination for convenience. Basically these clauses mean you have a contract for so long as the head contractor wants you to have one. They are just about as unfair a term of contract as could be imagined. What is worse is that if they are relied on to terminate your services, subcontractors are usually not entitled to any claim for loss of profits – something completely inconsistent with common law principles.

- Wrongful termination deemed to be for convenience. Clauses are being used where a termination by the head contractor, if found by a court or arbitrator to have been wrongful, is deemed to be a termination for convenience. This means that even if the High Court of Australia finds that there has been a wrongful termination of contract by the head contractor entitling a subcontractor to millions of dollars of damages they will not get it because they have agreed, by signing the contract, to accept that any wrongful termination, no matter how unjustified or unfair that was, was "a termination for convenience" merely entitling them to be paid for the work they had done prior to termination of the contract and for some de-mobilisation costs.