



Australian Government  
The Treasury

**TSY/AU**

# Enhancements to Unfair Contract Term Protections

Regulation Impact Statement for Decision

September 2020

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## Abbreviations

<b>Ai Group</b>	The Australian Industry Group
<b>ANZ</b>	Australia and New Zealand Banking Group Limited
<b>AADA</b>	The Australian Automotive Dealer Association
<b>AAF</b>	Australian Association of Franchisees
<b>ABA</b>	The Australian Banking Association
<b>ACCC</b>	The Australian Competition and Consumer Commission
<b>ACF</b>	The Australian Credit Forum
<b>ACL</b>	Australian Consumer Law
<b>ACL Committee</b>	Australian Consumer Law Committee of the Legal Practice Section of the Law Council of Australia
<b>AFCA</b>	The Australian Financial Complaints Authority
<b>AFGC</b>	The Australian Food and Grocery Council
<b>AFIA</b>	Australian Finance Industry Association
<b>AFRA</b>	Australian Furniture Removers Association
<b>AICM</b>	The Australian Institute of Credit Management
<b>ALNA</b>	Australian Lottery & Newsagents Association
<b>ARCA</b>	Australian Retail Credit Association
<b>ASBFEO</b>	The Australian Small Business and Family Enterprise Ombudsman
<b>ASIC</b>	The Australian Securities and Investments Commission
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001</i>
<b>ATO</b>	Australian Tax Office
<b>Banking Code</b>	Australian Banking Association <i>Banking Code of Practice</i>
<b>BCA</b>	Business Council of Australia
<b>CAANZ</b>	Consumer Affairs Australia and New Zealand
<b>CAF</b>	Legislative and Governance Forum on Consumer Affairs
<b>CCA</b>	<i>Competition and Consumer Act 2010</i>
<b>CCIA NSW</b>	The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW Ltd
<b>Competition and Consumer Committee</b>	Competition and Consumer Committee of the Business Law Section of the Law Council of Australia
<b>DSA</b>	Direct Selling Australia



<b>FAA</b>	The Financiers Association of Australia
<b>FCAI</b>	The Federal Chamber of Automotive Industries
<b>FSC</b>	The Financial Services Council
<b>HIA</b>	Housing Industry Association
<b>Insurance Council</b>	The Insurance Council of Australia
<b>IPA</b>	Institute of Public Accountants
<b>Law Council</b>	The Law Council of Australia
<b>MEA</b>	Master Electricians Australia
<b>Min-it</b>	Min-it Software
<b>MPANZ</b>	Master Plumbers Australia and New Zealand Ltd
<b>MTA Queensland</b>	The Motor Trades Association Queensland
<b>National Precast</b>	National Precast Concrete Association Australia
<b>NatRoad</b>	National Road Transport Association
<b>NECA</b>	National Electrical and Communications Association
<b>NFF</b>	The National Farmers Federation
<b>NFIA</b>	National Fire Industry Association
<b>NIRA</b>	National Independent Retailers Association
<b>NSW Farmers</b>	NSW Farmers' Association
<b>NSWSBC</b>	NSW Small Business Commissioner
<b>OSBC</b>	The Office of the Small Business Commissioner South Australia
<b>Prospa</b>	Prospa Group Limited
<b>QLS</b>	Queensland Law Society
<b>RIS</b>	Regulation Impact Statement
<b>SBDC</b>	Small Business Development Corporation Western Australia
<b>SCCA</b>	The Shopping Centre Council of Australia
<b>SME Committee</b>	Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia
<b>TIO</b>	Telecommunications Industry Ombudsman
<b>TPA</b>	<i>Trade Practices Act 1974</i> (superseded by the ACL, which is Schedule 2 to the CCA)
<b>UCT</b>	Unfair contract term
<b>VACC</b>	Victorian Automobile Chamber of Commerce

## Executive Summary

A Regulation Impact Statement (RIS) is carried out by governments when considering whether action is required to address a specified problem. On 13 December 2019, Treasury released a Consultation RIS on *Enhancements to Unfair Contract Term Protections*. Submissions closed on 27 March 2020 and close to 80 submissions were received. Treasury also held consultation roundtables with a broad range of stakeholders.

The purpose of this Decision RIS is to identify the options that yield the greatest net benefit for the community (having regard to the results of the regulatory impact assessment and the consultation process) and to set out how the preferred options will be implemented, monitored and reviewed.

### What is the identified problem?

Standard form contracts are a commonly-used and cost-effective option when conducting business, as they avoid the transaction costs associated with negotiated contracts. However, such contracts are often offered on a ‘take it or leave it’ basis and can be one-sided. Consumers and small businesses generally lack the resources and bargaining power to effectively review and negotiate contract terms or challenge their enforcement. The unfair contract term (UCT) protections were introduced to deal with terms that cause a significant imbalance in the parties’ rights and obligations, and which are not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term.

More than ten years after the introduction of the UCT protections for consumers and nearly four years since their extension to small business, UCTs are still prevalent in standard form contracts. Stakeholders advise that the current approach (involving voiding UCTs) is ineffective and that contract-issuing parties are able to capitalise on the typically weaker bargaining position of consumers and small businesses by including UCTs in their contracts.

Stakeholders also suggest that improvements are needed to improve clarity on the application of, and accessibility to, the UCT protections. For example, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections, is that at least one party to the contract employs fewer than 20 persons at the time the contract is entered into. Stakeholders advise that this headcount is too low to cover all small businesses that need protection and has also led to uncertainty about the coverage of the UCT regime, including for contract-issuing parties, which hinders compliance with the law.

In addition, while there is an expectation that a small businesses will continue to undertake their own due diligence when entering into a contractual agreement, some stakeholders suggest that the contract value threshold, which is another requirement for a contract to be covered by the UCT protections, is set too low to take into account the various types of contracts small business enter into. Moreover, stakeholders suggest small businesses would benefit from greater certainty as to whether the contract they intend to sign is a standard form contract likely to fall within the UCT protections.

Problems have also been identified with the efficient operation of the UCT protections. For example, even after a court or tribunal declares a term is unfair, the judgement only extends to the specific term in the contract to the proceedings and the same (or similar) terms could continue to be used in other similar small business contracts. In addition, the law is not clear whether, or the extent to which, the definition of ‘non-party consumer’ covers non-party small business. Concerns have also

been raised that while industry-specific requirements under state and territory legislation are exempt from the application of the protections, the headline clauses are not, creating possible uncertainty as to whether such headline clauses will be challenged as being ‘unfair’.

## What are the preferred options?

Having regard to stakeholder feedback during consultation and the results of the regulatory impact assessment of the options (Chapter 4), the preferred options are:

### Legality and penalties

#### **Option 3 – Make UCTs unlawful and give courts the power to impose a civil penalty**

Under this option, a term of a standard form small business or consumer contract could still be challenged in a court (or tribunal) and found to be ‘unfair’ and therefore void, which means it would not be binding on the parties. However, compared to the status quo, courts could also apply a civil pecuniary penalty for the contravention. Courts would be able to determine the appropriate penalty amount, up to the maximum set under the law. In imposing a civil pecuniary penalty, the court would need to be satisfied that imposing a penalty is necessary and the amount appropriate, depending on the circumstances of the individual case.

Successful implementation of this option will in part depend on the provision of appropriate guidance and education (such as that presented in Chapter 4 Impact analysis, legality and penalties – Option 2). For example, guidance that would assist in distinguishing between terms that may be ‘unfair’ and terms which, because they are reasonably necessary to protect the legitimate interests of the contract-issuing party, would not be considered ‘unfair’.

### Flexible remedies

#### **Option 2 – UCTs not automatically void; court given power to determine the appropriate remedy**

This option would amend the law to clarify that when a court or tribunal declares a term in small business or consumer contract is ‘unfair’, the court or tribunal has the discretion to determine appropriate remedies (including that the term is void or is to be varied) rather than the term being automatically void.

#### **Option 3 – Clarify that remedies for ‘non-party consumers’ also apply to ‘non-party small businesses’**

This option would ensure that the remedies available for ‘non-party consumers’ would also apply to ‘non-party small businesses’. As per the justification for extending UCT protections to small business contracts, small businesses and consumers share similar characteristics, including limited financial resources and negotiation powers.

#### **Option 4 – Create a rebuttable presumption provision for UCTs used in similar circumstances**

This option would amend the law to establish a rebuttable presumption that a contract term is unfair if, in a separate case, the same or a substantially similar term has been used by the same entity or in the same industry sector and declared by a court to be unfair. If such a term was challenged in a



court or tribunal, it would be presumed to be unfair, unless the contract-issuing party was able to produce evidence to demonstrate why it was not unfair in the particular circumstances of the case.

*Note: the above options are not mutually exclusive.*

### Definition of small business contract: headcount/turnover threshold

#### **Option 3 – At least one party to meet a less than 100 person headcount threshold OR less than \$10 million annual turnover threshold**

This option would replace the less than 20 person headcount threshold with a less than 100 person headcount threshold and a less than \$10 million annual turnover threshold. Accordingly, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections would be that at least one party to the contract is a business that employs fewer than 100 persons at the time the contract is entered into and/or has an annual turnover of less than \$10 million.

### Definition of small business contract: related bodies corporate

#### **Option 1 – Status quo**

This option would retain the current law and not state whether employees of ‘related bodies corporate’ are to be included when calculating employee numbers for the purposes of the UCT protections for small business contracts.

### Definition of small business contract: contract value threshold

#### **Option 3 – Remove the contract value threshold altogether**

This option would remove the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be considered a ‘small business contract’ and covered by the UCT protections.

### Definition of small business contract: clarity on standard form contract

#### **Option 2 – Court must consider ‘repeat usage’ in determining a contract is a ‘standard form contract’**

The current law provides factors a court must take into account in determining whether a contract is a standard form contract. This option would include ‘repeat usage’ as one of these factors.

#### **Option 3 – Clarify actions which do not constitute an ‘effective opportunity to negotiate’**

This option would amend the law to further clarify the types of actions which do not constitute an ‘effective opportunity to negotiate’. This could include:

- a. opportunities for a small business to negotiate minor amendments to a contract, which are amendments that would not alter the intent and essence of the original term;
- b. opportunities for a small business to select, from a pre-existing list of possible terms, which term they would prefer, rather than an opportunity to actually negotiate the substance of the term; and

- c. claims by the contract-issuing party that there was an effective opportunity to negotiate across all standard form contracts with all its customers, when it only gave an opportunity to negotiate to a small subset of customers.

*Note: the above options are not mutually exclusive.*

## Minimum standards

### **Option 2 – Provide an exemption for certain terms which meet minimum standards**

This option would amend the law to exempt certain clauses that include ‘minimum standards’ or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation.

## Types of contracts impacted

To ensure consistency in the operation of the UCT protections, where appropriate, the above proposals will be applied to small business and consumer contracts for goods, services and the sale or grant of an interest in land regulated under the Australian Consumer Law (ACL), which is Schedule 2 to the *Competition and Consumer Act 2010* (CCA), and consumer and small business contracts for financial products and services (regulated under mirror provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act)).<sup>1</sup> The ASIC Act provisions will extend to insurance contracts from 5 April 2021.

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<sup>1</sup> A reference to the ACL in this document should be taken to include the mirror provisions in the ASIC Act.

# Background

## The Australian Consumer Law

The ACL is the law governing consumer protection and fair trading in Australia. It includes UCT protections covering standard form consumer and small business contracts. The ACL applies economy-wide and is administered jointly by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies. As a law of each jurisdiction—Commonwealth, states and territories—the ACL is enforced by courts and tribunals in each jurisdiction subject to the specific rules that apply to enforcement processes, courts and tribunals in each jurisdiction.

Some of the consumer protection provisions in the ACL are mirrored in the ASIC Act in relation to financial products and services. The Australian Securities and Investments Commission (ASIC) is responsible for administering and enforcing the ASIC Act.

## UCT protection provisions

On 1 July 2010, protections for consumers against UCTs in standard form contracts were introduced into the *Trade Practices Act 1974* (TPA – now contained in the ACL, which is Schedule 2 to the CCA) and the ASIC Act. The ACL provisions address UCTs for goods, services and the sale or grant of an interest in land, and the ASIC Act provisions address UCTs for financial products and services.<sup>2</sup> This formed part of the response to the Productivity Commission's *2008 Review of Australia's Consumer Policy Framework*.<sup>3</sup>

Generally, a term of a standard form contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.<sup>4</sup>

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<sup>2</sup> Main provisions for unfair contracts terms are included in Part 2-3 of the ACL (which is in Schedule 2 to the *Competition and Consumer Act 2010*) and Subdivision BA, Part 2 of the ASIC Act. On 6 February 2020, Parliament passed a Bill to extend the UCT regime to insurance contracts, which will ensure consumers and small businesses have access to the same UCT protections as for other financial products and services.

<sup>3</sup> Available at: <https://www.pc.gov.au/inquiries/completed/consumer-policy>

<sup>4</sup> Section 25 of the ACL also provides examples of the types of terms of a small business or consumer standard form contract that may be unfair.

In November 2016, the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (the Act) extended the UCT protections to standard form small business contracts that meet certain criteria:

- at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- the upfront price payable under the contract does not exceed \$300,000, or \$1 million if the contract runs for more than 12 months.

The extension of the UCT protections to small business recognised that small businesses can often face the same challenges as consumers in a contractual relationship.

## Review of UCT protections for small business

During the passage of the Act through Parliament in late 2015, the Government agreed to undertake a review of the extension of the UCT regime for small business within two years of its commencement. On 21 November 2018, the Government released the *Review of Unfair Contract Term Protections for Small Business: Discussion Paper* (the discussion paper).<sup>5</sup> The discussion paper sought views on 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. The paper closed for submissions on 21 December 2018. A broad range of stakeholders made formal submissions.<sup>6</sup>

Information gathered through the 2018 Review suggested that while the UCT regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using UCTs in their standard form contracts. A number of submissions to the review supported this, arguing that UCTs are still prevalent in small business standard form contracts. Additionally, the review found that some aspects of the current regime appear to have created ambiguity, uncertainty and practical difficulties for businesses to comply with the law. For example, some submissions noted the practical difficulties in using the headcount approach for defining a small business and the uncertainty around whether a contract met the definition of a ‘standard form contract’. Some submissions to the Review also highlighted the need for regulators to promote awareness of the UCT protections and assist with compliance with the law by improving the guidance they provide to businesses.

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. Treasury subsequently released a Consultation RIS in December 2019 and the consultation process formally concluded at the end of March 2020, with almost 80 submissions received. A series of stakeholder roundtables were also held. Stakeholder views provided through submissions and the roundtables have informed the development of this Decision RIS. As the ACL is jointly administered

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<sup>5</sup> Available on Treasury’s Consultation Hub: <https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/>

<sup>6</sup> Non-confidential submissions were published at: [https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/consultation/published\\_select\\_respondent](https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/consultation/published_select_respondent)

by the Commonwealth and the states and territories under an Intergovernmental Agreement, any amendments to the ACL are subject to agreement from the states and territories through the Legislative and Governance Forum on Consumer Affairs (CAF).

# 1. The problem

## Unfair contract terms still exist in standard form contracts

New UCT protections for standard form consumer contracts were introduced as part of the development of the Australian Consumer Law and in response to the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* finding that the former TPA lacked provisions to deal with unreasonable and one-sided contract terms, or so-called 'unfair' terms.<sup>7</sup> These provisions were extended to small business in 2016 with the intention it would reduce the incentive to include unfair terms in standard form contracts with small businesses, providing for a more efficient allocation of risks in these contracts.

In terms of the extension of the UCT protections to small business, before and after these provisions came into effect, regulators undertook education and compliance programs across different industry sectors to encourage businesses to review their standard form contracts and remove any potential UCTs. In the lead-up to the new law taking effect in 2016, the ACCC examined standard form contracts in the advertising, telecommunications, retail leasing, independent contracting, franchising, waste management, and agriculture industries. The ACCC identified terms that it considered may be UCTs in business-to-business agreements once the law came into effect. The ACCC invited a number of major firms in each sector to voluntarily participate in the review, and ultimately examined 46 contracts. After identifying a range of contract terms that may raise concerns under the new law, the ACCC engaged with businesses about amending or removing the problematic terms.

On 10 November 2016, two days before the UCT regime for small business came into effect, the ACCC released its report, *Unfair terms in small business contracts: a review of selected industries* (the ACCC UCT Report).<sup>8</sup> The ACCC UCT Report discussed ways to avoid including unfair terms in standard form contracts. It also highlighted concerning terms the ACCC observed across the advertising, agriculture, franchising, telecommunications, retail leasing, and waste management industries. Among other things, the report noted the ACCC's concerns with terms used in the waste management industry allowing unilateral price increases, automatic rollovers, and unlimited indemnity. In December 2016, the ACCC wrote to JJ Richards & Sons Pty Ltd to draw its attention to the ACCC UCT Report and inform JJ Richards that the ACCC was investigating whether terms in standard form contracts being offered by providers of waste management services gave rise to concerns under the ACL. Despite the ACCC's attempts to engage with the large waste management company, JJ Richards did not address the ACCC's concerns.

In 2017, the ACCC took legal action against JJ Richards. The Federal Court declared eight terms in its standard form contract unfair and therefore void.<sup>9</sup> This included terms that the ACCC UCT Report had earlier flagged as possible UCTs used in the waste management industry.

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<sup>7</sup> *Review of Australia's Consumer Policy Framework* pp. 33-34. Available at <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf>

<sup>8</sup> Available at: <https://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts>

<sup>9</sup> *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224*.



The ACCC reports that, since the 2017 JJ Richards & Sons Pty Ltd decision, it has continued engaging with businesses in the waste management industry to ensure compliance. In late 2018, as a result of an ACCC investigation, three more waste management companies agreed to amend potential UCTs in their standard form contracts, which were similar to terms the Federal Court had determined were UCTs in the 2017 JJ Richards case. In April 2019, following further ACCC investigation, two more waste management companies agreed to remove UCTs from their small business contracts. Following this, the ACCC wrote to waste management industry bodies reminding them of their obligations and encouraging them to check their contracts for UCTs. The ACCC also released an information network bulletin to its small business database encouraging them to check their waste management contracts for UCTs and to seek to remove them.

The 2018 Review also found that the protections were limited in their effectiveness and UCTs appear to still be prevalent in standard form contracts. Stakeholders repeated these concerns during the 2020 consultation:

*...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.*<sup>10</sup>

*It is clear that UCTs are still present in almost all standard form contracts.*<sup>11</sup>

*Education and industry engagement have been largely ineffective in changing business behaviour and without strong deterrents, the law will continue to deliver adverse outcomes for consumers.*<sup>12</sup>

*A primary reason why the Committee supports a number of the proposed amendments is due to what appears to the members of the Committee to be a low level of proactive compliance by large businesses in amending their SFCs<sup>13</sup> to remove UCTs. ...a significant number of large companies had apparently taken no or limited steps to amend their SFCs, even three years after the UCT laws for small business were introduced.*<sup>14</sup>

*These reforms have been insufficient to properly protect farmer businesses from UCT[s]. Farmer businesses are still exposed to UCTs in standard form contracts across many agricultural industries.*<sup>15</sup>

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<sup>10</sup> NFIA submission, p.8.

<sup>11</sup> ASBFEO submission, p. 1.

<sup>12</sup> CHOICE submission, p. 1.

<sup>13</sup> (standard form contracts)

<sup>14</sup> Law Council Submission – SME Committee, p. 9.

<sup>15</sup> NSW Farmers submission, p.4.

## Scale and scope of the problem

### Regulator action on UCTs

The ACCC advises that between 1 July 2010 and 13 August 2020, the ACCC received 5,720 contacts alleging potential UCT concerns consisting of:

- 1,907 contacts relating to business to business transactions; and
- 3,828 contacts relating to business to consumer transaction.<sup>16</sup>

Noting that the extension of the UCT protections came into effect on 12 November 2016, of the 1,907 contacts relating to business to business transactions mentioned above, 1,749 of these contacts were received between 1 January 2017 and 13 August 2020.

Since the introduction of the UCT protections to consumer contracts, and extension to small business contracts, the ACCC has continued to identify several UCTs in standard form contracts. Consequently, the regulator has engaged with, and taken action against, a number of businesses, including litigation, and resolved a number of UCT concerns through court enforceable undertakings and public administrative resolutions. ASIC has also conducted compliance reviews, initiated court proceedings and issued reports to promote good industry practices and has taken steps to address UCTs in individual circumstances.

While the ACCC does not resolve individual complaints, it uses the information consumers and small businesses provide to help understand where to focus its compliance and enforcement efforts. State and territory consumer protection agencies have also been involved in action to reduce the prevalence of UCTs by providing information to consumers and small business about their rights and obligations and possible courses of action they may take. State and territory consumer protection agencies also play an important role in negotiating with business to resolve complaints. In some cases, state and territory consumer protection agencies have also undertaken legal proceedings to resolve UCT complaints.

Below is a summary of action is taken by the ACCC and ASIC in relation to UCTs. A more detailed summary is at Appendix A to this Decision RIS.

ACCC and ASIC action on UCTs	
<b>2010 – 2013</b>	Following the introduction of the UCT provisions for consumer contracts, the ACCC undertook a project of engaging with businesses and reviewing standard form contracts in the airline, telecommunications and vehicle rental industries and engaged directly with businesses to address concerns. On 15 March 2013, the ACCC released a report on the outcomes of this work. <sup>17</sup>
<b>November 2010</b>	Following consultation leading up to and after the introduction of the UCT protection provisions for consumer contracts, ASIC released guidance for mortgage lenders that sets

<sup>16</sup> Note: a small number of contacts were coded as both consumer and business.

<sup>17</sup> Available at <https://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf>

<b>ACCC and ASIC action on UCTs</b>	
	out how provisions in the National Credit Code and UCT protections apply to mortgage early termination fees (exit fees).
<b>January 2011</b>	Following ASIC concerns, MyBudget Pty Ltd agreed to amend or remove a number of potentially unfair and/or unconscionable terms in its Terms of Service Agreement.
<b>January 2013</b>	Mr Rental Australia Pty Ltd, entered into an enforceable undertaking with ASIC in which it agreed provide refunds to a approximately 1,560 consumers (anticipated to be in excess of \$300,000) and amended the standard form rental contract used by the 52 franchisees operating under the 'Mr Rental' banner.
<b>July 2013</b>	The Federal Court declared that a number of terms in Internet Service Provider ByteCard's standard form consumer contracts were unfair.
<b>February 2014</b>	ASIC accepted a court enforceable undertaking from Home Essentials Australia Pty Ltd, I Love My Water Pty Ltd, Triple Bay Group Pty Ltd and Triple Bay Pty Ltd in which the businesses agreed not to enforce their rights under the agreements for terms which were likely to be unfair.
<b>October 2014</b>	Following ASIC concerns the Commonwealth Bank of Australia (CBA) agreed to release \$2.2 million for a approximately 45,000 customers who had money left on expired CBA Travel Money Cards.
<b>December 2014</b>	The ACCC accepted a court enforceable undertaking from LivingSocial following concerns over a term that permitted LivingSocial to make substantive changes to its terms and conditions without notifying its customers.
<b>April 2015</b>	In April 2015, the Federal Court found that NRM Corporation Pty Ltd and NRM Trading Pty Ltd had used UCTs in its long term agreements for the supply of medical services and medications to men suffering from sexual dysfunction.
<b>August 2015</b>	ASIC reviewed 16 travel money cards by eight issuers as part of an industry-wide review into travel money cards issued in Australia. This resulted in all travel money cards issued in Australia now allowing customers to reclaim leftover funds, as well as a number of other improvements.
<b>November 2015</b>	The Federal Court found a term in Chrisco's 2014 lay-by agreements, which allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by agreement, unfair.
<b>January 2016</b>	Following concerns raised by the ACCC, telecommunications company Exetel agreed to remove a clause from its standard form residential broadband agreement that allowed it to vary any part of the agreement for any reason.
<b>April 2016</b>	The Federal Court found various terms in Europcar's standard form rental agreements unfair because, in part, they held consumers liable for vehicle loss or damage regardless of whether the consumer was at fault.
<b>November 2016– September 2017</b>	In the lead-up to the extension of the UCT protections to small business, the ACCC undertook a project to examine potential UCTs in standard form contracts across a number of industries.

ACCC and ASIC action on UCTs	
<b>March 2017</b>	ASIC and ASBFEO completed a review of small business standard form contracts and called on lenders across Australia to take immediate steps to ensure their standard form loan agreements comply with the law.
<b>May 2017</b>	ASIC hosted a roundtable where the big four banks committed to make significant improvements to their small business loan contracts to ensure they meet the UCT protection laws.
<b>August 2017</b>	The big four banks agreed to specific changes with ASIC to eliminate UCTs from their contracts.
<b>October 2017</b>	<p>The ACCC took JJ Richards to court where eight terms in its standard form contract were declared unfair and therefore void.</p> <p>The ACCC also accepted a court enforceable undertaking from Advance Hair Studio in connection with potentially unfair termination clauses. The Undertaking included partial cash refunds to certain consumers, corrective advertising, and establishing an ACL compliance program.</p>
<b>November 2017</b>	Australia Post proposed amendments to its Licensed Post Office Agreement to address potential UCTs after the ACCC raised concerns.
<b>December 2017</b>	Perth based building company 101 Residential provided the ACCC with a court enforceable undertaking, acknowledging that non-disparagement clauses in its standard form contracts may be unfair and agreeing not to enforce or rely on these clauses in its current contracts and remove them from its future contracts.
<b>March 2018</b>	<p>AWB Harvest Finance Pools amended terms in its contracts after the ACCC raised concerns they were unfair.</p> <p>The ACCC accepted a court enforceable undertaking from Cardtronics where it agreed to amend its contracts governing Automatic Teller Machines deployed on the premises of small businesses.</p>
<b>March 2018</b>	ASIC published Report 565 <i>Unfair contract terms and small business loans</i> which details the changes made by the big four banks to their small business loan contracts in order to comply with the unfair contract terms law.
<b>June 2018</b>	The ACCC accepted a court enforceable undertaking from Home builder Wisdom Properties Group to not enforce non-disparagement clauses in existing agreements or include them in future agreements
<b>July 2018</b>	<p>Following engagement with the ACCC regarding potential UCTs, Warrnambool Cheese &amp; Butter amended the terms in its milk supply agreements and associated milk supply handbook.</p> <p>The Federal Court declared 12 terms in the standard form contracts used by Servcorp and two of its subsidiaries (Servcorp Parramatta Pty Ltd and Servcorp Melbourne 18 Pty Ltd) were unfair and therefore void.</p>

<b>ACCC and ASIC action on UCTs</b>	
<b>September 2018</b>	Proceedings, which were instituted in March 2018 against credit reporting body Equifax (formerly Veda Advantage), were resolved following joint submissions by Equifax and the ACCC. These involved admissions by Equifax relating to various breaches of the ACL but not UCTs. Such a finding would not have substantially affected the remedies ordered by a court.
<b>September 2018</b>	Following an ASIC review, Prospa Advance Pty Ltd agreed to make changes to its standard form small business loan contract to amend clauses which were likely to be unfair.
<b>December 2018</b>	Dairy Processors Brownes Food Operations, Lion Dairy & Drinks, Norco Co-operative Limited, Parmalat Australia and Fonterra Australia each agreed to amend different terms in their milk supply agreements.  Following an ACCC investigation into the use of UCTs in the waste management industry, Visy Paper Pty Ltd (trading as Visy Recycling), Cleanaway Pty Ltd and Suez Recycling & Recovery Pty Ltd reviewed and amended potential UCTs in their standard form contracts.
<b>April 2019</b>	Three container stevedore companies, DP World, Hutchison and VICT agreed to remove or amend likely UCTs in their standard form contracts.
<b>June 2019</b>	Red Rich Fruits amended a term that allowed Red Rich Fruits to seek credit from a grower for produce Red Rich Fruits had on-sold to a third party, but which was then rejected by the third party.
<b>July 2019</b>	Uber Eats committed to amend terms which made restaurants responsible for the delivery of meal orders, in circumstances where they had no control over that delivery process once the food left their restaurant.
<b>August 2019</b>	The ACCC took Mitolo Group Pty Ltd to court where several terms in contracts between Mitolo and potato growers were declared unfair and therefore void. Mitolo also provided the ACCC with a court enforceable undertaking which contains a revised form of contract.
<b>September 2019</b>	The ACCC took hair loss business Ashley & Martin to court where terms in three standard form contracts with consumers were declared unfair and therefore void.
<b>September 2019</b>	ASIC took Bendigo and Adelaide Bank to court where several terms within six small business contracts used by the banks were declared unfair and subsequently void.
<b>March 2020</b>	1300 Australia gave a court enforceable undertaking to the ACCC to amend its current and future contracts with small businesses and, in certain circumstances, refund part of the termination fees paid by small business customers.
<b>June 2020</b>	Some of Australia's biggest winemakers agreed to change their supply agreements with grape growers after the ACCC raised concerns that their standard form grape supply agreements contained terms which were likely to be unfair.

ACCC and ASIC action on UCTs	
<b>July 2020</b>	<p>Following proceedings the ACCC had instituted in the Federal Court against TPG in December 2018, the Federal Court found that a term requiring forfeiture of a \$20 'prepayment' made by consumers was not unfair.</p> <p>The ACCC accepted a court enforceable undertaking from Chrisco following the ACCC's concerns Chrisco had had entered into or renewed lay-by agreements which included another term that allowed Chrisco to continue to take payments from consumers after they had fully paid for their existing lay-by order, despite the previous Federal Court ruling that such a term was unfair.</p>
<b>September 2020</b>	<p>The ACCC accepted a court-enforceable undertaking from Back In Motion Physiotherapy Pty Ltd in relation to certain restraint of trade terms in its franchise agreements. Among other things, Back in Motion Physiotherapy agreed to not include these terms in future contracts, not enforce the terms in existing contracts, and notify its franchisees of the ACCC undertaking.</p>

## ASBFEO and small business commissioners

Separate from regulators, ASBFEO and state and territory small business commissioners, which are independent statutory offices established under legislation, receive and investigate complaints made by small businesses. Generally ASBFEO and small business commissioners will aim to resolve disputes through the use of alternative dispute resolution processes such as mediation to avoid having to go to court. Below are some observations ASBFEO and two state small business commissioners have made in relation to their involvement with UCTs in standard form contracts.

ASBFEO advises that, from its work with small businesses, it is clear that UCTs are still present in almost all standard form contracts. The Ombudsman believes this results from the current structure of the UCT regime in that it applies only to standard form contracts which fall within the current scope of the protection, and that UCTs are only voidable and do not attract penalties.<sup>18</sup> All of these matters are explored further in this chapter.

The Office of the Small Business Commissioner (OSBC) South Australia advises that it deals with small businesses experiencing issues relating to UCTs on a regular basis. OSBC advises that these small businesses do not have the time or resources to go through the court process, and are worried about damaging their relationship with the contract-issuing party, which they fear will lead to loss of business.<sup>19</sup>

The Small Business Development Corporation in Western Australia (SBDC) advises that since the UCT protections were extended to small business contracts, it has continued to see unfair terms being used. The SBDC's advisory team believe that, while there has been a decrease in the number small businesses presenting to the SBDC for advice and assistance on UCT related matters, UCTs and poor contracting behaviour remains an ongoing issue facing small businesses in WA.<sup>20</sup> The SBDC advises

<sup>18</sup> ASBFEO submission, p. 1.

<sup>19</sup> OSBC submission, p. 1.

<sup>20</sup> SBDC submission, p. 1.



that it has partnered with the John Curtin Law Clinic (JCLC) <sup>21</sup> to provide some recent case studies on the usage of UCTs in small business contracts in WA. Four case studies are presented in the SBDC's submission. The SBDC advises that a common theme throughout the case studies is the power imbalance that is present between the contracting party and the small business operator. The SBDC asserts that small businesses continue to be disadvantaged and changes need to be made to the current UCT regime to ensure small businesses are better protected. <sup>22</sup>

## Awareness of the UCT protections

In their submissions, several stakeholders have suggested there is a need for greater awareness and education on the UCT regime, including targeted education campaigns. For example:

*We suggest that further guidance could be provided by the UCT regulators to assist business and their advisors in complying with both consumer and business UCT provisions. It can for example, be difficult to determine whether the UCT protections apply. There should be clarification of the application of both regimes (that is, those applying to consumer and business UCT provisions), having regard to the practical steps that could be taken to confirm whether UCT provisions apply.* <sup>23</sup>

*As ASIC has not been as active in terms of providing regulatory guidance and education in relation to UCT laws, the SME Committee considers it may be of benefit for ASIC to significantly increase its profile in this area.* <sup>24</sup>

*In our opinion, there has been no or very little spent in educating businesses to be compliant with UCTs. For example, there has been no media advertising reminding industry of what a UCT is.* <sup>25</sup>

*It is the ACF's experience that [a] number of big and small business are unaware of the legislative changes that took place in 2016.* <sup>26</sup>

*There is also a lack of practical guidance about what makes a term 'unfair' under the Australian Consumer Law. Clearer regulatory (as well as judicial) guidance is required to ameliorate this uncertainty.* <sup>27</sup>

These and many other stakeholders' submissions also provide suggestions around improvements to current guidance and specific areas where other guidance is needed. Some of these have been included as part of Chapter 4 – Impact analysis.

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<sup>21</sup> Established by Curtin University of Technology, the JCLC is a dedicated law clinic within the Curtin Law School that offers clinical legal education to law students and affordable legal services to the WA community. Amongst other things, the JCLC assists small businesses with legal issues involving lease agreements, franchise agreements, contracts, and consumer law matters.

<sup>22</sup> SBDC submission, p. 5.

<sup>23</sup> QLS submission, p. 4.

<sup>24</sup> Law Council Submission – SME Committee, p.13.

<sup>25</sup> Min-it and FAA joint submission, p. 9.

<sup>26</sup> ACF submission, p. 2.

<sup>27</sup> Law Council Submission – Competition and Consumer Committee, p. 5.

The NSW Small Business Commissioner (NSWSBC) suggests, awareness aside, small businesses sometimes can't or don't negotiate terms in contracts drafted by counterparties and that contract drafters, seeking to protect their own interests, may tend to include UCTs – whether or not they are familiar with the regime. <sup>28</sup> Another stakeholder suggests that regulatory guidance and education is valuable for people who essentially want to comply with the law, but is not effective for people who know they are the stronger party financially. <sup>29</sup> Likewise, Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice assert that nearly a decade of the current UCT regime has not eradicated UCTs from standard form consumer contracts and that they continue to see UCTs 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. <sup>30</sup>

## What are the potential risks and costs of maintaining the status quo?

The extension of the UCT protections to small business in 2016 gave both small businesses and regulators the power to challenge potential UCTs in court. However, small businesses rarely have the time or the resources to commence litigation. <sup>31</sup> Small businesses may also fear potentially damaging their relationship with the contract-issuing party, leading to loss of future business, especially in industries where there are relatively few large businesses for small business to contract with. <sup>32</sup>

While regulators have been able to identify UCTs in standard form contracts and have successfully litigated several cases and resolved a number of UCT concerns through public administrative resolutions, regulators have finite resources and UCTs still exist in many standard form contracts. Moreover, the fact that regulators have been required to take regulatory action and commence court proceedings demonstrates that many contract-issuing parties have not been proactive in amending the standard form small business and consumer contracts.

When UCTs are enforced or relied upon by the contract-issuing party it can have potentially devastating impacts on the small business. <sup>33</sup> Such impacts could include, for example:

- reinforcing the ongoing imbalance of power between principal contractors and sub-contractors in contract negotiations, given the inherent imbalance due to the power, scale and access to resources of larger organisations;
- deterring new entrants and the growth and expansion of existing small businesses, which could have a knock-on impact in industries more broadly;
- costly legal disputes;
- insolvency and bankruptcy for the small business;

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<sup>28</sup> NSWSBC submission, p. 2.

<sup>29</sup> Buchan, J submission, p. 1.

<sup>30</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice joint submission, p. 1.

<sup>31</sup> E.g. OSBC submission, p. 1.

<sup>32</sup> NECA submission, p. 2; NSW Farmers submission, p. 6.

<sup>33</sup> E.g. NECA submission, pp. 2-3; NFIA submission, p. 7; National Precast submission, p.5.

- difficulties with obtaining payment for work, uncertainty of income or reduced income, issues with cash flow;
- reduced innovation;
- issues with securing affordable insurance (relevant to the risks written into the contract); or
- facing claims for liquidated damages.

The National Fire Industry Association (NFIA) advises that in 2017-18, 1642 construction companies became insolvent, which represented just under a quarter (22 percent) of all insolvencies in Australia, and a far greater percentage of insolvencies than any other industry. <sup>34</sup> NFIA attributes this to sub-contractors being contractually responsible for the cost overruns, design errors and similar issues despite having far less capacity to manage these issues or bear the associated financial risks compared to the head contractor. <sup>35</sup> In addition, the National Farmers Federation (NFF) advises that it is aware of a number of small farming businesses that have closed because they were unable to secure fair contract terms or because their contracts were terminated. <sup>36</sup>

The Australian Furniture Removers Association (AFRA), advises that small businesses are not able to insure against commonly occurring broad indemnity clauses (which provide the small business accepts liability for the negligence of another party), and that this can easily place the small business into financial distress should an incident occur. <sup>37</sup>

Maintaining the status quo for consumer contracts could also have a devastating impact on consumers, who are no less vulnerable nor less likely to experience UCTs in standard form contracts. Consumer advocacy group CHOICE advises that through ACCC enforcement actions and its own investigations, it has seen notable instances where consumers have suffered significant financial loss or have had their ability to comment on goods or services restricted by UCTs. <sup>38</sup> In its submission, CHOICE refers to the Ashley & Martin case as an example where consumers faced losing hundreds or thousands of dollars if they cancelled the contract with the hair loss treatment business after considering medical advice, or even if they developed side effects to the prescribed medication. In this case, while over 25,000 consumers were affected by the UCTs across three standard contracts, the Federal Court ordered hair loss treatment business Ashley & Martin to refund money paid by consumers <sup>39</sup> but was unable to penalise the business for the harm caused to the consumers.

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<sup>34</sup> NFIA submission, p. 7.

<sup>35</sup> NFIA submission, pp. 7-8.

<sup>36</sup> NFF submission, p. 6.

<sup>37</sup> AFRA submission, p. 3.

<sup>38</sup> CHOICE submission, p. 2.

<sup>39</sup> *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd (No 2)* [2019] FCA 1739 (24 October 2019). Available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1739.html>

## The need for Government action

### Contract-issuing parties continue to exploit power imbalances

As small businesses generally lack the resources and bargaining power to effectively review and negotiate contract terms or challenge their enforcement, some contract-issuing parties have continued to exploit this power imbalance when issuing standard form contracts. As the SBDC asserts, as the onus is on the small business to pursue a remedy through the courts if they believe an unfair term is included in their standard form contract, larger companies are able to capitalise on a small business's typically weaker bargaining position and often continue to include UCTs in their contracts.<sup>40</sup>

For example, the Victorian Automotive Chamber of Commerce (VACC) advises that over the past decade, car insurers have become increasingly powerful within the industry, utilising their strong bargaining power and potentially contravening the UCT protections. VACC suggests that the standard form contract, or repair Authority, used by a large general insurance company in transactions with smash repairers contains certain terms that cause further imbalance in the parties' rights and obligations.<sup>41</sup>

Likewise, the National Electrical and Communications Association (NECA) notes that in the electrotechnology industry, electrical sub-contracting businesses are generally characterised as SMEs, offering specialised electrical skillsets and capabilities in contrast to principal contractors, which are mostly characterised as much larger, diverse and well-resourced organisations.<sup>42</sup> In addition to the size and power yielded by these principal contractors, there is a very small pool of these principal contractors which means there is limited competition, resulting in sub-contractors regularly and consistently engaging with the same small group of principal contractors.<sup>43</sup> NECA suggests that the relationship between principal and sub-contractors is such that sub-contractors depend on principal contractors and that unscrupulous principal contractors abuse their power and size to enforce detrimental and unfair contracts on sub-contractors. The sub-contractors often do not have the capacity to fairly and equitably negotiate contracts with larger principal contractors, which exposes SMEs in the industry to potential mistreatment or adverse and compromising contracts.<sup>44</sup>

The NSW Farmers' Association (NSW Farmers) advises that within the agricultural sector, a lack of competition means that farm businesses have no choice but to accept the standard form contracts issued by large processors and supermarkets. NSW Farmers adds that legal advice given to many farmers indicates these contracts are skewed against their interests but that if there are no other options available to the farmer and therefore no ability to effectively negotiate, they are forced to

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<sup>40</sup> SBDC submission, p. 7.

<sup>41</sup> VACC submission, p. 3-6.

<sup>42</sup> NECA submission, pp. 1-2.

<sup>43</sup> NECA submission, p. 2.

<sup>44</sup> NECA submission, p. 2.

agree to terms that they would not normally accept under other circumstances. This is particularly the case for small businesses with an asset base tied to a single industry or supply chain.<sup>45</sup>

The National Precast Concrete Association Australia (National Precast), which represents the precast concrete manufacturing industry, advises that its members are regularly presented with UCTs in tenders who often find that, as a sub-contractor with relatively weak bargaining power, they have minimal ability to negotiate these terms. It advises that, given that unfair terms are so prevalent in the industry, small businesses are presented with a difficult choice of enter into contracts with unfair terms, with all the attendant risk, or slowly go out of business through a lack of work.<sup>46</sup>

NFIA advises the construction industry operates on a pyramid structure with increasing bargaining power imbalances the further one goes down the contractual chain. NFIA advises that often the head contractor will agree to contractual terms that accept all risks on key issues 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.<sup>47</sup>

Small businesses often have less capacity than larger businesses to manage certain risks that are transferred to them by UCTs. NFIA asserts that UCTs are used to transfer risks down the contractual chain to sub-contractors at the base of the pyramid that have the least capacity to bear the financial risks associated with the project. NFIA state that this is because they are the least able to negotiate a set of more reasonable and balanced terms. NFIA further advises that in all instances, the party higher up the contractual chain will present its contract documentation on a 'take-it-or-leave-it' basis.<sup>48</sup>

Master Plumbers Australia and New Zealand Ltd advises that one of the key issues currently being experienced by its members is contract terms which provide that a builder or contractor is not liable for any costs which the sub-contractor incurs, even where it is the result of negligence on the part of the builder or contractor. It says this is arguably an unreasonable transfer of risk that also makes it difficult for sub-contractors to obtain insurance.<sup>49</sup>

## Simply voiding a term does not provide an effective deterrent

The current provisions do not prohibit the use of UCTs, but rather allow a court to declare that a term is unfair and therefore void. If a term is declared void, there is no penalty that incentivises businesses to ensure their standard form contracts are free from UCTs. Contract-issuing businesses can intentionally include and rely on UCTS in their standard form contracts and the risk is limited to being unable to rely on the term in the event of a court or tribunal declaring the term is unfair. Many submissions to the 2018 Review argued this approach does not provide adequate incentive for businesses to ensure their standard form contracts are free from UCTs.

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<sup>45</sup> NSW Farmers submission, p. 6.

<sup>46</sup> National Precast submission, p.4.

<sup>47</sup> NFIA submission, p.7.

<sup>48</sup> NFIA submission, p.7.

<sup>49</sup> MPANZ submission, p. 3.

During the 2020 consultations many stakeholders repeated concerns that the current approach to UCTs is ineffective. For example, one small business advises that it has not been able to challenge a UCT through the court process as the cost of doing so would far exceed its ability to complete the process and there is a risk that taking action could impact the small business through a reduction in work provided by the contract-issuing party.<sup>50</sup> The SBDC submits that small businesses generally lack access to justice due to a combination of factors including the cost of engaging legal representation, unfamiliarity with legal process and the stress associated with pursuing court action. The SBDC adds that it believes that often larger businesses take the risk of including an unfair term to reap the benefits, knowing that it is unlikely that a contracted small business will pursue its removal through legal action.<sup>51</sup>

Likewise Clubs Australia submits that the current approach offers inadequate levels of protection to small business as most small businesses do not have the resources to identify then take legal action to void an unfair term. Clubs Australia argues the UCT regime should recognise the incentive structure for entities that may wish to include an unfair term.<sup>52</sup> Clubs Australia, the Australian Automotive Dealer Association (AADA) and NSW Farmers submit that making UCTs illegal and attaching penalties is the only way to deal effectively with the prevalence of UCTs.<sup>53</sup>

The ACCC, ASIC and small business commissioners also suggest more significant consequences are needed to deter contract-issuing parties from including UCTs in their standard form contracts. The ACCC, ASIC and small business commissioners also submitted that the UCT protections would be far more effective if there was a penalty and that larger businesses would be more motivated to ensure that they remove such terms from their standard form contracts.<sup>54</sup> The SBDC adds that ensuring that small businesses and consumers, when entering into an insurance contract, have the equivalent level of protections as they do under other financial products and services by removing terms that are unfair is the right thing to do. SBDC believes this would increase confidence in the industry, which will likely lead to small businesses more adequately insuring themselves.<sup>55</sup>

Consumer advocacy group CHOICE, Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice also submit making UCTs illegal and introducing financial penalties for breaches would deter businesses from using UCTs in their standard form consumer contracts. CHOICE submits that businesses can take advantage of the power imbalance inherent in standard form consumer contracts knowing full well that consumers are unlikely to proceed with lengthy court processes to have a term declared 'void' in a contract.<sup>56</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice argue there needs to be a stronger basis to deter the use of UCTs by

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<sup>50</sup> The Repair Shed submission, p. 1.

<sup>51</sup> SBDC submission, p. 7.

<sup>52</sup> Clubs Australia submission, p. 6.

<sup>53</sup> AADA submission, p.10; Clubs Australia submission, p. 6; NSW Farmers submission, p.4.

<sup>54</sup> ACCC submission, p. 1; ASIC submission pp.4-5; NSW SBC submission, p. 3; SBDC submission, pp.7-8.

<sup>55</sup> SBDC submission, p. 8.

<sup>56</sup> CHOICE submission, p. 3.



businesses when dealing with consumers as a decade of non-compliance with the UCT laws shows that UCTs must be made illegal if the regime is to be effective.<sup>57</sup>

## Automatically voiding a term may make a contract unworkable

The law currently provides that if a court or tribunal finds a term is 'unfair', it is void and the rest of the contract will continue to bind the parties if it can operate without the void term. Submissions from the ACCC and ASIC note that the automatic voiding of a term may not be an appropriate remedy in every situation, as it may make a contract unworkable, cause disruption and require a new contract to be entered into.<sup>58</sup> NFF submit this is a particular issue in the agricultural industry where the nature of many markets means small farm businesses have little choice of processors or purchasers. If a voided term were to make contract unworkable, a primary producer could be deprived from accessing the only viable purchaser, leaving the small farm business with perishable product without a buyer.<sup>59</sup>

The Australian Finance Industry Association (AFIA) notes that if credit contracts are rendered inoperative and unenforceable, this can trigger the withdrawal of funding to small businesses.<sup>60</sup> The Insurance Council of Australia (Insurance Council) notes the potential impacts for insurance contracts where the voiding of a term may prevent the insured from being able to bring a claim under the policy.<sup>61</sup>

A voided contract can also negatively impact the contract-issuing party. AFIA notes that unenforceable credit contracts can have material impact on credit providers. Likewise, the Australian Retail Credit Association notes that, as a credit provider relies on the existence of the credit contract in order to govern its ongoing ability to charge interest and fees and to enforce non-payment, a finding that a term of the agreement, or the agreement itself, is void would be disastrous for that credit provider.<sup>62</sup>

## There could be improved access to remedies and more certainty around their use

Where a court or tribunal declares a term unfair and the contract-issuing party applies or relies (or purports to apply or rely) on the unfair term, a small business or a regulator can make an application to the court or tribunal that the small business has suffered, or is likely to suffer, loss or damage as a result. A court or tribunal may then grant one or more of the following remedies:

- an injunction preventing the contract-issuing party from attempting to enforce the term or terms that have been declared unfair;

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<sup>57</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice joint submission, p.10.

<sup>58</sup> ACCC submission, p. 3. ASIC submission, p.7.

<sup>59</sup> NFF submission, p.8.

<sup>60</sup> AFIA submission, p. 8.

<sup>61</sup> Insurance Council submission, p.3

<sup>62</sup> ARCA submission, p.4.

- an order to compensate one or more persons who have suffered, or are likely to suffer, loss or damage as a result of another person applying or relying on, or purporting to apply or rely on the term or terms that have been declared unfair; and
- other orders that the court thinks are appropriate.

Nonetheless, there are currently barriers that impede access to these remedies. For example, the law requires a small business or regulator seeking an order for a remedy, such as variation to the unfair term, to quantify its financial loss or damage before the court.

This requirement is reasonable where the small business is seeking financial compensation, but is not necessarily appropriate if seeking orders for the contract issuing party to vary the contract to remedy the harm to the small business. This is particularly the case when the regulator or small business will already have to prove that the contract term is a UCT, which includes proving the potential detriment of the UCT if it was relied on.

Even with amendments to these provisions, stakeholders submit that access to the provisions is difficult for small business and consumers. NFIA submits that small construction businesses avoid court action as much as possible due to an industry culture that court action will damage commercial relationships beyond repair and cause reputational damage to sub-contractors right across the industry.<sup>63</sup>

The OSBC submits that it is virtually impossible for a small business to litigate matters through court due to the time and cost involved.<sup>64</sup> This view is supported by NSW Farmers which says that while farming businesses often suspect that their contract terms are unlawful, the risks in undertaking court proceedings against their contracting partner are too great.<sup>65</sup> It is also supported by the Institute of Public Accountants which advises that bringing an action through the court systems make this avenue unaffordable for all but very few small businesses.<sup>66</sup>

The ACL enables regulators to seek orders that will provide redress, in whole or in part, for loss or damage to non-party consumers who are disadvantaged by a term in a consumer contract which a court or tribunal has declared unfair. The result of this is that consumers are not required to institute their own follow on proceedings.

A recent example of the third part redress provision in action is where the ACCC successfully brought proceedings against hair loss business Ashley & Martin.<sup>67</sup> In this case, over 25,000 consumers were affected by UCTs across three of Ashley & Martin's standard contracts. The orders for redress provided relief for those patients who signed Ashley & Martin's contracts prior to receiving medical advice or within seven days of receiving medical advice and who during the term of the contract:

- were advised by a medical practitioner that the RealGROWTH Program was not suitable; or

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<sup>63</sup> NFIA submission, p. 13.

<sup>64</sup> SBDC submission, p. 2.

<sup>65</sup> NSW Farmers submission, p.7.

<sup>66</sup> IPA submission, p. 4.

<sup>67</sup> *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436* (4 September 2019). Available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1436.html>

- experienced one or more side-effects from the prescription medicines which caused them to stop using such medicines; or
- expressed a desire to terminate the contract or obtain a refund (within 7 days of signing the contract or first obtaining medical advice, whichever is later); or
- expressed a desire to terminate the contract or obtain a refund because they did not have an opportunity to obtain medical advice or had subsequently received and considered medical advice and no longer wished to proceed with the RealGROWTH Program.<sup>68</sup>

These patients were provided with a full refund of all money paid under the relevant contract, less any amount already refunded. Ashley & Martin was also ordered to pay the ACCC's legal costs.

When the UCT protections for small business were introduced, it was intended that the remedies available for 'non-party consumers' would also apply to 'non-party small businesses', which would allow regulators to apply to a court to seek certain orders for the benefit of small businesses that are not parties to proceedings where:

- the respondent is a party to a small business contract and is advantaged by a term of the contract that the court has declared to be an unfair term;
- the declared term has caused, or is likely to cause, a class of small business to suffer loss or damage; and
- the class includes small businesses who have not been a party to enforcement action in relation to the declared term.

The current law is not clear whether, or the extent to which, the definition of 'non-party consumer' covers non-party small business and therefore whether remedies would be available to a small business that is not a party to proceedings brought by a regulator, but has suffered, or is likely to suffer, loss or damage caused by the UCT. Self-Employed Australia submits it is essential that a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that a UCT has caused or is likely to cause the class of small businesses to suffer loss or damage small businesses do not have the money or organisational capacity to undertake court proceedings.<sup>69</sup>

## The same unfair terms can be used repeatedly

Under the current law, proceedings in relation to UCTs in consumer and small business contracts only apply to the terms subject to the proceedings. This means if businesses within the same industry use the same standard form contract template when drawing up contracts, the fact that a similar or even identical term has been declared void in other proceedings has no legal force. This provides little incentive for contract-issuing parties to amend similar terms in their standard form contracts, even in

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<sup>68</sup> *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd (No 2)* [2019] FCA 1739 (24 October 2019). Available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1739.html>

<sup>69</sup> Self-Employed Australia submission, p. 7.

response to litigation that found that term void in similar circumstances. It also means that consumers and those small businesses who cannot afford litigation cannot rely on a court ruling.

## The current headcount threshold used to define small businesses is not always appropriate

One of the existing requirements for a contract to be considered a ‘small business contract’ and therefore covered by the protections, is that at least one party to the contract must employ fewer than 20 persons at the time the contract is entered into. The ACCC notes there are problems with the current headcount threshold in that it has led to uncertainty about the coverage of the UCT regime, which hinders compliance with the law. Specifically, the ACCC advises that it is difficult for a contract-issuing party to determine the other party’s employee numbers, and it is often not easy for a small business itself to determine whether its seasonal or casual workers meet the UCT regime’s test of being ‘employed on a regular and systematic basis’ in accordance with section 23(5) of the ACL.<sup>70</sup> Several stakeholders have raised similar concerns about applying a 20 person headcount threshold to access the protections:

*The ACF considers that particularly the hospitality industry is impacted by the current headcount threshold of 20 employees. During busy periods as a seasonal business, the number of employees may increase over the prescribed 20 employees for that period. This is confusing and it is unclear as to whether they are considered a small business.*<sup>71</sup>

*...a strict limit on definition of a small business for the purpose of UCT protection does not adequately address the circumstances where the power differences between a franchisor and its franchisee is so large as to make it impossible for contracts to be negotiated on a level playing field.*<sup>72</sup>

*The current headcount threshold of employing fewer than twenty persons at a time does not adequately protect a multitude of agricultural businesses that are vulnerable to UCTs in standard form contracts. Agricultural industries, particularly horticulture, hire seasonally to meet the demand of various activities including planting, pruning and picking. At these times, many horticultural businesses exceed the total headcount threshold that prevents them from receiving protections from UCTs.*<sup>73</sup>

*...the current 20 employee headcount threshold is much too low, as it does not include many businesses treated for other purposes as small businesses, including those with large seasonal or casual workforces.*<sup>74</sup>

In addition, several stakeholders have advised that the fewer than 20 person headcount threshold is inconsistent with other commonly used proxies to define small business. For example, ASIC advises

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<sup>70</sup> ACCC submission, p.3.

<sup>71</sup> ACF submission, p.3.

<sup>72</sup> AADA submission, p.3.

<sup>73</sup> NSW Farmers submission, p.8.

<sup>74</sup> Law Council Submission – SME Committee, p.10.

that the current definition is not consistent with the way the Australian Financial Complaints Authority (AFCA) applies protections to small businesses (being 100 employees).<sup>75</sup> Similarly, the Australian Banking Association *Banking Code of Practice* (Banking Code) defines a business as small business if the business has fewer than 100 full-time equivalent employees at the time the business obtains the banking service. However, the Bank Code adds two additional limbs that must also be met at the time at the time the business obtains the banking service in order for the business to be considered a small business. These include that the business had an annual turnover of less than \$10 million in the previous financial year and that it has less than \$3 million total debt to all credit providers.<sup>76</sup>

The *Australian Small Business and Family Enterprise Ombudsman Act 2015* defines a business as a small business at a particular time in a financial year if the business has fewer than 100 employees at that time or its revenue for the previous financial year is \$5 million or less (or if the business was not carried on in the previous financial year, its revenue for the current year is \$5 million or less). Part-time employees are considered as an appropriate fraction of full-time equivalent employees for the purposes of the headcount threshold.<sup>77</sup>

The Australian Tax Office (ATO) uses an aggregated turnover less than \$10 million to define a ‘small business entity’ in an income year to assess eligibility for small business entity for several concessions.

A further problem with the current headcount threshold is that the ACL is currently silent on whether employees of ‘related bodies corporate’ are to be included when calculating employee numbers. While no evidence was presented in relation to the potential impacts this could have on small business, concerns have been raised as to how this could impact medium to large business. Specifically, a subsidiary or special purpose entity of large a business could be covered by the protections if they were to meet the headcount threshold. ASIC suggests this could run counter to the purpose and intent of the UCT protections and unnecessarily intervene in contract negotiations between competitive businesses on a relatively equal footing.<sup>78</sup> Likewise, the Federal Chamber of Automotive Industries (FCAI) suggests this is particularly relevant in the new motor vehicle retailing industry where a single dealer group will often represent several franchise brands, but each individual franchise may be operated by a smaller subsidiary company and where further consolidation is currently happening.<sup>79</sup>

## **The contract value threshold reduces scope and leads to uncertainty**

When the UCT protections were extended to small business contracts in 2016, a contract value threshold was included to limit the scope of the UCT protections to low value small business contracts. This was on the basis that it would be reasonable for a small business to undertake their own due diligence for contracts above a certain value. Accordingly, one of the requirements for a

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<sup>75</sup> ASIC submission, p. 9.

<sup>76</sup> ABA *Banking Code of Practice*, 1 March 2020 Release, p. 12. Available at: <https://www.ausbanking.org.au/wp-content/uploads/2020/06/2020-Code-A4-Booklet-with-July-1-COVID-19-Special-Note-WEB.pdf>

<sup>77</sup> *Australian Small Business and Family Enterprise Ombudsman Act 2015*, section 5.

<sup>78</sup> ASIC submission, p. 10.

<sup>79</sup> FCAI submission, p. 5.

contract to be considered a ‘small business contract’ and covered by the UCT protections is that the upfront price payable under the contract does not exceed \$300,000, or if the contract has a duration of more than 12 months, the upfront price payable under the contract does not exceed \$1 million.

While there is an ongoing expectation that small businesses will continue to undertake their own due diligence when entering into a contractual agreement, some stakeholders have suggested that the contract value threshold set is too low to take into account the range of contracts small businesses enter into. The NFF advises that farming businesses tend to be capital intensive, with high revenue but low profit margins and that the value of contracts for heavy farming equipment or supply of produce is normally higher than the current value threshold of \$300,000. The NFF also suggest that many agricultural sectors operate with an oligopoly at the processor level which means that, while a farmer may enter into a contract worth over \$300,000 per annum, it is often the only supply agreement he or she will enter in to.<sup>80</sup> This Australian Institute of Credit Management (AICM) supports the suggestion that the current threshold may be too low for some industries, such as the agriculture industry, for heavy farming equipment or the supply of produce.<sup>81</sup>

Likewise, NSW Farmers suggests many agricultural businesses exceed the current value threshold yet are vulnerable to UCTs in their standard form contracts as farmers generally operate with high value contracts with low margins (e.g. poultry meat growing contracts easily exceed the contract value threshold). NSW Farmers adds that such contracts include terms that enable for risk to be unfairly transferred from the contracting business to individual farmers but due to the imbalance in market power between the contracting parties, farmers have no choice but to accept the terms of these contracts.<sup>82</sup>

A further problem with the current contract value threshold is that the upfront price of a contract may not be available at the time of entering the contract. This can create uncertainty as to whether the contract is covered by the UCT protections, particularly when a contract value may fluctuate based on market conditions.<sup>83</sup> For example, ASIC notes that some contract prices may be determined as a percentage of an unknown amount, such as the commission on the sale of a property or a franchise royalty calculated as a percentage of future sales.<sup>84</sup>

### **It is not always clear whether a contract is a ‘standard form contract’**

The UCT protections only apply to standard form contracts. ‘Standard form contract’ is defined by section 27 of the ACL which provides that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise. The ACL also provides factors a court must take into account in determining whether a contract is a standard form contract including:

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<sup>80</sup> NFF submission, p. 9.

<sup>81</sup> AICM submission, p.5.

<sup>82</sup> NSW Farmers submission, p. 8.

<sup>83</sup> SBDC submission, p. 6.

<sup>84</sup> ASIC submission, p. 11.

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;<sup>85</sup>
- whether another party was given an effective opportunity to negotiate the terms of the contract;<sup>86</sup>
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction; and<sup>87</sup>
- any other matter prescribed by the regulations.

The court may also take into account any other matters it considers relevant.

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (SME Committee) and NFIA submit that the rebuttable presumption is insufficient and when entering into a contract, small businesses would benefit from greater certainty as to whether the contract they intend to sign is a standard form contract and likely to be covered by the UCT protections.<sup>88</sup> This position is supported by several other stakeholders, including ASBFEO, which states that uncertainty and lack of clarity is a consistent problem for small businesses, especially when they are facing the prospect of complex and costly legal proceedings.<sup>89</sup>

The SME Committee suggests that what constitutes standard form commercially and legally is generally well understood, in that the terms of the contract are generally not negotiable (i.e. they are offered on a 'take it or leave it' basis) and the contract is used repeatedly.<sup>90</sup>

However, it is not always clear at the time of entering into a contract whether an effective opportunity to negotiate has been given. This is especially the case where the parties have negotiated or amended one or two minor contractual terms. National Precast submits that if minor parts of a contract are negotiated, the contract itself may no longer be considered 'standard form', even if one party to the contract may have had very little commercial power to negotiate the relative risks of those terms. National Precast submits the effect of the UCT protections are diluted by a strict interpretation of what constitutes a 'standard form contract'.<sup>91</sup> NFIA submits that many contracts in

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<sup>85</sup> Other than terms referred to in s26(1) of the ACL (terms that define the main subject matter of the contract, terms that set the upfront price payable under the contract or terms that are required, or expressly permitted, by a law of the Commonwealth, a State or Territory).

<sup>86</sup> That were not terms referred to in s26(1) of the ACL (see footnote above).

<sup>87</sup> Other than terms referred to in s26(1) of the ACL (see footnote above).

<sup>88</sup> Law Council – SME Committee, submission on the 2018 Review of Unfair Contract Term Protections for Small Business, p.3; NFIA submission, p. 16.

<sup>89</sup> ASBFEO submission, p.3.

<sup>90</sup> Law Council SME Committee, submission on the 2018 Review of Unfair Contract Term Protections for Small Business, p.3; Law Council Submission – Annexure A – Competition and Consumer Committee, p. A29.

<sup>91</sup> National Precast submission, p.6.



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.) and sub-contractors at the bottom end of the hierarchy are typically not informed of what amendments have been made to standard form contracts.<sup>92</sup>

The Shopping Centre Council of Australia (SCCA) also supports providing certainty around whether another party was given an effective opportunity to negotiate the terms of the contract. Specifically, it suggests there is a need for a distinction between a small business contract which:

- is a standard form contract which provides a basis for the commencement of negotiations between the parties (as is the case in regard to retail leases, where there is often a legal obligation on landlords to provide a ‘proposed’ lease to a prospective lessee when negotiations are entered into); and
- is a standard form contract offered on a ‘take it or leave it’ basis.<sup>93</sup>

As outlined above, the SME Committee suggests one of the generally well understood factors in determining whether a contract is a standard form contract is that the contract is used on a repeated basis. This is supported by ASBFEO which suggests that if the same substantive clauses are repeated in most of the contracts made by a party proposing a contract, it would seem likely that this is a ‘standard form’ contract.<sup>94</sup> ASIC suggests that ‘repeat usage’ is a more objective factor that takes into account occasions where a contract-issuing party has used the same contract or, importantly, the same core terms and conditions in multiple contracts.<sup>95</sup> While courts and tribunals may already consider ‘repeat usage’ as a relevant factor in determining whether a contract is a standard form contract, it is not listed in section 27 of the ACL and therefore is not a factor a court *must* consider in making their decision.

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<sup>92</sup> NFIA submission, p. 16.

<sup>93</sup> SCCA submission, p.5.

<sup>94</sup> ASBFEO p.4.

<sup>95</sup> ASIC submission, p. 13.

## 2. Objectives

The primary objective of this reform is to enhance the effectiveness of current laws designed to protect small business and consumers from UCTs. This will help reduce the prevalence of unfair terms in small business and consumer standard form contracts, promote a more efficient allocation of risk, and improve small business and consumer confidence when entering in to standard form contracts.

Secondary objectives include:

- improving clarity on the application of, and accessibility to, the protections;
- ensuring the coverage of the protections is appropriate; and
- ensuring consistency in application of the UCT regime, including in relation to consumer contracts for goods and services (regulated under the ACL), and consumer and small business contracts for financial products and services (regulated under mirror provisions in the ASIC Act which will also extend to insurance contracts from 5 April 2021).

This will provide certainty for contract-issuing parties, small business and consumers on when the protections apply, which will assist with compliance with the law.

## 3. Options

There are 22 options presented for decisions-makers. These options have been divided into four categories:

- Legality and penalties
- Flexible remedies
- Definition of small business contract
  - Headcount/turnover threshold
  - Related bodies corporate
  - Contract value threshold
  - Clarity on standard form contract
- Minimum standards

### Legality and penalties

#### Option 1 – Status quo

Under the status quo, a term of a standard form small business or consumer contract could be challenged in a court or tribunal, which could determine the term is ‘unfair’ and therefore void, which means it will not be binding on the parties. The rest of the contract would continue to bind the parties to the extent it is capable of operating without the unfair term. The contract-issuing party would not receive a penalty for including the unfair term in the contract or any identical terms in any of its other contracts, regardless of whether the inclusion of the term caused any detriment to the other parties.

#### Option 2 – Strengthened compliance and enforcement activities

Under this option, regulators would strengthen their compliance and enforcement activities. This would enable them to investigate more reported cases of potential UCTs in small business contracts and, where appropriate, commence proceedings to challenge these terms. Regulators would also boost their education and awareness activities. This could, for example, include working with industry stakeholders, small business groups and state small business commissioners to launch targeted education campaigns to improve the awareness of UCT protections.

#### Option 3 – Make UCTs unlawful and give courts the power to impose a civil penalty

Under this option, a term of a standard form small business or consumer contract could still be challenged in a court (or tribunal) and found to be ‘unfair’ and therefore void, which means it would not be binding on the parties. As per the status quo, the rest of the contract would continue to bind

the parties to the extent it is capable of operating without the unfair term. However, compared to the status quo, courts could also apply a civil pecuniary penalty for the contravention. Courts would be able to determine the appropriate penalty amount, up to the maximum set under the law. In imposing a civil pecuniary penalty, the court would need to be satisfied that imposing a penalty is appropriate in the circumstances of each individual case.

## Option 4 – Strengthened powers for regulators

### Option 4a – Regulators given the power to issue infringement notices

This option is dependent on the adoption of Option 3 as described above and would give certain regulators the power to issue infringement notices.

### Option 4b – Regulators given powers to determine a term is unfair and request it is varied

This option would give regulators the power to determine whether a contractual term is unfair and request the contract-issuing party to vary the term. If a business wished to challenge a decision made by a regulator, they could appeal to a court or tribunal for merits or judicial review of the decision.

## Flexible remedies

### Option 1 – Status quo

Under the status quo, a term of a standard form small business or consumer contract could be challenged in a court or tribunal, which could determine the term is ‘unfair’ and therefore void, which means it will not be binding on the parties. The rest of the contract would continue to bind the parties to the extent it is capable of operating without the unfair term.

### Option 2 – UCTs not automatically void; court given power to determine the appropriate remedy

This option would amend the law to clarify that when a court or tribunal declares a term in small business or consumer contract is ‘unfair’, the court or tribunal has the discretion to determine appropriate remedies (including that the term is void or is to be varied) rather than the term being automatically void.

### Option 3 – Clarify that remedies for ‘non-party consumers’ also apply to ‘non-party small businesses’

This option would ensure that the remedies available for ‘non-party consumers’ would also apply to ‘non-party small businesses’. As per the justification for extending UCT protections to small business contracts, small businesses and consumers share similar characteristics, including limited financial resources and negotiation powers.

## Option 4 – Create a rebuttable presumption provision for UCTs used in similar circumstances

This option would amend the law to establish a rebuttable presumption that a contract term is unfair if, in a separate case, the same or a substantially similar term has been used by the same entity or in the same industry sector and declared by a court to be unfair. If such a term was challenged in a court or tribunal, it would be presumed to be unfair, unless the contract-issuing party was able to produce evidence to demonstrate why it was not unfair in the particular circumstances of the case.

## Definition of small business contract

### Headcount/turnover threshold

#### Option 1 – Status quo

Under the status quo, a less than 20 person headcount threshold is used as a proxy to define small business. Accordingly, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections is that at least one party to the contract employs fewer than 20 persons at the time the contract is entered into.

#### Option 2 – Replace 20 person headcount threshold with \$10 million annual turnover threshold

This option would replace the less than 20 person headcount threshold with a less than \$10 million annual turnover threshold as a proxy for defining small business. Accordingly, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections would be that at least one party to the contract is a business with an annual turnover of less than \$10 million, regardless of the number of persons the business employs.

#### Option 3 – At least one party to meet a less than 100 person headcount threshold OR less than \$10 million annual turnover threshold

This option would replace the less than 20 person headcount threshold with a less than 100 person headcount threshold and a less than \$10 million annual turnover threshold. Accordingly, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections would be that at least one party to the contract is a business that employs fewer than 100 persons at the time the contract is entered into and/or has an annual turnover of less than \$10 million.

### Related bodies corporate

#### Option 1 – Status quo

This option would retain the current law and not state whether employees of ‘related bodies corporate’ are to be included when calculating employee numbers for the purposes of the UCT protections for small business contracts.

## Option 2 – Related bodies corporate relevant in determining employee numbers and annual turnover

This option involves amending the current law to specify that employees of ‘related bodies corporate’ are to be included when calculating employee numbers for the purposes of the UCT protections for small business contracts.

To clarify, if amendments are made to the current headcount threshold (either through adopting headcount/turnover threshold Options 2 or Option 3), this option would involve amending the current law to specify that:

- any related bodies corporate would be considered relevant in determining annual turnover for the purposes of the UCT protections for small business contracts (if Option 2 is adopted); or
- employees of related bodies corporate are to be included when calculating employee numbers and any related bodies corporate would be considered relevant in determining annual turnover for the purposes of the UCT protections for small business contracts (if Option 3 is adopted).

## Contract value threshold

### Option 1 – Status quo

Under the status quo, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections is that the upfront price payable under the contract does not exceed \$300,000, or if the contract has a duration of more than 12 months, the upfront price payable under the contract does not exceed \$1 million.

### Option 2 – Increase contract value threshold to \$5m per contract, regardless of contract duration

Under this option, one of the requirements for a contract to be considered a ‘small business contract’ and covered by the UCT protections would be that the upfront price payable under the contract does not exceed \$5 million per contract, regardless of the duration of the contract.

### Option 3 – Remove the contract value threshold altogether

This option would remove a contract value threshold altogether.

## Clarity on ‘standard form contract’

### Option 1 – Status quo

There would be no change to the current definition of ‘standard form contract’ under the current law.

### Option 2 – Court must consider ‘repeat usage’ in determining a ‘standard form contract’

The current law provides factors a court *must* take into account in determining whether a contract is a standard form contract. This option would include ‘repeat usage’ as one of these factors.

### Option 3 – Clarify actions which do not constitute an ‘effective opportunity to negotiate’

The current law already notes that negotiation on terms relating to the main subject matter of the contract, the upfront price payable under the contract, and terms required or permitted by a law does not constitute an ‘effective opportunity to negotiate’. This setting would remain.

This option would amend the law to further clarify the types of actions which do not constitute an ‘effective opportunity to negotiate’. This could include:

- a. opportunities for a small business to negotiate minor amendments to a contract, which are amendments that would not alter the intent and essence of the original term;
- b. opportunities for a small business to select, from a pre-existing list of possible terms, which term they would prefer, rather than an opportunity to actually negotiate the substance of the term; and
- c. claims by the contract-issuing party that there was an effective opportunity to negotiate across all standard form contracts with all its customers, when it only gave an opportunity to negotiate to a small subset of customers.

## Minimum standards

### Option 1 – Status quo

The Consultation RIS presented the status quo as “minimum requirements or standards under state and territory laws could possibly be challenged as being unfair”.

### Option 2 – Provide an exemption for certain terms which meet minimum standards

This option would amend the law to exempt certain clauses that include ‘minimum standards’ or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation.



## 4. Impact analysis

### Legality and penalties

#### Option 1 – Status quo

Under the status quo, a term of a standard form small business or consumer contract could be challenged in a court or tribunal, which could determine the term is ‘unfair’ and therefore void, which means it will not be binding on the parties. The rest of the contract would continue to bind the parties if it is capable of operating without the unfair term. A regulator could not seek a penalty for including an unfair term in a contract or any identical terms in any of its other contracts, regardless of whether the inclusion of the term caused any detriment to the other parties.

As small businesses generally lack the resources and bargaining power to effectively review and negotiate contract terms or challenge their enforcement, the status quo enables contract-issuing parties to continue to exploit power imbalance when issuing standard form contracts. <sup>96</sup> AFRA suggest that ultimately, small businesses are likely to accept UCTs because they require the contract to remain on foot. <sup>97</sup> In addition, NECA suggests that limited competition in some industries can create a dependency on larger businesses and the potential to be taken advantage of or enter into what they believe are adverse contracts. <sup>98</sup> Further, National Precast suggests that in some industries, UCTs are so prevalent, small businesses are presented with a difficult choice of entering into contracts with unfair terms, with all the attendant risk, or face slowly go out of business through a lack of work. <sup>99</sup>

Likewise, consumer advocacy group CHOICE notes that the considerable cost for an individual consumer to take a business to court is unlikely to be outweighed by the benefit of pursuing legal action. CHOICE submits that supply-side prevention of UCTs is the only way to restore the power imbalance. <sup>100</sup>

#### Option 2 – Strengthened compliance and enforcement activities

Compared to the status quo, this option involves regulators allocating additional resources to strengthen their compliance and enforcement activities, which would enable them to investigate more reported cases of potential UCTs in small business contracts and, where appropriate, take enforcement action, including commencing proceedings to challenge these terms. Regulators would also boost their education and awareness activities.

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<sup>96</sup> E.g. SBDC submission, p. 7; NFIA submission, p.7; National Precast submission, p.4.

<sup>97</sup> AFRA submission, p.4.

<sup>98</sup> NECA submission, p. 2.

<sup>99</sup> National Precast submission, p.4.

<sup>100</sup> CHOICE submission, p. 3.

### **Additional resources to strengthen compliance and enforcement activities**

Some stakeholders favoured this option over Option 3, while several other stakeholders favoured this option in addition to Option 3.

As outlined in Appendix A to this Decision RIS, since the UCT protections were introduced for consumer contracts in 2010 and extended to small business contracts in 2016, regulators have undertaken significant action to address UCTs in standard form contracts. While such action has led to positive results, it can be resource intensive and regulators do not have infinite resources to enforce the law.

Allocating additional resources to strengthen compliance and enforcement activities in relation to UCTs would come at a cost – either through requiring additional funding, or diverting resources from other high priority activities and therefore reducing the compliance and enforcement of those areas. Consequently, the effect on reducing the prevalence of UCTs in small business contracts through this option alone is likely to be limited and involve a significant cost.

### **Boosted education and awareness activities**

As noted in Chapter 1 – The Problem, several stakeholders raised concerns about the need for greater awareness and education on the UCT regime, including targeted education campaigns. While several stakeholders did not necessarily respond to Option 2 directly, many stakeholders suggest improvements to the status quo, particularly in response to the following question which was posed in the Consultation RIS:

*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.*

Overall, stakeholders suggest there is a need for:

- further education and guidance (presented in plain language) on:
  - terms that are unfair,<sup>101</sup> including specific examples of UCTs<sup>102</sup> and terms courts have declared unfair;<sup>103</sup>
  - what constitutes a ‘standard form contract’;<sup>104</sup>
  - the processes that business should follow when they suspect a contract contains unfair terms;<sup>105</sup>

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<sup>101</sup> MEA submission, p. 3.

<sup>102</sup> E.g. NFIA submission, p. 11; DSA submission, p. 2; AFRA submission, p. 4.

<sup>103</sup> E.g. AFIA submission, p. 5; QLS submission, p. 5.

<sup>104</sup> E.g. ACF submission, p.4; AFGC submission, p.1; AICM submission, p.6; NIRA submission, p.4.

<sup>105</sup> E.g. NFIA submission, p. 11; NFF submission, p. 6; QLS submission, p. 5.

- how contract-issuing parties can meet their obligations, <sup>106</sup> especially when a smaller business is the one issuing the contract; <sup>107</sup>
- industry-specific guidance (e.g. building and construction; <sup>108</sup> and generally <sup>109</sup>).

There is also a suggestion that regulators should work with the legal profession to ensure that terms that are now regarded as UCTs are not repeatedly included in future contracts, which would allow the terms to persist. <sup>110</sup>

In addition, a few stakeholders also showed interest in a joint approach to education and awareness involving industry and regulators working together. For example, the Housing Industry Association advises that it would be willing and able to assist in any targeted education campaigns or activities relating to UCTs in the residential building industry. <sup>111</sup> Also, the NFF suggest that agricultural industry associations are well placed to assist the Government and ACCC increase access to information and to help tailor relevant information to make it easier to understand. It also suggested that it would be pleased work in conjunction with its members to disseminate information on UCTs via its formal networks as well as its social media networks. <sup>112</sup> Likewise, the Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW suggests that success of Option 2 lies in compliance and ongoing education, rather than one-off campaigns and advises that, as an industry association, it would be happy to collaborate on any industry specific initiatives or forums or both to raise awareness and encourage best practice. <sup>113</sup>

Some stakeholders suggest that responsibility for providing awareness and education on UCTs should extend beyond that of regulators. For example, one stakeholder suggests that in addition to ASIC, ASBFEO should provide educational campaigns to small businesses to allow consumers and businesses to enter into informed conversations with their financiers during the contract negotiation process. <sup>114</sup> Another stakeholder suggests it would be helpful if primary contractors or large suppliers were required to provide a simply worded guide on the terms of any standard form contracts, similar to a PDS or FEG. <sup>115</sup>

While many stakeholders assert there is a need for greater education and awareness on the UCT regime in its current form, several stakeholders do not believe that regulatory guidance and education campaigns alone would be effective in reducing the prevalence of UCTs in standard form contracts. Specifically, while guidance may give consumers and small business more clarity on how to identify UCTs, it would not assist them to effectively deal with those terms. For example, the National Road Transport Association (NatRoad) believes the use of UCTs in the road transport

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<sup>106</sup> E.g. CCIA NSW submission, p. 3; QLS submission, p. 4.

<sup>107</sup> E.g. DSA submission, p. 2.

<sup>108</sup> NFIA submission, p. 11; MEA submission p.3.

<sup>109</sup> E.g. DSA submission, p. 2; AFGC submission, p. 1; AFGC submission, p.1 QLS submission, p. 5.

<sup>110</sup> Min-it & FAA joint submission, p. 9.

<sup>111</sup> HIA submission, p. 10.

<sup>112</sup> NFF submission, p. 7.

<sup>113</sup> CCIA NSW submission, p. 3.

<sup>114</sup> AFIA submission, p. 5.

<sup>115</sup> AFRA submission, p. 5.

industry has become systemic and laws with ‘cut-through’ are needed. NatRoad also considers guidance should set out factors where a provision is not unfair because it is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. <sup>116</sup>

Similarly, the NSWABC suggests that awareness aside, there are existing barriers that mean small businesses sometimes cannot or do not negotiate terms in contracts drafted by counterparties. <sup>117</sup> For example, Master Electricians Australia, a trade association representing electrical contractors, advises that there are often short time periods for responding to tenders and contracts (as five business days but frequently only two weeks) and significant competition in the industry which puts pressure on sub-contractors and small businesses to accept tenders’ terms including evaluating and accepting the draft contract prior to submitting a tender. <sup>118</sup> Another stakeholder advises that a tendering sub-contractor may submit a list of commercial exceptions to objectionable terms in the contractor’s contract with its tender but when the tendering sub-contractor is advised it has won the tender, they are also advised the contractor’s terms are not negotiable. <sup>119</sup>

The NSWABC also suggests that contract drafters, whether or not they are familiar with the regime, may tend to include UCTs as they tend to seek to protect their own interests. <sup>120</sup> Another stakeholder suggests that regulatory guidance and education is valuable for people who essentially want to comply with the law, but is not effective for people who know they are the stronger party financially. <sup>121</sup>

Consumer advocacy group CHOICE submits that education and industry engagement have been largely ineffective in changing business behaviour and without strong deterrents, the law will continue to deliver adverse outcomes for consumers. <sup>122</sup> Likewise, Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice assert that nearly a decade of the current UCT regime has not eradicated UCTs from standard form consumer contracts and that they continue to see UCTs being 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. <sup>123</sup> The authors of this joint submission add that 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 and that the use of UCTs in consumer contracts will only be further reduced with a real deterrent. <sup>124</sup>

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<sup>116</sup> NatRoad submission, p. 7.

<sup>117</sup> NSWABC submission, p. 2.

<sup>118</sup> MEA submission, p. 3.

<sup>119</sup> Palyga, S submission, p. 2.

<sup>120</sup> NSWABC submission, p. 2.

<sup>121</sup> Buchan, J submission, p. 1.

<sup>122</sup> CHOICE submission, p. 1.

<sup>123</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice joint submission, p. 1.

<sup>124</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice joint submission, p. 10.

### Option 3 – Make UCTs unlawful and allow a court to impose a civil penalty

Under this option, a term of a standard form small business or consumer contract could still be challenged in a court (or tribunal) and found to be ‘unfair’ and therefore void, which means it would not be binding on the parties. As per the status quo, the rest of the contract would continue to bind the parties to the extent it is capable of operating without the unfair term. However, compared to the status quo, where the action is brought by a regulator, the court could also apply a civil pecuniary penalty for the contravention. The court would be able to determine the appropriate penalty amount, up to the maximum set under the law. In imposing a civil pecuniary penalty, the court would need to be satisfied that imposing a penalty is appropriate in the circumstances of each individual case.

As outlined in Chapter 1 – The Problem, the current law does not prohibit the use of UCTs, but rather allows a court to declare that a term is unfair and therefore void. This allows contract-issuing businesses to intentionally include and rely on terms in their standard form contracts that may be unfair, with the risks limited only to being unable to rely on the term if a court or tribunal declares the term is unfair and therefore void.

Many submissions to the 2018 Review argued this approach does not provide adequate incentive for businesses to ensure their standard form contracts are free from UCTs. These concerns were echoed in submissions to the 2020 consultation.

Many stakeholders suggested that more significant consequences are needed to deter contract-issuing parties from including UCTs in their standard form contracts and support making UCTs illegal and attaching penalties.<sup>125</sup> Stakeholders in support of Option 3 further assert that:

- penalties are the only effective deterrent;<sup>126</sup>
- businesses can take advantage of the power imbalance inherent in standard form contracts on the basis that small business and consumers are unlikely to proceed with court processes to have a term declared ‘void’ in a contract;<sup>127</sup>
- contract-issuing parties will be encouraged to take proactive steps to amend their existing standard form contracts.<sup>128</sup>

While a few stakeholders do not support Option 3 because they believe the current provisions are working effectively,<sup>129</sup> the remaining views against the introduction of penalties are largely based on uncertainty around what may be considered ‘unfair’ and concerns that this option would impose

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<sup>125</sup> E.g. SBDC submission, p. 7; CHOICE submission, p. 3; Consumer Action Law Centre, Financial Rights Legal Centre and WEStjustice joint submission, p.10; AAF submission, p.1; Law Council Submission – ACL Committee, p. 19.

<sup>126</sup> E.g. AADA submission, p. 10; NSW Farmers submission, p.4 Law; Council Submission – SME Committee, p. 10.

<sup>127</sup> E.g. CHOICE submission, p. 3; SBDC submission, p. 7; Clubs Australia submission, p. 6.

<sup>128</sup> ASIC submission, p. 6.

<sup>129</sup> E.g. FCAI submission, p. 3; Ai Group submission, p. 2; AFIA submission pp. 6-7; ABA; p. 3; HIA submission, p. 10; Law Council Submission – Competition and Consumer Committee, p. 6; MIGA submission, p.2; E.g. Ai Group submission, p.2; HIA submission, p. 8; BCA, 2020 Melbourne consultation, Session 2 (note: BCA has requested their feedback at the consultation session is submitted in lieu of a written submission).

compliance costs. Accordingly, primary views against making UCTs illegal and introducing penalties include:

- the nature of determining whether a term is unfair is subjective; <sup>130</sup>
- uncertainty around whether the UCT protections apply in the circumstances (e.g. if a standard form contract, if thresholds are met); <sup>131</sup>
- imposing penalties would impose compliance costs; <sup>132</sup>
  - costs could be passed onto consumers and small business; <sup>133</sup>
  - costs associated with reducing the use of standard form contracts to reduce the risk of penalties; <sup>134</sup>
- businesses could be left in a position where they could not legitimately and reasonably protect their interests; and <sup>135</sup>
- some contract-issuing businesses may choose not to deal with certain businesses (e.g. small businesses). <sup>136</sup>

In addition, a few stakeholders raised specific concerns that this option could potentially have negative impacts on small business. For example, AICM, which represents the interests of commercial and consumer credit management professionals, believes that strong enforcement and penalties should be applied when a business unreasonably relies on or enforces an unfair term. It suggests that if a penalty were to apply merely for the existence of an unfair term in standard form contract, this could create a greater unintended consequence of restricting small businesses access to credit. <sup>137</sup> Direct Selling Australia (DSA), suggests the compliance spend of most small businesses is not as great as larger businesses with ready access to either in-house or external legal counsel and that this option might attach liability to small businesses contracting with other small businesses. <sup>138</sup> The specific concerns are considered collectively with the broad concerns mentioned above.

### Uncertainty around what may be considered ‘unfair’

The law currently provides statutory guidance on the types of terms which may be regarded as being unfair. However, it does not prohibit the use of those terms, nor does it create a presumption that those terms are unfair. Some stakeholders have suggested that the law be amended include a list of

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<sup>130</sup> E.g. DSA submission, p.2; SSCA submission, p. 6; FCAI submission, p. 3; ABA; p. 3; Sise, P submission; FSC submission, p. 3; Law Council Submission – Competition and Consumer Committee, p. 6; SSCA submission, p. 6; HIA submission, p. 8.

<sup>131</sup> E.g. Sise, P submission, p. 4.

<sup>132</sup> E.g. Ai Group submission pp. 2-3; ARCA submission, pp. 3-4; Communications Alliance submission, p. 5; HIA submission, p. 8; BCA, 2020 Melbourne consultation.

<sup>133</sup> E.g. Ai Group submission pp. 2-3; Sise, P submission, p. 5; ARCA submission, p. 3.

<sup>134</sup> E.g. Sise, P submission, p. 5.

<sup>135</sup> E.g. Ai Group submission pp. 2-3; Communications Alliance submission, p. 3.

<sup>136</sup> E.g. Ai Group submission pp. 2-3; Communications Alliance submission, p. 3.

<sup>137</sup> AICM submission, p. 1.

<sup>138</sup> DSA submission, p. 2.

prohibited UCTs which must not be included in standard form contracts (or if they appear in contracts, are automatically non-binding).<sup>139</sup> While a list of prohibited terms could provide some additional certainty around whether a term should not be included in a standard form contract, there is a risk that characterising a particular term as ‘unfair’ could impose inflexibility on contracting practices and create an incentive for ‘gaming’ by using terms with substantially the same effect but that are not described exactly as those on the list. In addition, Australian Grape and Wine Incorporated, which represents the interests of grape growers and winemakers, suggests that the focus on individual contract terms can impose unnecessary and costly restrictions on flexibility for both the small business (grape grower) and contract-issuing party (winemaker).<sup>140</sup>

There may also be circumstances in which a term may be considered ‘unfair’ in some circumstances but which may be considered reasonably necessary in order to protect a party’s reasonable business interests in other circumstances. For example, two standard form contracts may contain the same term which may be considered unfair in one contract, but not in the other contract because it has an additional term that provides a counter-balancing right to protect the other contracting party’s interests also. Further, it may also be impracticable to identify a comprehensive list and it would likely need to be continually updated, adding to implementation costs.

Alternatively, the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia advises that it considers that increased judicial consideration of the provisions will assist to resolve the uncertainty for parties in their assessment of terms within the context of the UCT regime. The committee adds that regulatory guidance or education campaigns to help reduce the use of UCTs should include providing further material including:

- examples of situations where a term will and will not be considered unfair, in order to show (through clear and consistent analysis) how the circumstances, and contracts as a whole, can impact the assessment of the term;
- entire sample contracts to provide context to the examples and demonstrate how the potentially unfair clause may interact with the entirety of the contract in order to reach a determination that a clause is or is not unfair; and
- examples of amendments to unfair terms that would result in the term no longer being unfair but still achieve the parties’ intended outcome.<sup>141</sup>

### Approach of regulators

One of the functions of regulators is to provide information and advice to consumers and businesses to promote compliance with the law. In general, education and awareness is often the first step towards securing compliance, and goes beyond the publication of guidance materials. For example, as discussed in Chapter 1 – The Problem, before the UCT protections for small business came into effect, the ACCC reviewed a number of contracts, and engaged with business across several different industries highlighting potentially problematic terms. The ACCC then released a report highlighting

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<sup>139</sup> E.g. Malbon, J submission; ARCA submission, p. 2; AFRA submission, p.3; Ai Group submission, p. 6; NatRoad submission, p. 6.

<sup>140</sup> Australian Grape & Wine submission, pp. 3-4

<sup>141</sup> Law Council Submission – Annexure A – Competition and Consumer Committee, pp. A4-A5.



concerning terms the ACCC observed across those industries. One of those industries was the waste management industry. Following this, the ACCC continued to make businesses in the waste management industry aware of their obligations under the UCT Regime, including by engaging with waste management provider JJ Richards & Sons Pty Ltd. The ACCC's subsequent decision to take legal action against JJ Richards was a result of JJ Richards failing to address the ACCC's concerns.

Regulators have a range of civil, administrative and criminal enforcement tools that they can use to try to address concerning conduct. Regulators do not have infinite resources and must consider complaints carefully and exercise discretion, directing resources to matters that can result in industry wide change or provide the greatest overall benefit for consumers and small business. Litigation is costly compared to most other compliance and enforcement actions. As such, regulators engage in a range of other tools and strategies they have available to achieve outcomes in a timely and proportionate manner. Such tools differ across each regulator, but may include:

- education, guidance and influencing good practice
- encouraging voluntary industry self-regulation codes
- dispute resolution
- formal written warnings
- infringement notices
- enforceable undertakings
- public statements such as media releases and public warnings

A regulator would be more likely to commence legal action in circumstances where alleged breaches are blatant, within a regulator's priority areas, are repeated or would cause significant detriment.

In the March 2019 case of *ACCC vs Mitolo Group Pty Ltd* (Mitolo), the Federal Court found that Mitolo had contravened the Horticulture Code by failing to specify the method or formula for calculating the price of goods before or upon delivery and that terms in 19 contracts Mitolo entered into with small business potato growers were unfair under the ACL. For the Horticulture Code contravention, the Court imposed a \$240,000 pecuniary penalty against Mitolo for entering into contracts with growers for a fixed volume of produce before harvest season with prices to be determined at harvest. However, the court did not have any power to issue a pecuniary penalty for Mitolo's conduct in relation to the terms the court found to be UCTs. These terms included the inclusion of unilateral variation clauses in favour of Mitolo, the right to reject grower produce without a proper review mechanism and preventing growers from selling their produce to alternative purchases.

Another relevant example is the Federal Court case of *ACCC v Chrisco Hampers Australia Ltd* (Chrisco). In March 2016, the Court ordered Chrisco to pay a \$200,000 penalty for contravening the ACL by making a false or misleading representations to consumers between January 2011 and December 2013 that consumers could not cancel their lay-by agreement after making their final payment. The Court also found that Chrisco's 2014 lay-by agreement contained a UCT, which related to Chrisco's "HeadStart Plan", and required a consumer to 'opt out' in order to avoid having further

payments automatically deducted by Chrisco after their lay-by had been fully paid. The unfair term was void but no pecuniary penalty could be issued for the use of that term.

As evident in the Chapter 1 – The Problem, UCTs continue to be prevalent in standard form contracts more than 10 years since the introduction of the protections for consumer contracts and nearly four years since the extension to small business contracts. This suggests the current approach to enforcing the UCT protections is not sufficient to ensure future compliance with the law and deter the inclusion of UCTs in standard form contracts. For example, despite the previous action against Chrisco, the ACCC more recently had concerns that Chrisco had entered into or renewed lay-by agreements since 26 October 2018 which contained another Head Start Plan term that allowed Chrisco to continue to take payments from consumers after they had fully paid for their existing lay-by order, unless consumers expressly opted out. In July 2020 the ACCC accepted a court enforceable undertaking from Chrisco acknowledging that the term may be a UCT and undertaking to increase the transparency of the Head Start Plan term by requiring consumers to opt in to a Head Start Plan and to confirm their participation from year to year. Given that the consequences of court proceedings for UCTs is simply that the term is void, in this instance, court proceedings would not have produced an outcome any more effective in terms of specific or general deterrence than the court enforceable undertaking resolution.

ASIC advises that its Report 565 *Unfair contract terms and small business loans*,<sup>142</sup> while relating to contract terms of the ‘big four’ banks, was intended to put all lenders on notice on its expectations for the fairness of terms in small business loan contracts. However, despite achieving important changes to the small business loan contracts of the big four banks, it subsequently observed systemic non-compliance by some other lenders, which it then took action on. ASIC notes that it is possible that, had unfair terms in small business standard form contracts attracted a penalty, it may have provided a strong financial and reputational incentive to encourage lenders to review and change their contracts without ASIC’s intervention and ASIC would not have needed to use the same level of resources to obtain changes from other lenders.<sup>143</sup>

Regulators will continue to consider complaints carefully and exercise discretion so as to direct their finite resources to matters that can result in industry wide change or provide the greatest overall benefit for consumers and small business. Furthermore, the possibility of pecuniary penalties will provide a strong deterrence for contract-issuing parties to not include UCTs in standard form contracts from the outset, to be proactive in amending any likely UCTs in existing standard form contracts, and to cooperate with regulators and address any concerns raised.

Regulators will continue to exercise their powers in a way that is proportionate to the harm from the conduct and in accordance with general principles of deterrence. This means early engagement on the law will focus on industry engagement and compliance activities to provide businesses with an opportunity to take the necessary steps to amend their contracts to comply with the law.

Regulators will continue to take legal action where they consider that litigation is the most appropriate way to achieve their compliance objectives. This means that litigation is more likely where the conduct is by a large or national trader or results, or has the potential to result, in

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<sup>142</sup> Available at <https://download.asic.gov.au/media/4676255/rep565-published-15-march-2018.pdf>

<sup>143</sup> ASIC submission, p. 5.

substantial harm. Large or national traders are likely to have the necessary resources to ensure they are compliant with the law. It is unlikely that including but not relying on a UCT in a contract would cause substantial harm, so in many circumstances it is likely that regulators would provide parties with an opportunity to amend their contracts to comply with the law prior to considering legal action. In instances where there is a difference in opinion between a contract-issuing party and the regulator as to whether a term is legitimately required to protect the business interests of the contract issuing party, the court would make the final decision on the term, the appropriateness of issuing a penalty and the penalty amount.

As with any change of the law, there would be a transition period during which regulators and other parties would provide appropriate guidance and education to assist contract-issuing parties, small businesses and consumers. It is acknowledged a number of stakeholders have raised concerns around the current insufficiency of clear guidance on what constitutes a UCT. It is therefore recommended the adoption of this option is considered in conjunction with increased education and awareness activities outlined in Option 2.

While there is a risk that regulator resourcing constraints could limit the amount of guidance materials produced, this risk can be mitigated by ensuring that education and guidance are targeted. In particular, consideration should be given to areas which stakeholders submit are areas where further education and guidance are needed (refer to Option 2). For example, stakeholders suggest there is a need for guidance that would assist in distinguishing between terms that may be ‘unfair’ and terms which, because they are reasonably necessary to protect the legitimate interests of the contract-issuing party, would not be considered ‘unfair’.

It is noted that, as well as regulators, all relevant peak bodies also have an important role to play in educating their members on UCTs, as well as general education on compliance with laws more broadly. As outlined in Option 2, a few peak bodies have already indicated their interest in working with regulators to improve awareness and education around UCTs.

In this way, concerns around the possibility that Option 3 could introduce an additional regulatory burden for business, increase compliance costs, prevent businesses from being able to protect their legitimate interests, capture businesses who inadvertently include a UCT in a contract, and result in possible reputational harm, can be mitigated through the provision of appropriate guidance and further education activities. Existing approaches regulators take towards compliance and enforcement (including the use of tools and strategies that do not involve litigation to achieve compliance in the majority of cases) will also help to mitigate these concerns.

### **Dispute resolution options**

Small business commissioners and small business ombudsmen can play an important role in assisting small businesses that are in dispute with other businesses, including in relation to alleged UCTs. This includes facilitating discussions between the small business and the other party. If necessary, access to external alternative dispute resolution services can sometimes be provided.

### Penalty amount

While a few stakeholders have commented on what penalty amount they believe courts should be able to impose,<sup>144</sup> this matter would be resolved when draft legislation is developed, should Option 3 be progressed. As with all other pecuniary penalties under the ACL and ASIC Act, a court would need to be satisfied that imposing a pecuniary penalty is appropriate in all the circumstances of an individual case.

### Business compliance costs

When the UCT protections were extended to small business contracts in 2016, it was anticipated that all Australian businesses would incur familiarisation costs, and businesses offering standard form contracts may need to review and amend contract terms and change certain business processes. At that time, it was expected that there would be a net annual compliance burden of around \$50 million in the first year, with no ongoing compliance costs. Option 3 does not introduce any new obligations for business so it is anticipated that the majority of compliance costs already occurred when the UCT protections were introduced.

Introducing a stronger deterrence effect could encourage some businesses to be proactive in re-examining contracts that had been previously reviewed. However, any such action is at the discretion of individual businesses. Other variables (such as how thoroughly a contract was previously reviewed) makes it challenging to quantify how many businesses may incur additional compliance costs and the total regulatory costs from Option 3. These costs are expected to be small (see Chapter 6 – Evaluation, conclusion and estimated regulatory burden, for more information).

### Competition effects

Some stakeholders submit that the risk of receiving a penalty might limit the degree to which a business can assign certain risks to the other party in return for a lower contract price. Some stakeholders also submit that any compliance cost associated with the intervention could be passed onto small businesses or consumers through a higher contract price. Suppliers may also respond by limiting their supply (or acquisition) of particular goods or services to small businesses, or moving to negotiated contracts for some transactions. For example, the Australian Industry Group argues that given the difficulty faced by a contract-issuing party in determining whether the other party is a small business, introducing civil penalties may have a dampening impact on the competitive negotiating environment broadly.<sup>145</sup>

The UCT protections were carefully designed to reduce unintended consequences and minimise interference with freedom of contract. Terms which are considered reasonably necessary to protect legitimate business interests cannot be considered unfair. Stakeholders raised similar concerns with the introduction of the UCT protections for small businesses in 2016. Evidence suggests that those consequences did not occur, including in financial product and service contracts. Standard form contracts continue to be widely used and there is no evidence to suggest that there was a significant impact on the price and supply of related goods and services.

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<sup>144</sup> E.g. Law Council Submission – SME Committee, p. 10; AAF submission, p.1, 4; MEA submission, p. 2; Law Council Submission – ACL Committee, p. 20; Sise, P submission pp. 7-9.

<sup>145</sup> Ai Group submission, p. 1.

Option 3 maintains an appropriate balance between protecting those businesses most likely to lack sufficient resources and bargaining power, while preserving contractual freedom and certainty, and encouraging businesses to take reasonable steps to protect their interests.

## Option 4 – Strengthened powers for regulators

### Option 4a – Regulators given the power to issue infringement notices

In addition to prohibiting UCTs in small business standard form contracts, regulators could also be given the power to issue infringement notices to further strengthen the deterrence effect of the UCT regime. As some state regulators do not currently have the ability to issue infringement notices for civil contraventions of the ACL, an infringement notice regime would only apply to relevant regulators (such as the ACCC and ASIC at the Commonwealth level).

Some regulators have the power to issue an infringement notice where it has reasonable grounds to believe that a person has contravened certain consumer protection provisions including:

- unconscionable conduct provisions;
- unfair practices provisions (except for certain sections e.g. section 18 of the ACL);
- certain unsolicited consumer agreement and lay-by agreement provisions; and
- certain product safety and product information provisions.

These regulators may also issue an infringement notice to a person for:

- failing to respond to a substantiation notice; or
- providing false or misleading information to the regulator in response to a substantiation notice.

An infringement notice is not a penalty issued by a regulator. If a party receives an infringement notice and chooses to pay it, the effect of doing so is that the regulator cannot take action against the party for the conduct set out in the infringement notice. If the party chooses not to pay an infringement notice, the regulator would then need to decide how to address the conduct in another way, which could include taking the matter to court in order to secure a pecuniary penalty. This means that infringement notices are reserved for instances where the regulator has a strong evidentiary and legal basis for believing that a breach of the ACL has occurred. The ACCC will only consider issuing an infringement notice where it is likely to seek a court-based resolution should the recipient of the notice choose not to pay.<sup>146</sup>

Infringement notices are designed to provide a timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the law. For example, where a potential contravention is isolated and where there is a less severe level of consumer or small business detriment. Additional benefits of infringement notices is that they can be combined with court-enforceable undertakings

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<sup>146</sup> *Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission*, p. 3. Available at: <https://www.accc.gov.au/system/files/Infringement%20notices%20-%20Guidelines%20on%20the%20use%20of%20infringement%20notices%20-%20July%202020.pdf>

offered by businesses in order to effect changes to businesses' practices, in addition to addressing past conduct<sup>147</sup> and can add flexibility to the regulatory toolkit, allowing regulators to proportionately and appropriately tailor enforcement responses to the full array of circumstances.<sup>148</sup>

Several stakeholders support giving regulators the power to issue infringement notices for including an unfair term in a small business or consumer standard form contract.<sup>149</sup> However, some stakeholders raise concerns around the appropriateness of giving regulators the power to issue infringement notices where there may be some uncertainty as to whether a term is unfair.<sup>150</sup> In addition, the Financial Services Council notes that, in its view, the application of an infringement notices regime for the UCT protections is inconsistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Infringement Notice Guide) published by the Attorney-General's Department.<sup>151</sup>

The Infringement Notice Guide states that the efficacy of an infringement notice scheme depends on the reliability of the assessments made by the enforcement officers as to whether an offence has occurred. To ensure accuracy, these assessments should be based on straightforward and objective criteria rather than complex legal distinctions.<sup>152</sup>

While the provisions around what may be considered an 'unfair' contractual term were drafted in such a way so as to provide flexibility in the administration of the regime, it is possible this could lead to circumstances where making a decision as to whether a term is unfair would require a regulator to exercise significant discretion in determining whether a penalty should be imposed on a recipient by way of infringement notice. Once penalties are introduced and the law continues to develop with further case law, the level of discretion that would need to be exercised in determining whether a term is unfair may reduce. This may mean that the use of infringement notices becomes a more appropriate enforcement option at a later stage. Consequently, it is recommended that infringement notices are not introduced at this time, but rather that regulators firstly focus on boosting their education and awareness activities (as discussed in Options 2 & 3) to provide greater clarity and certainty around the UCT regime and continue to engage with relevant parties about potentially unfair contractual terms before pursuing financial penalties.

It is recommended that further consideration of the appropriateness of applying an infringement notice regime to the UCT protection provisions is done so following the implementation of the preferred options in this Decision RIS (if adopted) and subsequent review into the effectiveness of these reforms.

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<sup>147</sup> ACCC submission, p. 5.

<sup>148</sup> ACCC submission, p. 3.

<sup>149</sup> E.g. ASBFEO submission, p. 2; OSBC submission, p. 1.; NSW SBC submission, p. 2; TIO submission, p.5; Spier Consulting submission, p. 3; AADA submission, p. 11; Buchan, J; Self-Employed Australia; Law Council Submission – SME Committee p. 9; NFIA submission, p. 13.

<sup>150</sup> E.g. AFIA submission, p. 7; DSA submission, p. 2; FSC submission, p. 3-4; Communications Alliance submission, p. 3.

<sup>151</sup> FSC submission, p. 3.

<sup>152</sup> *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, p. 58. Available at <https://www.ag.gov.au/sites/default/files/2020-03/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

### **Option 4b – Regulators given powers to determine a term is unfair and request it is varied**

This option would give regulators the power to determine whether a contractual term is unfair and request the contract-issuing party to vary the term. If a business wished to challenge a decision made by a regulator, they could appeal to a court or tribunal for merits or judicial review of the decision.

While several stakeholders support this option,<sup>153</sup> others suggest that in practice, this option could be expensive and time consuming<sup>154</sup> and not necessarily achieve a faster resolution compared to existing dispute resolution mechanisms or litigation.<sup>155</sup> In addition, a few stakeholders raise concerns around the appropriateness of transferring powers from the courts to regulators where the determination around whether a term is unfair could, in certain circumstances, be an exercise demanding considerable interpretation and judgement and could require a regulator to exercise significant discretion in making a determination.<sup>156</sup>

It is noted that a few stakeholders suggest that, rather than regulators, one or more dispute resolution bodies could be given the power to determine whether a contractual term is unfair. For example, the Australian Consumer Law Committee of the Legal Practice Section of the Law Council notes that most consumers will pursue disputes against insurers through AFCA and suggests that authorising AFCA to assess whether a contract term is unfair would in their view, significantly improve access to justice for vulnerable consumers.<sup>157</sup> While it is acknowledged there is some merit to such a suggestion, it is not currently considered an appropriate option. While some external dispute resolution schemes such as AFCA are already able to consider potential UCTs, such determinations are centred on assessing a complaint under the scheme, not exercising the power of a court. In addition, while AFCA is an external dispute resolution scheme for financial products, and other external dispute resolution schemes exist for energy, water and telecommunications, there is currently no external dispute resolution scheme which would provide full coverage for the UCT regime. Establishing a single dispute resolution body for the UCT regime, or even just a body to cover those matters not covered by AFCA (i.e. consumer and small business standard form contracts for goods, services and land), is not considered viable in this case given the significant costs involved. While such costs could be recovered from industry, this would ultimately put a cost burden on businesses.

As mentioned in Option 3 above, regulators already have a range of enforcement powers and use a range of administrative remedies to ensure compliance with the law. If a regulator has concerns that a standard form contract may contain UCTs, the regulator can engage with the relevant contract-issuing party about these terms. Some regulators can also accept a court enforceable undertaking with the contract-issuing party to resolve the matter in a timely manner. These

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<sup>153</sup> E.g. Buchan, J submission, p. 3; Law Council Submission – ACL Committee, p. 19; ANZ submission, p. 4; TIO submission, p. 5; ASBFEO submission, p. 2; NSW SBC submission, p. 3; OSBC submission, p. 2; NatRoad submission, p. 8; NIFA submission, p. 13; Gold Coast Family Car Rentals submission.

<sup>154</sup> AADA submission, p. 11.

<sup>155</sup> ASIC submission, p. 6; Communications Alliance submission, p. 4; CCIA NSW submission p. 3.

<sup>156</sup> E.g. AFIA submission, p. 7; DSA submission, p. 2; FCAI submission, p. 3; FSC submission, p. 3-4; AFIA submission, p. 7; Communications Alliance submission, pp. 3-4.

<sup>157</sup> Law Council Submission – ACL Committee, p. 20.



processes require the regulator forming a view about whether a term may be unfair, but a legally binding decision can only be made by a court or tribunal.

Option 4b would mean that a regulator would be able to make a binding determination about whether a term is unfair. While the contract-issuing party would be able to appeal a decision made by a regulator, they would need to appeal to a court or tribunal for merits or judicial review of the decision.

The scope for regulators to determine (rather than merely suggest) a party has breached a provision under legislation is generally limited to situations where doing so does not reflect a judgment as to the person’s guilt or liability, and where regulatory officers are not required to weigh evidence or draw conclusions as to legal responsibility. A regulator’s determination of whether a term is unfair could be viewed as an exercise which would require a regulator to exercise significant discretion in making a determination. It is recommended the final decision on whether a term is unfair continues to remain with courts and tribunals.

Table 1: Summary of the costs and benefits of legality and penalties options.

Option	Costs	Benefits
<b>Option 1</b> <b>Status quo</b>	<ul style="list-style-type: none"> <li>- Lack of effective deterrence against the use of UCTs, which would continue to remain prevalent.</li> </ul>	<ul style="list-style-type: none"> <li>- No additional compliance costs.</li> </ul>
<b>Option 2</b> <b>Strengthened compliance and enforcement activities</b>	<ul style="list-style-type: none"> <li>- Not sufficient alone to provide effective deterrence against the use of UCTs, may require additional resources to strengthen compliance and enforcement activities.</li> </ul>	<ul style="list-style-type: none"> <li>- Increased education and awareness of the UCT protections.</li> </ul>
<b>Option 3</b> <b>Make UCTs unlawful and allow a court to impose a civil penalty</b>	<ul style="list-style-type: none"> <li>- Possible compliance costs = some larger businesses may decide to review their standard form contracts in light of penalties being introduced.</li> </ul>	<ul style="list-style-type: none"> <li>- Stronger deterrence against the use of UCTs.</li> <li>- Reduced prevalence of UCTs.</li> <li>- More efficient allocation of risk.</li> <li>- Improved small business and consumer confidence when entering in to standard form contracts.</li> </ul>
<b>Option 4a</b> <b>Infringement notices</b>	<ul style="list-style-type: none"> <li>- Determining whether a contractual term is unfair may better rest with courts and tribunals at this stage.</li> </ul>	<ul style="list-style-type: none"> <li>- Could provide a timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the law.</li> </ul>

Option	Costs	Benefits
<b>Option 4b</b> <b>Regulator determinations</b>	- Degree of subjectivity involved in determining whether a contractual term is unfair may better rest with courts and tribunals.	- May provide a more accessible remedy than commencing court proceedings.

For the reasons above, Option 3 will generate the greatest net benefit for the community and is therefore the preferred option.

## Flexible remedies

### Option 1 – Status quo

In general, stakeholders were not supportive of maintaining the status quo, and there was general support for implementing flexible remedies. ASBFEO states in its submission that it is important that remedies available for UCTs are flexible and proportionate<sup>158</sup> while ASIC considers that the use of flexible remedies would promote the fairness objectives of the UCT laws.<sup>159</sup>

Under the status quo, there is the potential that a UCT, if challenged and declared void, could put the small business into a worse situation than if the unfair term were to remain. The NFF illustrates this issue in its submission saying that the nature of primary production markets means small farm businesses can have few if any choices with regard to the processors or purchasers they must deal with and voiding a contract can deprive a primary producer from accessing the only viable purchaser of their product which, in effect, could close the business.<sup>160</sup> AFIA highlights similar issues in credit contracts say that if credit contracts are rendered inoperative and unenforceable, this can have material impact on credit providers and can trigger the withdrawal of funding to small businesses. AFIA submits it is therefore sensible, in such cases, for the court to be able to apply remedies that it determine are the most flexible to the benefit of both parties– including to vary the terms to allow a contract to remain on foot.<sup>161</sup>

### Option 2 – UCTs not automatically void; court given power to determine the appropriate remedy

Option 2, which would give courts the flexibility to order an appropriate remedy when a small business contract term is found to be unfair, received strong support from a number of small and large business representatives, as well as regulators. ASIC notes in its submission to that removing

<sup>158</sup> ASBFEO submission, p. 2.

<sup>159</sup> ASIC submission, p. 7.

<sup>160</sup> NFF submission, p. 8.

<sup>161</sup> AFIA submission, p. 8.

the automatic voiding of UCTs may promote the fairness objective of the UCT protection provisions by providing flexibility and ensuring that small businesses have access to remedies that are tailored to the specific circumstances of their case.<sup>162</sup> The ACCC considers that removing the automatic voiding of a UCT and empowering the court to determine the appropriate remedy, including the power to vary the term, would allow for a more just, flexible, and mutually beneficial outcome.<sup>163</sup> Some industry stakeholders note that the experience and expertise of courts make them well placed to decide on an appropriate remedy in a case concerning UCTs. The FCAI notes that courts are used to crafting remedies that address the loss suffered by a complainant and that the FCAI is confident that courts would be able to do this in the context of UCTs,<sup>164</sup> while the Insurance Council notes that courts should have the power to determine the most appropriate remedy.<sup>165</sup>

### Option 3 – Clarify that remedies for ‘non-party consumers’ also apply to ‘non-party small businesses’

Option 3, clarifying that remedies for ‘non-party consumers’ also apply to ‘non-party small businesses’ received strong support from stakeholders, as a means to confirming this redress option is accessible to small businesses. The ACCC states in its submission this option would benefit small businesses and make enforcement action more effective, increasing the efficacy of the UCT regime.<sup>166</sup> ASIC also supports this option, stating it would be consistent with the purpose and intent of extending the UCT protections to small businesses and would clarify what remedies are available.<sup>167</sup>

The Telecommunications Industry Ombudsman notes the benefits that would flow to small business from this option, specifically that it would promote consistency and ensure small businesses, who cannot afford the cost of pursuing litigation, are not at a disadvantage.<sup>168</sup> The NFF similarly submits that this option would dilute the negative impact on commercial relationships that many small farming businesses will continue to rely on after a case is concluded.<sup>169</sup>

While some stakeholders suggest that this option would turn a regulator into a class action lawyer, it does not increase access to class action nor does it explicitly create additional powers for regulators.<sup>170</sup> Rather, Option 3 aims to ensure that remedies available for non-party consumers would also apply to non-party small businesses. The benefits to small business from this option are predicted to outweigh any costs.

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<sup>162</sup> ASIC submission, p. 7.

<sup>163</sup> ACCC submission, p. 3.

<sup>164</sup> FCAI submission, p. 4.

<sup>165</sup> Insurance Council submission, p. 3.

<sup>166</sup> ACCC submission, p. 4.

<sup>167</sup> ASIC submission, p. 7.

<sup>168</sup> TIO submission, p. 6.

<sup>169</sup> NFF submission, p. 9.

<sup>170</sup> Prospa submission, p. 5.

## Option 4 – Create a rebuttable presumption provision for UCTs used in similar circumstances

This option involves amending the law to create a rebuttable presumption that a contract term is unfair if, in a separate case, the same or a substantially similar term has been used by the same entity or in the same industry sector and declared by a court to be unfair. Feedback received through consultation indicates that stakeholders are, for the most part, supportive of this option, on the premise that will reduce the prevalence of UCTs.<sup>171</sup>

If a court declares a term is unfair and a business uses the same term in another contract in similar circumstances, the onus should be on that business to demonstrate why it is not unfair in the circumstances. A rebuttable presumption would create a presumption that a term found to be unfair in one standard form contract would also be an unfair term in another standard form contract used by the same contract-issuing party, or in the same industry sector, unless the contract-issuing party can provide evidence to satisfy a court or tribunal that the term is not unfair in the circumstances of the case. This option would still rely on a regulator or aggrieved party commencing legal action, but it shifts the evidential burden onto the contract issuing party.

Contract-issuing parties are often better resourced than their small business or consumer contractors to provide evidence in a court that a particular term is not unfair in the circumstances. The general justification for shifting the evidentiary onus in this way is that the relevant matters are particularly within the knowledge of the respondent.

Proceeding with this option will be subject to further consideration of the legal and practical implications. The Senate Scrutiny of Bills Committee has previously expressed the view that presumptions should be kept to a minimum and a strong justification for them must be provided. The ACCC notes, for example, that this presumption would give greater certainty to consumers and small businesses and make it easier for them to effectively enforce their rights under the UCT regime. However, the ACCC also submits further consideration will need to be given to how to appropriately frame any such rebuttable presumption to ensure the scope is appropriate.<sup>172</sup>

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<sup>171</sup> TIO submission, p. 6; NFF submission, p.8.

<sup>172</sup> ACCC submission, p. 4.

Table 2: Summary of the costs and benefits of flexible remedies options.

Option	Costs	Benefits
<p><b>Option 1</b> <b>Status quo</b></p>	<ul style="list-style-type: none"> <li>- If a UCT is challenged and declared void, the small business could be in a worse situation than if the unfair term were to remain.</li> <li>- Small businesses may continue to be discouraged from challenging potential unfair terms, which may increase the inclination of other businesses to include such terms in their contracts.</li> </ul>	
<p><b>Option 2</b> <b>UCTs not automatically void</b></p>		<ul style="list-style-type: none"> <li>- Provides a flexible way forward for continuing a contract that may otherwise be unworkable, benefiting both parties.</li> </ul>
<p><b>Option 3</b> <b>Remedies for non-party small businesses</b></p>		<ul style="list-style-type: none"> <li>- Remedies available for non-party consumers would also apply to non-party small businesses, allowing courts to redress loss or damage suffered by small businesses who may have been affected by the unfair term but are not a party to the proceedings.</li> </ul>
<p><b>Option 4</b> <b>Rebuttable presumption</b></p>	<ul style="list-style-type: none"> <li>- Contract-issuing parties will need to monitor and update standard form contract terms if a term is found to be unfair.</li> <li>- Contract-issuing parties would bear an evidential burden in legal proceedings to prove that certain terms already found to be unfair in similar circumstances were not unfair in the current case.</li> </ul>	<ul style="list-style-type: none"> <li>- Contract-issuing parties will be more motivated to remove any terms in their standard form contracts that a court has already declared unfair, or may be likely to be unfair.</li> </ul>

Options 2, 3, and 4 will generate the greatest net benefit for the community and are the preferred options.

## Definition of small business contract

### Headcount/turnover threshold

#### Option 1 – Status quo

Submissions to the consultation do not support the current headcount threshold of less than 20 employees as a simple proxy for defining ‘small business’ (Option 1). For example:

*The ACF considers that particularly the hospitality industry is impacted by the current headcount threshold of 20 employees. During busy periods as a seasonal business, the number of employees may increase over the prescribed 20 employees for that period. This is confusing and it is unclear as to whether they are considered a small business.*<sup>173</sup>

*...a strict limit on definition of a small business for the purpose of UCT protection does not adequately address the circumstances where the power differences between a franchisor and its franchisee is so large as to make it impossible for contracts to be negotiated on a level playing field.*<sup>174</sup>

*The current headcount threshold of employing fewer than twenty persons at a time does not adequately protect a multitude of agricultural businesses that are vulnerable to UCTs in standard form contracts. Agricultural industries, particularly horticulture, hire seasonally to meet the demand of various activities including planting, pruning and picking. At these times, many horticultural businesses exceed the total headcount threshold that prevents them from receiving protections from UCTs.*<sup>175</sup>

*...the current 20 employee headcount threshold is much too low, as it does not include many businesses treated for other purposes as small businesses, including those with large seasonal or casual workforces.*<sup>176</sup>

*We note that under the current law, one of the requirements for a contract to be considered a small business contract is that at least one party to the contract employs fewer than 20 persons at the time the contract is entered. While this definition covers around 97 per cent of Australian businesses, some businesses are unintentionally excluded from the coverage.*<sup>177</sup>

*As accommodation providers operating in a seasonal industry, caravan parks can employ large numbers of casual employees during peak holiday times. Even though many are small businesses, with limited financial resources and negotiation powers, this seasonal labour*

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<sup>173</sup> ACF submission, p.3.

<sup>174</sup> AADA submission, p.3.

<sup>175</sup> NSW Farmers submission, p.8.

<sup>176</sup> Law Council submission – SME Committee, p.10.

<sup>177</sup> NSW SBC submission, p. 3.

*demand can cause them to become ineligible for the unfair contract terms protections during their busy periods.*<sup>178</sup>

*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.*<sup>179</sup>

*As accommodation providers operating in a seasonal industry, caravan parks can employ large numbers of casual employees during peak holiday times. Even though many are small businesses, with limited financial resources and negotiation powers, this seasonal labour demand can cause them to become ineligible for the unfair contract terms protections during their busy periods.*<sup>180</sup>

In addition, several stakeholders have advised that the fewer than 20 person headcount threshold is inconsistent with other commonly used proxies to define small business which can create uncertainty and confusion for small business.

Contract-issuing parties also advise it can be practically difficult for contract-issuing parties to determine if a contract would meet the definition of a small business contract based on employee numbers.<sup>181</sup> In addition, as a business' headcount can fluctuate significantly over time, this creates challenges for contracting parties to identify which of their standard form contracts are subject to the UCT protections. This can be particularly difficult when businesses who respond to seasonal labour demands are involved, due to the fluctuation of their employee numbers.

## Option 2 – Replace 20 person headcount threshold with \$10 million annual turnover threshold

Option 2, which involves replacing the headcount threshold with a \$10 million annual turnover threshold, would likely enable more small businesses to be covered by the protections. The Australian Food and Grocery Council suggests the inclusion of a turnover threshold for the definition of a small business will aid all parties to contract negotiations as it provides a clearer delineation for those seeking to deal with small businesses as well as ensuring small businesses with staff numbers that fluctuate seasonally still benefit from the protections.<sup>182</sup> Further, as the ATO already uses a \$10 million annual turnover threshold as a proxy for defining small business, a small business is more likely to already know whether it meets this definition.<sup>183</sup>

However, while Option 2 would more appropriately align the protections with those businesses who need the protection, including small businesses that operate in labour-intensive but low-revenue

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<sup>178</sup> CCIA NSW submission, 4.

<sup>179</sup> NIFA submission, p. 14.

<sup>180</sup> CCIA NSW submission, p. 4

<sup>181</sup> E.g. HIA submission, p. 10; AICM submission, p. 4.

<sup>182</sup> AFGC submission, p. 1.

<sup>183</sup> ACCC submission, p.5.

industries, <sup>184</sup> it may not cover small businesses that operate in high turnover but low-profit industries. ASIC suggests this could have the unintended consequence of essentially replacing one excluded cohort of small businesses with another. <sup>185</sup> DSA agrees, saying that an analysis of current DSA membership indicates that 18 companies that meet the current less than 20 employee headcount would no longer have their contract covered by the UCT protections if the test was limited to only a \$10 million turnover as their annual turnover exceeds this threshold. DSA adds that many of its members can experience significant growth over the course of several years and it is quite conceivable that under a turnover only test, these members qualify as a small business one year but not the next and that employee growth may represent a more stable indicator of business growth depending on the nature of the business or industry. <sup>186</sup>

NFIA also raises concerns with replacing the current headcount threshold with only a turnover threshold as annual turnover does not equate to net profit and therefore, annual turnover should never be used exclusively to define a small business because it could exclude legitimate small businesses which have a low annual income even though their turnover is high. <sup>187</sup> The AADA supports this saying that new car Dealerships are capital-intensive organisations that exhibit high turnovers due to the nature of the products and services they provide and but operate on very slim profit margins. <sup>188</sup>

In terms of insurance contracts, the Insurance Council considers a turnover threshold is problematic because it reflects the gross cost of service rather the size of a company. It suggests, for example, that \$10 million of consultancy work will require a much larger size of company than \$10 million for an importing business wholesaling heavy machinery, where one item might be worth several million but requires only a small number of employees. <sup>189</sup>

### Option 3 – At least one party to meet a less than 100 person headcount threshold OR less than \$10 million annual turnover threshold

Option 3 builds on Option 2 by providing a small business would only need to meet one of two thresholds for defining small business. Specifically, a standard form small business contract would be covered by the protections if at least one party to the contract has either less than 100 employees or an annual turnover of less than \$10 million.

During consultation, Option 3 was the option most favoured by stakeholders. For example, ASBFEO believes this provides the most expansive operation of the UCT protections and leverages existing definitions of ‘small business’. <sup>190</sup> The OSBC agrees this option is the most effective and appropriate definition of small business for the purpose of the UCT protections. <sup>191</sup> ASIC also agrees that this

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<sup>184</sup> ACCC submission, p.5.

<sup>185</sup> ASIC submission, p.9.

<sup>186</sup> DSA submission, pp. 2-3.

<sup>187</sup> NFIA submission, p.14.

<sup>188</sup> AADA submission, p. 7.

<sup>189</sup> Insurance Council submission, p. 3.

<sup>190</sup> ASBFEO submission, p. 3.

<sup>191</sup> OSBC submission, p. 2.



option would also cover a greater number of small businesses with less negotiating power and fewer resources, thereby addressing the problem this option attempts to solve. ASIC also notes that the option of a combined headcount and annual turnover threshold would make it easier for contract-issuing parties to identify whether a contract is a small business contract.<sup>192</sup> Option 3 is also supported by several other stakeholders.<sup>193</sup>

Regarding the headcount threshold component of this option, ASIC advises that it would be consistent with the way AFCA applies protections to small businesses (being 100 employees) and that aligning these two approaches in the financial services space may simplify the application of the UCT framework and would ensure that all small businesses that have access to the UCT protections also have access to external dispute resolution as one means of using those protections.<sup>194</sup> The AADA advises that it believes an increased headcount threshold of 100 persons would likely capture the majority of standalone Dealership operations but notes it would need to take into consideration ‘full-time equivalent’ number of staff so as to account for part time workers.<sup>195</sup>

In terms of the proposal to set the annual turnover threshold at \$10 million, there were no objections to this amount when used in combination with the proposed headcount threshold of less than 100 employees. As mentioned above, as the ATO already uses a \$10 million annual turnover threshold as a proxy for defining small business, a small business is more likely to already know whether it meets this definition. The NSW SBC notes that while numerous definitions are used to categorise a firm as a small business in Australia for different purposes, it considers that the ATO turnover threshold would serve as a reasonable benchmark and make it easier for parties to identify whether a contract would be considered a small business contract for the purposes of UCT protections.<sup>196</sup>

Table 3: Summary of the costs and benefits of definition of ‘small business contract’: headcount/turnover threshold options.

Option	Costs	Benefits
<p><b>Option 1</b> <b>Status quo</b></p>	<ul style="list-style-type: none"> <li>- Will not cover all small businesses that should benefit from the protections.</li> <li>- Information on employee numbers not readily available and could fluctuate throughout the year.</li> <li>- Could create uncertainty as to whether the protections apply.</li> </ul>	

<sup>192</sup> ASIC submission, p. 9.

<sup>193</sup> E.g. NIFA submission, p. 4; National Precast submission, p. 7; NSW Farmers submission, p. 8; SBDC submission, p. 6; AFRA submission, p. 4; CCIA NSW submission p. 5; MTA Queensland, p. 3; NatRoad submission, p. 8.

<sup>194</sup> ASIC submission, p. 9.

<sup>195</sup> AADA submission, p. 7.

<sup>196</sup> NSW SBC submission, p. 4.

Option	Costs	Benefits
<p><b>Option 2</b></p> <p><b>Replace 20 person headcount threshold with \$10 million annual turnover threshold</b></p>	<ul style="list-style-type: none"> <li>- May not cover small businesses operating in high turnover but low-profit industries (may have the unintended consequence of essentially replacing one excluded cohort of small businesses with another).</li> </ul>	<ul style="list-style-type: none"> <li>- Threshold consistent with ATO definition of ‘small business entity’.</li> <li>- Will likely cover small businesses operating in labour-intensive but low-revenue industries.</li> <li>- Information on turnover threshold is readily available compared to employee numbers.</li> </ul>
<p><b>Option 3</b></p> <p><b>At least one party to meet a less than 100 person headcount threshold OR less than \$10 million annual turnover threshold</b></p>		<ul style="list-style-type: none"> <li>- Will likely cover the greatest number of small businesses.</li> <li>- Headcount threshold consistent with AFCA and ASBFEO definitions.</li> <li>- Turnover threshold consistent with ATO definition of ‘small business entity’.</li> <li>- Provides greater certainty about whether the protections apply and assists contract-issuing parties to comply with the law.</li> </ul>

Option 3 is the preferred option as it would cover a greater number of small businesses. It would also provide greater certainty about whether the protections apply and assist contract-issuing parties to comply with the law by aligning the definition of small business with commonly used definitions of small business.

## Related bodies corporate

### Option 1 – Status quo

This option would retain the current law and not state whether employees of ‘related bodies corporate’ are to be included when calculating employee numbers for the purposes of the UCT protections for small business contracts.

Some stakeholders suggest that under the status quo, there is a possibility that a subsidiary or special purpose entity of large a business could be covered by the UCT protections if they were to meet the

headcount threshold (or the turnover threshold, if Option 2 or 3 above is adopted).<sup>197</sup> However, no evidence was provided to suggest this is currently occurring, nor was any evidence provided to suggest the current approach is intervening in contract negotiations between medium to large business or having a negative impact on small businesses.

## Option 2 – Related bodies corporate relevant in determining employee numbers and annual turnover

This option involves amending the current law to specify that employees of ‘related bodies corporate’ are to be included when calculating employee numbers for the purposes of the UCT protections for small business contracts.

If amendments are made to the current headcount threshold (either through adopting headcount/turnover threshold in Option 2 or Option 3), this option would involve amending the current law to specify that:

- any related bodies corporate would be considered relevant in determining annual turnover for the purposes of the UCT protections for small business contracts (if Option 2 is adopted); or
- employees of related bodies corporate are to be included when calculating employee numbers and any related bodies corporate would be considered relevant in determining annual turnover for the purposes of the UCT protections for small business contracts (if Option 3 is adopted).

This option would help to address the concern that a subsidiary or special purpose entity of large a business should not be covered by the UCT protections where such a subsidiary or entity clearly has access to the financial means or support required to protect its commercial interests when entering into standard form contracts, or to avoid standard form contracts altogether by using its bargaining power to negotiate contracts.

However, no evidence has been provided to suggest that there is a need to prevent such practices. Instead, some stakeholders raise concerns that this option could create some complexities compared to the current situation. For example, the Insurance Council believes that it is impractical to aggregate headcount or annual turnover thresholds for a business and its related bodies corporate to determine whether the UCT regime thresholds apply where that business is part of a large corporate group, as it considers such information is fluid and non-transparent.<sup>198</sup> In addition, NFIA suggests that requiring subsidiary employee numbers to be considered relevant in determining employee numbers would add another layer of complexity to an already complex situation.<sup>199</sup>

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<sup>197</sup> E.g. SCCA submission, p. 4; Sise, P submission, p. 18.

<sup>198</sup> Insurance Council submission, p. 3.

<sup>199</sup> NFIA submission, p. 14.

Table 4: Summary of the costs and benefits of definition of ‘small business contract’: related bodies corporate options.

Option	Costs	Benefits
<b>Option 1</b> <b>Status quo</b>	<ul style="list-style-type: none"> <li>- A subsidiary or special purpose entity of large a business could be covered by the UCT protections, although there is no evidence of problems occurring.</li> </ul>	-
<b>Option 2</b> <b>Related bodies corporate relevant in determining employee numbers and annual turnover</b>	<ul style="list-style-type: none"> <li>- Creates additional complexity in the law.</li> <li>- May be impractical to aggregate headcount or annual turnover thresholds for a business and its related bodies corporate, as such information can be fluid and less easily determined.</li> </ul>	<ul style="list-style-type: none"> <li>- Addresses the concern that a subsidiary or special purpose entity of large a business could be covered by the UCT protections.</li> </ul>

Given there is currently no evidence to suggest there is a problem with the present situation, the greatest net benefit to the community would be to maintain the status quo (Option 1). Maintaining the status quo will not have any compliance cost on businesses, as businesses are already familiar with the current law.

## Contract value threshold

Submissions to the consultation indicated strong support to change the status quo, with many stakeholders sharing the view that the existing thresholds are too low. Several stakeholders submit that, in terms of the UCT protections, the bargaining power of a small business does not depend on the value of the contract.<sup>200</sup> Regardless of the contract’s value, the fact that it is a standard form contract means there are very limited (if any) opportunities to negotiate its terms.

As noted in Chapter 1 – The problem, stakeholders note that in certain industry sectors, businesses which are ordinarily classed as a small businesses may not have their contracts covered by the UCT protections due to the nature of their business, including in cases where a contract value may fluctuate based on market condition. It is also noted that the current contract value threshold limits the protections in cases where a contract-issuing party draws out the term of the contract or packages multiple contracts as a way to circumvent the threshold, or as part of their normal dealings, simply includes multiple contracts in one, which inadvertently pushes the overall value of the contracts above the threshold.

<sup>200</sup> E.g. MEA submission, p. 6; NatRoad submission, p. 8; CCIA NSW submission, p. 6.

## Option 1 – Status quo

Stakeholders submit that the current contract value threshold for the UCT protections is too low, particularly in industries where businesses operate with high value contracts but low profit margins, including agriculture and motor vehicle retailing. The NFF notes farming businesses tend to be capital intensive, with high revenue but low profit margins and the value of contracts for heavy farming equipment or supply of produce is normally higher than the current value threshold. The NFF adds that while a farmer may enter into a contract that exceeds the current value threshold for the protections, it is often the only supply agreement the farmer will enter in to.<sup>201</sup> Similarly, the AADA submits that new car retailing, like farming, is capital intensive and exhibits high turnover and very low profit levels.<sup>202</sup> Further, ASIC notes the current threshold may not adequately address circumstances where the upfront price of the contract is uncertain (e.g. a contract price may be determined as a percentage of an unknown amount, such as the commission on the sale of a property or a franchise royalty calculated as a percentage of future sales).<sup>203</sup> ASBFEO also indicates it does not support maintaining the status quo as it believes it is far too low.<sup>204</sup>

Under this option, uncertainty over whether a contract is covered by the UCT protections would persist, especially for those contracts that do not have a clear up front price payable.

## Option 2 – Increase contract value threshold to \$5m per contract, regardless of contract duration

This option received some support from stakeholders as an improvement to the status quo. ASBFEO submits this option is most likely to capture small business contracts without being overly burdensome.<sup>205</sup> ASIC notes that raising the contract value threshold to \$5 million for financial products and services would align with the definition used by AFCA.<sup>206</sup> CCIA NSW, however, submits that in the case of the UCT regime, the value of a contract is not necessarily an accurate reflection of bargaining power.<sup>207</sup>

Other stakeholders also raise concerns about the limitations of this option including that, while it would be an improvement to the status quo, it would still exclude some long term contracts. For example, NSW Farmers notes a \$5 million dollar contract value may exclude long term contracts that may seem high but which farmers have had limited opportunity to effectively negotiate the terms for. NSW Farmers adds that an appropriate threshold would ensure that farming businesses, which would otherwise be in a weaker position to negotiate their contracts, would benefit from the UCT protections.<sup>208</sup>

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<sup>201</sup> NFF submission, p. 9.

<sup>202</sup> AADA submission, p. 6.

<sup>203</sup> ASIC submission, p. 11.

<sup>204</sup> ASBFEO submission, p. 3.

<sup>205</sup> ASBFEO submission, p. 3.

<sup>206</sup> ASIC submission, p. 11.

<sup>207</sup> CCIA NSW submission, p. 6.

<sup>208</sup> NSW Farmers submission, p.8.

### Option 3 – Remove the contract value threshold altogether

Option 3 would remove the requirement for a standard form contract to be under a certain value in order for the UCT protections to apply. This option received strong support from stakeholders, including small business representatives and regulators. ASIC notes that removing the value threshold entirely would benefit small businesses because they are not ordinarily in a position to negotiate standard form contracts regardless of the contractual value.<sup>209</sup> The ACCC similarly notes that this option would assist in achieving the intended outcomes of the UCT protections. Specifically, the ACCC submits that where a small business has no effective opportunity to negotiate a standard form contract and has no meaningful choice about whether to enter into the standard form contract, then regardless of the value of the contract, the UCT protections are necessary and appropriate.<sup>210</sup>

The NSW SBC notes that this option provides certainty a contract will not be excluded from UCT protections based on value, which is helpful for larger contracts and where the upfront contract price is not clear at time of signing and that small businesses require UCT protections irrespective of contract value.<sup>211</sup> Similarly, the SBDC also supports this option, noting that it will ensure that regardless of contract value, small business contracts will be covered by the UCT protections.<sup>212</sup>

Stakeholders also note that, compared to the status quo and Option 2, this option would overcome issues relating to uncertainty around whether the UCT protections apply, based on the value of the contract, particularly when a contract value may fluctuate based on market conditions.<sup>213</sup> In addition, some stakeholders note that removing the contract value threshold would not necessarily capture contracts that are not small business contracts, as the requirement to meet a headcount threshold (or turnover threshold, if adopted) and for a contract to be a standard form contract would remain.<sup>214</sup>

While at least one stakeholder raises concerns that removing the contract value threshold altogether may result in small businesses failing to undertake due diligence,<sup>215</sup> the ACCC notes it has seen no evidence that the UCT regime has disincentivised consumers or small businesses from conducting appropriate due diligence. The ACCC adds that if there is any disincentive, it expects it comes from the lack of an effective opportunity to negotiate and the lack of a meaningful choice about whether or not to enter the contract, rather than from the existence of the UCT protections.<sup>216</sup>

Table 5: Summary of the costs and benefits of definition of ‘small business contract’: contract value threshold options.

Option	Costs	Benefits
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<sup>209</sup> ASIC submission, p. 12.

<sup>210</sup> ACCC submission, p. 5

<sup>211</sup> NSW SBC submission, p. 4.

<sup>212</sup> SBDC submission, p. 6.

<sup>213</sup> E.g. SBDC submission, p. 6; NFF submission, pp. 9-10.

<sup>214</sup> E.g. AICM submission, p.5.

<sup>215</sup> SCCA submission, p. 5.

<sup>216</sup> ACCC submission, p. 5.

<p><b>Option 1</b> <b>Status quo</b></p>	<ul style="list-style-type: none"> <li>- Uncertainty over UCT protections will persist for small businesses, particularly where contracts do not have a clear upfront price payable.</li> </ul>	
<p><b>Option 2</b> <b>Increase contract value threshold to \$5m per contract, regardless of contract duration</b></p>	<ul style="list-style-type: none"> <li>- Some small business contracts will still fall outside the scope of UCT protection, including businesses with long term or high value but low profit margin contracts.</li> </ul>	<ul style="list-style-type: none"> <li>- Extends coverage of the UCT protections to a larger proportion of small business contracts.</li> </ul>
<p><b>Option 3</b> <b>Remove the contract value threshold altogether</b></p>	<ul style="list-style-type: none"> <li>- Small businesses may fail to undertake due diligence.</li> </ul>	<ul style="list-style-type: none"> <li>- Provides the most certainty that a small business contract will not be excluded from UCT protections based on a value threshold, across industry sectors that may otherwise be excluded because of high value, low profit margin contracts.</li> <li>- Provides certainty for those contracts where the upfront value may not be clear at the outset.</li> <li>- Increases clarity on the application of the protections for both contracting parties.</li> </ul>

Option 3 would provide the greatest net benefit to the community and is therefore the preferred option.

## Clarity on ‘standard form contract’

### Option 1 – Status quo

Submissions to the consultation supported the need for additional clarity to define a standard form contract. ASBFEO states that retaining the status quo is not appropriate <sup>217</sup> and it is important that greater clarity is provided on what is considered a standard form contract. <sup>218</sup> ASIC echoes these

<sup>217</sup> ASBFEO submission, p. 4.

<sup>218</sup> ASBFEO submission, p.3.

views, stating it considers there is an opportunity to provide additional clarity on what a standard form contract is for the benefit of regulators, small businesses and contract-issuing parties.<sup>219</sup>

### Option 2 – Court must consider ‘repeat usage’ in determining a ‘standard form contract’

Option 2, which would require courts to consider ‘repeat usage’ in determining whether a contract is a standard form contract, received support from small and large business representatives, as well as regulators. The ACCC supports including repeat usage as a factor in determining both business-to-consumer and business-to-business standard form contracts,<sup>220</sup> and ASIC notes that ‘repeat usage’ is a more objective factor that takes into account occasions where a contract-issuing party has used the same contract or the same core terms and conditions in multiple contracts.<sup>221</sup> Given this option is not a major change from the current regulatory position, some stakeholders note the proposal is a matter of common sense,<sup>222</sup> and 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 contract.<sup>223</sup>

Feedback received also notes the need to properly define ‘repeat usage’ to ensure contracting parties are clear on whether using the same contract twice would meet the threshold of ‘repeat’.<sup>224</sup> This is an issue that will be considered during the legislative drafting stage, should Option 2 be progressed.

### Option 3 – Clarify actions which do not constitute an ‘effective opportunity to negotiate’

A number of stakeholders emphasised that the real issue in defining whether a contract is standard form contract, is whether there has been an effective opportunity to negotiate.<sup>225</sup> Option 3 received strong support from stakeholders. One stakeholder notes that embedding examples of actions which do not constitute an effective opportunity to negotiate in the legislation would assist in reducing the current confusion on the UCT regime more broadly.<sup>226</sup> NSW Farmers, which supports this option, comments that clarification around the wording of effective opportunity to negotiate is essential to ensure that small businesses that deal with a contract-issuing business, where there is an imbalance of negotiating power, are covered by the UCT protections. NSW Farmers submits that it is not always clear to small businesses that they are signing up to a standard form contract and that it is also important to ensure that contract-issuing businesses are not able to make minor changes to its contracts with small businesses to prevent these contracts from being covered by the protections.<sup>227</sup>

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<sup>219</sup> ASIC submission, p. 13.

<sup>220</sup> ACCC submission, p. 5.

<sup>221</sup> ASIC submission, p. 13.

<sup>222</sup> AFIA submission, p. 10-11.

<sup>223</sup> Consumer Action Law Centre, Financial Rights Legal Centre and WEstjustice joint submission, p. 11.

<sup>224</sup> Spier Consulting submission, p. 4.

<sup>225</sup> E.g. ALNA submission, p. 2; Spier Consulting submission, p. 4.

<sup>226</sup> ACF submission, p. 4.

<sup>227</sup> NSW Farmers submission, p. 10.



Table 6: Summary of the costs and benefits of clarity on standard form contracts options.

Option	Costs	Benefits
<b>Option 1</b> <b>Status quo</b>	- Businesses and consumers may continue to face uncertainty and lack of clarity around the operation of UCT laws.	
<b>Option 2</b> <b>Court must consider ‘repeat usage’</b>		- Will provide additional clarity on the definition of a standard form contract.
<b>Option 3</b> <b>Clarify actions which do not constitute an ‘effective opportunity to negotiate’</b>		- Will provide additional clarity on the definition of a standard form contract.

Options 2 and 3 will generate the greatest net benefit for the community and are therefore the preferred options.

## Minimum standards

### Option 1 – Status quo

Under the status quo, industry-specific requirements which are required, or expressly permitted, to be included in contractual agreements by a law of the Commonwealth, a state or a territory, are exempt from the application of the UCT protections by virtue of s26(1)(c) of the ACL. The exclusion of terms ‘required, or expressly permitted, by a law of the Commonwealth or a State or Territory’ ensures that a court is not required to determine the fairness of terms that are required to be included, or expressly permitted to be included, in contracts as a matter of public policy.

Some Commonwealth, state or territory laws require that, if certain clauses are included in a contract (Clause X), terms setting industry-specific requirements must also be included in the contract (Terms A, B, C, etc.). For example, state and territory retail lease legislation provides that, should a demolition clause (Clause X) be included in a retail lease agreement, certain requirements relating to the demolition (Terms A, B, C, etc.) must also be included in the agreement, or in some cases are taken to be automatically included in the agreement. Two specific examples of Terms A, B, C, etc. in this case are:

- a landlord cannot terminate a retail lease agreement on the grounds of demolition unless the landlord has given the tenant at least six months written notice of the termination date; and

- a demolition is to occur within a reasonably practicable time after the lease is to be terminated.<sup>228</sup>

While Terms A, B, C, etc. are required by a law of a state and therefore cannot be declared unfair, the headline clause (Clause X) is not ‘expressly permitted’ nor ‘required’ in the way envisaged by s26(1)(c). This means that Clause X could be challenged as unfair, despite a state parliament having already contemplated the inclusion of Clause X in a contract, by virtue of requiring the minimum standards (Terms A, B and C etc.) should Clause X be included in the contract.

Concerns have been raised that the ability to challenge a headline clause (Clause X) could create uncertainty for the parties to the contract. For example, the SCCA raises concerns that under the status quo, a demolition clause (Clause X) could possibly be challenged as being unfair after a contract is signed, which could impact proposed redevelopments, cause considerable disruption and create uncertainty for other affected tenants, and, potentially, make the redevelopment unviable.

## Option 2 – Provide an exemption for certain terms which meet minimum standards

This option would enable certain headline clauses (e.g. Clause X) that are not necessarily ‘required’ or ‘expressly permitted’ by legislation to be exempt from the application of the UCT protections, but only to the extent that they also include ‘minimum standards’ or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation (that is, Terms A, B, C, etc.). An example of the type of clause (Clause X) that might be exempt is a ‘demolition clause’ in a retail lease agreement, as described above.

When the UCT protections were extended to small business standard form contracts, care was taken to reduce unintended consequences, and minimise interference with the freedom of parties to contract. For example, terms which are considered reasonably necessary to protect legitimate business interests cannot be considered unfair. This option would help minimise interference with freedom of contract while still ensuring appropriate protections for small businesses from UCTs.

To ensure this option would operate as intended, any new provision to exempt these clauses should be framed as narrowly as possible to ensure other terms are not inadvertently excluded from the operation of the UCT protections, and to provide certainty for both contracting parties.

Further consideration and consultation would need to occur to determine the types of headline clauses that are not necessarily ‘required’ or ‘expressly permitted’ by legislation but which meet prescribed minimum standards and which should be exempt from the application of the UCT protections. Determining these clauses would encourage small businesses to exercise appropriate caution when considering entering into a standard form contract with such a clause, given the clause would be exempt from the UCT protections.

Table 7: Summary of the costs and benefits of clarity on Minimum Standards options.

Option	Costs	Benefits
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<sup>228</sup> See for example section 35, *Retail Leases Act 1994* (NSW); section 56, *Retail Leases Act 2003* (VIC).

<p><b>Option 1</b> <b>Status quo</b></p>	<ul style="list-style-type: none"> <li>- A term could be challenged as unfair, despite a parliament having already contemplated its inclusion in a contract. This could cause disruption and uncertainty for the parties.</li> </ul>	
<p><b>Option 2</b> <b>Provide an exemption for certain terms which meet minimum standards</b></p>	<ul style="list-style-type: none"> <li>- Small businesses would need to exercise appropriate caution when considering whether to enter into a standard form contract with such as clause, given the clause would be exempt from the UCT protections.</li> </ul>	<ul style="list-style-type: none"> <li>- Helps minimise interference with freedom of contract while still ensuring appropriate protections for small businesses from UCTs.</li> </ul>

Option 2 is the preferred option as it will help minimise interference with freedom of contract while maintaining appropriate protections from UCTs for small businesses.

## 5. Consultation

Two public consultation exercises have informed this RIS.

In late 2015, the Australian Government agreed to undertake a review of the extension of the UCT regime to small business within two years of its commencement. On 21 November 2018, the Treasury released the *Review of Unfair Contract Term Protections for Small Business: Discussion Paper*. The objective of this consultation exercise was to seek the views of small businesses and other stakeholders on 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. The paper closed for submissions on 21 December 2018. A broad range of stakeholders made formal submissions. 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, a COAG Consultation RIS to seek stakeholders’ views on a range of options was developed. The Consultation RIS was informed by the stakeholder submissions to the 2018 consultation process, as well as further work with the states and territories, the ACCC and ASIC on potential options to test through the Consultation RIS. The Consultation RIS was released on 13 December 2019. The objective of this consultation exercise was to seek further evidence from stakeholders on the extent of the problems identified through the 2018 consultation process, and to seek views on the benefits and costs of a range of reform options to enhance the UCT protections.

The closing date for submissions on the Consultation RIS was extended until 27 March 2020, as some stakeholders were affected by the impacts of the COVID-19 pandemic. Almost 80 were submissions received. Treasury will publish non-confidential submissions on its website. Treasury also held consultation roundtables in March 2020 with a broad range of stakeholders in Sydney, Melbourne, and via videoconference.

Evidence provided in submissions and given at consultation sessions indicated that UCTs continue to be included in standard form small business contracts, and there is a need for the Government to strengthen the protections to ensure they operate as originally intended. Small business representatives were largely supportive of making UCTs unlawful and introducing civil penalties. However, some larger business groups argued that the existing regime is working effectively and raised concerns about introducing penalties when there is subjectivity and uncertainty around whether a term is unfair.

These views were taken into consideration alongside other factors, such as regulators’ approach to compliance and enforcement. Specifically, this Decision RIS notes that regulators already pursue compliance and/or enforcement tools and remedies best suited to the circumstances, with legal action predominately reserved for cases where breaches are blatant, repeated or cause significant detriment. For less significant breaches, it is anticipated that regulators will continue to pursue tools and remedies other than litigation. Regulators would engage with relevant parties about concerns, which would provide the vast majority of contract-issuing parties the opportunity amend their contracts to remove any UCTs without the need for court action. Where a case is taken to court, the

legislation already provides a fairly high threshold for a term to be declared unfair, and it provides examples of unfair terms for courts to consider. A court would also need to be satisfied that imposing a penalty is appropriate in all the individual circumstances.

Detailed stakeholder feedback is reflected in Section 4 – Impact Analysis, of this RIS. As well as incorporating the views of stakeholders into this RIS, Treasury also consulted the states and territories, ACCC and ASIC, and sought further evidence and data from other sources where appropriate. References to stakeholder submissions in this Decision RIS refer to submissions made on the Consultation RIS, unless specified otherwise.

## 6. Evaluation, conclusion and estimated regulatory burden

As outlined in Chapter 4 – Impact Analysis, having regard to stakeholder feedback during consultation and the results of the regulatory impact assessment of the options, the preferred options are:

### Legality and penalties

**Option 3** – Make UCTs unlawful and give courts the power to impose a civil penalty

### Flexible remedies

**Option 2** – UCTs not automatically void; court given power to determine the appropriate remedy

**Option 3** – Clarify that remedies for ‘non-party consumers’ also apply to ‘non-party small businesses’

**Option 4** – Create a rebuttable presumption provision for UCTs used in similar circumstances

### Definition of small business contract: headcount/turnover threshold

**Option 3** – At least one party to meet a less than 100 person headcount threshold OR less than \$10 million annual turnover threshold

### Definition of small business contract: related bodies corporate

**Option 1** – Status quo

### Definition of small business contract: contract value threshold

**Option 3** – Remove the contract value threshold altogether

### Definition of small business contract: clarity on standard form contract

**Option 2** – Court must consider ‘repeat usage’ in determining a contract is a ‘standard form contract’

**Option 3** – Clarify actions which do not constitute an ‘effective opportunity to negotiate’

### Minimum standards

**Option 2** - Provide an exemption for certain terms which meet minimum standards

## Estimated regulatory burden

Businesses should already be familiar with the UCT protections, which have been part of the consumer law since 2010 for consumer contracts, and 2016 for small business contracts.

The 2016 extension of the protections to small business contracts estimated a net annual compliance burden of around \$52 million in the first year with no compliance costs after that. It was expected that those businesses that decided to review and amend their standard form contracts would likely do so within the first 12 months of implementation and there will be limited ongoing costs thereafter.

The preferred options in this reform process enhance the existing protections, rather than create a new or substantially different framework. Regulators will be expected to undertake activities to inform businesses of the changes to the law and provide updated guidance material. This will make it easier for businesses to familiarise themselves with the changes, although as the proposed reforms do not introduce any significant new concepts, the need for educative and compliance work by regulators will be less than when the protections were first introduced.

Introducing penalties will strengthen the deterrence against including UCTs in standard form contracts and does not introduce any new obligations for business. As such, it is assumed that the majority of compliance costs were captured when the UCT protections were first introduced.

Introducing a stronger deterrence effect could result in some businesses re-examining standard form contracts that had already been previously reviewed. However, as such action is up to the discretion of individual businesses and other variables (such as how thoroughly a contract was previously reviewed), it is difficult to quantify how many businesses may incur additional compliance costs. However, the total regulatory costs are expected to be small.

Preferred option	Compliance activity
Make UCTs unlawful and give a court the power to impose a civil penalty	A small number of businesses that offer standard form contracts may decide to further review and, if necessary, amend any terms in those standard form contracts.
Provide more flexible remedies to a court when it declares a contract term unfair	These are changes to improve the operation of the existing protections and are not likely to require any compliance activities.
Change the definition of a 'small business contract'	Based on previous feedback from stakeholders, most businesses do not differentiate between standard form contracts for businesses with less than 20 employees (current threshold) and those with more than 20 employees, so there are unlikely to be any compliance activities required as a result of this option.

Remove the contract value threshold	Based on previous feedback from stakeholders, most businesses do not normally differentiate between standard form contracts based on their value over or under \$300,000, so there are unlikely to be any compliance activities required as a result of this option.
Clarify the definition of a standard form contract	These are changes to improve the operation the existing protections and are not likely to require any compliance activities.
Clarify that the UCT protections do not apply to terms which meet the minimum standards of a law of a state or territory	This is a change to improve the operation of the existing protections and is not likely to require any compliance activities.

While quantification is difficult, for the purposes of estimating a regulatory costing, it is assumed that a quarter of large businesses (which are more likely to offer a number of standard form contracts or more complex standard form contracts) may consider undertaking a further review of their contracts as a result of penalties being introduced.

These larger businesses are expected to apply one of three approaches:

- Category A: review (and amend) themselves;
- Category B: seek legal advice to review (and amend); or
- Category C: take no action based on a risk assessment that it is not cost effective to review.

It is anticipated that small-medium businesses will not incur significant compliance costs. Most do not offer standard form contracts and those that do generally standard form contracts offer only one or two contracts with simple terms and conditions.

There are no regulatory costs for individuals or community organisations, which rarely offer standard form contracts of the kind that would be captured by the UCT protections.

Based on the costs that can be quantified, the preferred options are estimated to have a **compliance burden on businesses of around \$7.5 million in the first year**, with no ongoing compliance costs.

Table 8: Average annual regulatory costs (from business as usual)

Change in costs (\$million)	Business	Community Organisations	Individuals	Total change in cost
<b>Total, by sector</b>	\$0.75	-	-	\$0.75



Compliance costs have been calculated using the following parameters:

- There are 4,271 larger businesses in Australia (200+ employees).<sup>229</sup>
- It is assumed that 25 percent of those businesses will decide to review their standard form contracts, with:
  - o 60 per cent reviewing and amending those contracts themselves (Category A),
  - o 20 percent seeking legal advice and amending (Category B), and
  - o 20 per cent subsequently taking no action based on a risk assessment that it is not cost effective to review (Category C).
- The length of time reviewing and amending a standard form contract will depend on the length and complexity of the contract and whether a business has access to in-house legal expertise.
- Previous consultation heard that larger businesses are likely to offer several different types of standard form contracts.
- For Category A, it is assumed each business would review on average five standard form contracts using in-house legal resources, with this amounting to a business-as-usual cost given these businesses are assumed to already regularly review their standard form contracts.
- For Category B, it is assumed an average of five standard form contracts would be reviewed per business, with legal costs averaging \$7,000 per contract.
  - o In general, simple contracts could cost between \$3,000-10,000 to review and amend, while more complex contracts could cost slightly more.

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<sup>229</sup> Australian Bureau of Statistics Counts of Australian Business 8165.0, Table 13, 20 February 2020.

## 7. Implementation and review

### Implementation

All of the preferred options will be implemented via legislation to amend the ACL, contained in Schedule 2 to the CCA, and relevant state and territory Acts which apply the ACL. The preferred options will also be implemented via legislation to amend the mirror provisions in the ASIC Act.

The ACCC and state and territory fair trading agencies will continue to enforce the UCT protections for goods, services and the sale or grant of an interest in land. ASIC will continue to enforce the mirror provisions in the ASIC Act for financial products and services. Regulators will also work with businesses and consumers to make them aware of the changes, including through enhancing education and awareness activities, within existing resources.

The changes are not expected to have significant resourcing implications for ACL regulators or the courts. As noted earlier, the changes do not introduce a new regime or significant new concepts. Rather, they enhance the existing protections, which have been in place for more than ten years for consumer contracts and almost four years for small business contracts. In the short term, the combination of introducing penalties, further education and guidance about the UCT protections, and increasing the number of small businesses covered by the protections, could lead to an increase in complaints to regulators. It could also raise public expectations that regulators will be more active in pursuing alleged breaches. In the longer term, the introduction of penalties is expected to have a deterrent effect which will reduce the prevalence of UCTs in standard form contracts, which would likely result in fewer complaints to regulators.

ACL regulators cannot pursue all complaints regarding UCTs. Rather, they consider complaints carefully and exercise discretion, directing resources to matters that can result in industry-wide change or provide the greatest overall benefit. When they do pursue a complaint, regulators have a range of tools and strategies available to achieve outcomes in a timely and proportionate manner. Regulators are more likely to commence legal action in circumstances where alleged breaches are blatant, are within a regulator's priority areas, are repeated or cause significant detriment.

As these matters may vary between jurisdictions, priorities for enforcement action on UCTs will continue to differ. Consistent with current practice, ACL regulators will continue to work together to employ the most effective means of addressing consumer and small business harm from UCTs, through cooperative and complementary enforcement action, and avoiding unnecessary duplication of effort. ACL regulators will continue to coordinate their activity through Consumer Affairs Australia and New Zealand (CAANZ).

It is recommended consideration be given to putting in place transitional arrangements to give businesses time to review and modify their contracts if required, and regulators time to develop further guidance and conduct additional education and awareness activities. The length of such transitional arrangements should, however, take into account that the UCT protections have already been in place for more than ten years for consumer standard form contracts and nearly four years for small business standard form contracts.

## **Review**

It is noted that there could be more meaningful quantitative data captured on the prevalence of UCTs in standard form contracts. Part of this limitation is due to underreporting. Regulators, ASBFEO and state and territory small business commissions may wish to consider putting arrangements in place to collect consistent and meaningful data on enquiries relating to UCTs and the outcomes of such enquiries to assist in determining the effectiveness of the new measures.

It is recommended that CAANZ review the effectiveness of the enhanced protections no earlier than three years after they have come into effect.

# Appendix A

## Regulator action on UCTs

### ACCC

#### 2010 – 2013

Following the introduction of the UCT protection provisions for consumer contracts, the ACCC undertook a project of engaging with businesses and reviewing their standard form contracts in the airline, telecommunications and vehicle rental industries. The ACCC identified contract terms which posed problems under both the general consumer protections provisions and the UCT protection provisions under the ACL, and engaged directly with businesses to address these concerns. The ACCC released its report on this work on 15 March 2013. This review and engagement lead to substantial changes by businesses to their standard form contracts. Some changes included:

- **TPG**: amended a term in its standard form consumer contracts which allowed it to change subscription fees in its contracts without notice to, or consent from, the consumer. TPG also agreed to remove a term that gave it a broad right to suspend or disconnect customers' access to any aspect of their service at any time and without notice to the customer.
- **Telstra**: amended its standard form consumer contracts to limit the circumstances in which it could suspend or terminate the consumers' service.
- **Dodo**: removed a term in its standard form consumer contracts which prevented the consumer from relying on representations made by it or its agents.
- **Jetset Travelworld Group**: amended its standard form consumer contracts to deal with the ACCC's concerns about clauses that required consumers to waive their credit and debit card charge back rights.
- **Universal Music**: amended the terms in its standard form consumer contracts to expressly acknowledge that its liability to the consumer in relation to the supply of services was subject to the ACL. Its contract previously limited all liability purporting to place the entire onus of risk on the consumer and none on the business.

#### July 2013

Following the ACCC commencing proceedings against ByteCard in April 2013, in July 2013, the Federal Court declared that a number of terms in **ByteCard**'s standard form consumer contracts unfair including terms which:

- enabled ByteCard to unilaterally vary the price under an existing contract without providing the customer with a right to terminate the contract;

- required the consumer to indemnify ByteCard in any circumstance, even where the contract had not been breached, and where the liability, loss or damage may have been caused by ByteCard’s breach of the contract; and
- enabled ByteCard to unilaterally terminate the contract at any time without cause or reason.

### December 2014

The ACCC accepted a court enforceable undertaking from **LivingSocial**, after raising concerns regarding a term that permitted LivingSocial to make substantive changes to its terms and conditions without notifying its customers. LivingSocial acknowledged that the term was likely to have been a UCT and undertook, amongst other things, to send emails to all LivingSocial subscribers when substantive updates were made to its terms and conditions.

### April 2015

In April 2015, the Federal Court found that **NRM Corporation Pty Ltd** and **NRM Trading Pty Ltd** (together, **NRM**), had used UCTs in its long term agreements for the supply of medical services and medications to men suffering from sexual dysfunction. These terms included that NRM patients were required to provide 30 days’ written notice to terminate the contract and pay a number of fees, including a fixed administrative fee of 15 per cent of the original contract price. The ACCC’s court proceedings commenced in 2011 and were the first court proceedings the ACCC took in relation to the UCT protections. The ACCC also alleged that NRM and Advanced Medical Institute engaged in unconscionable conduct in the way the companies promoted and supplied their services to men suffering from sexual dysfunction, and the Court found the companies had engaged in unconscionable conduct.

### November 2015

In November 2015, the Federal Court found that **Chrisco** had a UCT in its 2014 lay-by agreements relating to its “HeadStart Plan”, which allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by agreement. Consumers were required to opt out in order to avoid having further payments deducted. In concluding that the term was a UCT, the Federal Court considered that the term caused a significant imbalance in the rights and obligations between Chrisco and its customers. (The ACCC commenced its court proceedings against Chrisco in 2014.)

### January 2016

In mid-2015, Exetel wrote to more than 2,000 residential broadband customers on 12-month fixed term plans, informing them that they were required to either change their broadband plan or terminate their Exetel service without penalty. In January 2016, following concerns raised by the ACCC, **Exetel** agreed to remove a clause from its standard form residential broadband agreement which allowed it to vary any part of the agreement for any reason. The ACCC also considered that Exetel’s advertising of its fixed term plans was likely to be misleading. Exetel also agreed to:

- refund any additional monthly subscription costs incurred for the remainder of the fixed term by a customer who changed to a new plan; and
- refund any activation charge previously paid by a customer who terminated their service rather than change to a new plan.

### April 2016

In April 2016, the Federal Court found various terms in **Europcar**'s standard form rental agreements unfair because they held consumers liable for vehicle loss or damage:

- regardless of whether the consumer was at fault, and
- when they breached the rental agreement, no matter how trivial the breach or whether it had any connection to the loss or damage caused.

Europcar consented to orders for corrective advertising and costs.

The ACCC commenced its court proceedings against Europcar in 2014. In 2015 (while the proceedings were on foot), Europcar amended its standard form rental agreement to remove the unfair terms.

### November 2016 – September 2017

In the lead-up to the business to business UCT provision coming into effect, the ACCC commenced a project examining potential business to business UCTs in standard form contracts across a number of industries. The project involved engaging with a number of businesses who agreed to amend their standard form contracts. Some examples included:

- **Uber**: amended its standard Driver Agreement to limit the circumstances in which it could terminate the agreement. The original term allowed it to terminate the agreement without cause.
- **Fairfax Media**: amended a term in its Advertising Contract to limit the circumstances in which it could refuse or withdraw a customer's advertisement. The original term allowed it to refuse or withdraw a customer's advertisement for any reason at any time.
- **Lendlease Property Management (Australia)**: amended various terms in its standard lease that allowed it unlimited rights to recover costs from its tenants.
- **Sensis**: amended automatic renewal terms in its Standard Product Contract Terms to make them more transparent and include an obligation requiring it to remind customers of the pending renewal of their contracts.
- **Jetts Fitness**: amended a wide-ranging restraint of trade clause in its Franchise Agreement to reduce both the period and geographical scope of the restraint.

These changes affected thousands of small business contracts across Australia.

In June 2017, the Federal Court found, among other things, that **Get Qualified Australia Pty Ltd** entered into consumer agreements containing a UCT with respect to the payment of refunds.

### October 2017

Since the UCT protections were extended to small businesses, JJ Richards entered into or renewed at least 26,000 contracts for it to provide waste management services, which included contracts that were covered by the UCT protections.

Following the ACCC commencing court proceedings against **JJ Richards**, in October 2017 the Federal Court declared eight terms in JJ Richards' standard form contract were unfair and therefore void. These terms involved:

- binding customers to subsequent contracts unless they cancelled the contract within 30 days before the end of the contract period;
- allowing JJ Richards to unilaterally increase its prices;
- removing any liability for JJ Richards where its performance was prevented or hindered 'in any way';
- allowing JJ Richards to charge customers for services not rendered even when the cause was something beyond the customer's control;
- giving JJ Richards exclusive rights to remove waste from a customer's premises;
- allowing JJ Richards to suspend its service but continue to charge the customer if payment was not made after seven days;
- creating an unlimited indemnity in favour of JJ Richards; and
- preventing customers from terminating their contracts if they had payments outstanding and entitling JJ Richards to continue charging customers equipment rental after the termination of the contract.

In resolving the proceedings, JJ Richards consented to orders restraining it from relying on the unfair terms in existing small business contracts and from using the terms in future contracts with small businesses.

The ACCC also accepted a court enforceable undertaking from **Advance Hair Studio**, a provider of hair loss treatments and procedures including its Advanced Laser Therapy Program. The undertaking related to laser program contracts with consumers that:

- between April 2015 and February 2017, included a termination clause that required consumers to pay 100% of the contract price to terminate after commencing laser therapy sessions; and
- between February 2017 and June 2017, included a termination clause that required consumers to pay 20% of the contract plus \$150 per laser session unattended after commencing laser therapy sessions.

The undertaking included partial cash refunds to certain consumers, corrective advertising, and establishing an ACL compliance program.

### November 2017

**Australia Post** agreed to amend some of the terms of its standard Licensed Post Office Agreement to address UCT concerns raised by the ACCC, including to terms allowing it to unilaterally amend the agreement and alter commissions payable by licensees, and its termination 'without cause' clause.

### December 2017

Between October 2014 and August 2017, Perth based building company **101 Residential** issued standard form building contracts which contained non-disparagement clauses that prohibited customers from publishing or disseminating any unapproved information about the company, including online reviews. Following ACCC concerns that the non-disparagement clauses were likely to be unfair, in December 2017 101 Residential provided the ACCC with a court enforceable undertaking, acknowledging that the non-disparagement clauses may be unfair and agreeing to not enforce or rely on the non-disparagement clauses in current contracts and removing them from its future contracts.

### March 2018

After the ACCC raised concerns with **AWB Harvest Finance Pools** in relation to its contracts, it amended terms providing AWB with the ability to:

- unilaterally increase fees to growers, such as administration fees or management fees, after the contract had been accepted by a grower;
- introduce new fees to growers from time to time after the contract had been signed; and
- reject grain at its absolute discretion.

Following concerns raised by the ACCC, **Cardtronics Australasia Pty Ltd** amended its contracts governing Automatic Teller Machines (ATMs) deployed on the premises of small businesses which involved terms providing Cardtronics' subsidiary DC Payments with:

- a unilateral right to increase certain fees;<sup>230</sup> and
- the first right of refusal should businesses seek to change provider at the conclusion of the contract.

The contracts also contained automatic renewal clauses which meant contracts were automatically renewed for up to six years unless the merchant provided six months' notice to cancel.

The ACCC accepted a court enforceable undertaking from Cardtronics which included allowing existing customers to cancel contracts without penalty in response to increases in certain fees and requiring Cardtronics to provide written notice to customers five months before the end of the contract, reduce the minimum notice to cancel the contract from six months to three months and not exercise its first right of refusal.

### June 2018

Home builder **Wisdom Properties Group** had entered into over 3,000 standard form contracts with consumers containing non-disparagement clauses which:

- allowed Wisdom to control any public statements made by customers about Wisdom's agreement or services;

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<sup>230</sup> This included several terms that allowed Cardtronics to unilaterally increase various fees, including the surcharge fee.



- gave Wisdom broad indemnities for any losses arising from statements published by customers (including those approved by Wisdom); and
- allowed Wisdom to suspend building works if customers breached the non-disparagement clauses.

The ACCC accepted a court enforceable undertaking from Wisdom to not enforce the terms in existing agreements or include them in future agreements.

### July 2018

Following engagement with the ACCC regarding potential UCTs, **Warrnambool Cheese & Butter (WCB)** amended the terms in its milk supply agreements and associated milk supply handbook which included:

- a unilateral right to vary the price paid to suppliers and other terms of supply, with the supplier unable to terminate the milk supply agreement early without incurring a financial penalty;
- placing restrictions on farmers selling their farm; and
- requiring farmers to indemnify WCB for loss which could be avoided or mitigated by WCB.

Following legal proceedings instituted by the ACCC in the Federal Court against office services provider **Servcorp Ltd** and two of its subsidiaries (Servcorp Parramatta Pty Ltd and Servcorp Melbourne 18 Pty Ltd) (together Servcorp), in July 2018 the Federal Court declared certain terms used by Servcorp unfair. The proceedings related to 12 terms of three different standard form service contracts. These terms had the effect of:

- automatically renewing a customer's contract, unless the customer had opted out;
- allowing Servcorp to then unilaterally increase the contract price;
- permitting Servcorp to unilaterally terminate contracts;
- unreasonably limiting Servcorp's liability or imposing unreasonable liability on the consumer; and
- permitting Servcorp to keep a customer's security deposit if a customer failed to request its return.

### September 2018

The ACCC had instituted proceedings in March 2018 against credit reporting body **Equifax** (formerly Veda Advantage) alleging that a term, which automatically renewed customers' subscriptions to the services unless the customers opted out in advance, was, among other things, unfair.

In September 2018 the proceedings were resolved following joint submissions by Equifax and the ACCC. These involved admissions by Equifax that it engaged in misleading or deceptive conduct, made certain false or misleading representations and engaged in unconscionable conduct. They did not involve findings in relation to the ACCC's allegations that the automatic renewal term was unfair. However, such a finding would not have substantially affected the remedies ordered by a court in this matter, given that it would have had no direct impact on the penalties ordered against Equifax.

## December 2018

Following ACCC engagement, Dairy Processors **Brownes Food Operations, Lion Dairy & Drinks, Norco Co-operative Limited, Parmalat Australia** and **Fonterra Australia** each agreed to amend different terms in their milk supply agreements. The terms included:

- unilateral variation of milk prices (terms that allowed processors to decrease the milk price during the term of a milk supply agreement, where the supplier was unable to terminate the agreement without penalty);
- unilateral variation of milk supply terms (terms that allowed processors to vary milk supply terms contained in milk supply handbooks/manuals such as quality requirements, payment terms and incentive terms, where the supplier was unable to terminate the agreement, without penalty, if a change to the milk supply terms had a material adverse impact on the supplier); and
- extended termination periods (terms that required suppliers to give notice to terminate the agreement at a point in time when they may not have had access to sufficient information regarding possible arrangements with alternate suppliers).

Following an ACCC investigation into the use of UCTs in the waste management industry, **Visy Paper Pty Ltd (trading as Visy Recycling), Cleanaway Pty Ltd** and **Suez Recycling & Recovery Pty Ltd** reviewed and amended potential UCTs in their standard form contracts which included price variation and liquidated damages clauses that previously allowed them to:

- unilaterally increase their prices in specified circumstances; and
- impose penalties on customers who wanted to exit their contracts before the end of the contract term.

## April 2019

The three container stevedore companies, **DP World, Hutchison** and **VICT** cooperated with the ACCC's investigation and agreed to remove or amend likely UCTs in their standard form contracts. DP World and Hutchison had contract terms that:

- allowed the stevedore to unilaterally vary terms in the agreements without notice, including the fees to be paid by the land transport operators; and
- limited their liability for loss or damage suffered by the transport businesses, while not offering the transport businesses the same protections.

VICT's contract had a term requiring transport businesses to indemnify VICT for loss or damage, with no reciprocal obligation on VICT. DP World's standard agreement also required the transport businesses to pay the stevedore's legal costs and expenses, in circumstances where such payments would normally be determined by court order.

Hutchison made commitments to the ACCC in a court enforceable undertaking to:

- amend its terms (which applied or may have applied to 300 small business truck carriers);
- publish corrective advertising; and

- implement a compliance program designed to minimise Hutchison’s risk of future breaches of the ACL.

### June 2019

After the ACCC raised concerns with **Red Rich Fruits** about its contracts with growers, Red Rich Fruits amended a term that allowed it to seek credit from a grower for produce Red Rich Fruits had on-sold to a third party, but which was then rejected by the third party. Specifically the term meant the grower was required to provide credit for the amount the third party had contracted to pay Red Rich Fruits for the rejected produce, which was likely to include the trader’s profit margin.

### July 2019

From at least 2016, **Uber Eats**’ contract terms made restaurants responsible for the delivery of meal orders, in circumstances where they had no control over that delivery process once the food left their restaurant. Following an investigation by the ACCC, Uber Eats committed to amend these terms to clarify that restaurants will only be responsible for matters within their control such as incorrect food items or incorrect and missing orders.

### August 2019

Following complaints from industry associations and farmers in engagement work conducted by the ACCC’s Agriculture Unit and the ACCC’s wider review of standard form contracts in the agriculture sector, the ACCC took **Mitolo Group Pty Ltd** to court alleging that the terms of contracts between Mitolo and 25 potato growers entered into between December 2016 and February 2018 were unfair. Following admissions made by Mitolo, the Federal Court declared that several terms used by Mitolo were unfair, including terms that allowed Mitolo to:

- unilaterally determine or vary the price Mitolo paid farmers for potatoes;
- unilaterally vary other contractual terms;
- declare potatoes as “wastage” without a mechanism for proper review; and
- prevent farmers from selling potatoes to alternative purchasers.

The Court also declared that terms in Mitolo’s contracts preventing farmers from selling their own property unless the prospective purchaser entered into an exclusive potato farming agreement with Mitolo were UCTs.

In addition to the orders made by the Court, Mitolo provided the ACCC with a court enforceable undertaking which contains a revised form of contract. Mitolo undertook to contract with growers on terms no less favourable than the revised contract terms, which are annexed to the undertaking.

### October 2019

The Federal Court found hair loss business Ashley & Martin’s terms in three standard form contracts with consumers were void because they were unfair.

From June 2014 until at least June 2017, **Ashley & Martin** signed up more than 25,000 customers to its 'Personal RealGROWTH Program' using three different standard form contracts which were all found to contain unfair terms.

Customers were typically signed up to a 12-month Ashley & Martin program by a sales consultant, and the unfair terms required consumers to pay for all of the medical treatment before they received, or could properly consider, medical advice.

Under one of the terms found unfair by the Court, consumers who wished to terminate the contracts more than 2 days after they accepted the program, and consulted with a doctor, were required to pay 100% of the total price payable. Another term required customers to pay for treatment even if they developed side effects to the medication that meant they could no longer continue the program. The court ordered Ashley & Martin to refund customers who terminated their contracts in these circumstances.

### March 2020

ACCC concerns that some of **1300 Australia** contract terms were unfair, the 'phonewords' company gave a court enforceable undertaking to the ACCC to amend its current and future contracts with small businesses and in certain circumstances refund part of the termination fees paid by small business customers. Terms the ACCC was specifically concerned with were those that permitted 1300 Australia to:

- automatically renew a contract without notifying the customer;
- charge unspecified penalties for late payments; and
- charge significant early termination fees.

### June 2020

Some of Australia's biggest **winemakers** agreed to change their supply agreements with grape growers after the ACCC raised concerns that their standard form grape supply agreements contained terms which were likely to be unfair, including terms that:

- covered contractual disputes with growers;
- related to wine grape quality assessments;
- provided unnecessarily broad rights to enter and inspect growers' vineyards, and payment periods;
- prevented growers from seeking legal or financial advice through confidentiality clauses; and
- allowed them to make unilateral changes to supply contracts, including one sided termination rights.

This followed resource-heavy engagement between the ACCC and winemakers, which began in September 2019 after the ACCC's publication of the wine grape market study final report.

The ACCC remains concerned that some winemakers' contracts still provide for lengthy payment periods for growers, and will continue to monitor the issue, including the industry's review of its voluntary code of conduct in this regard.

### July 2020

The ACCC had instituted proceedings in the Federal Court against **TPG** in December 2018 in relation to a standard form contract term requiring forfeiture of a \$20 'prepayment' made by consumers. This prepayment operated as a non-refundable fee, and TPG retained at least \$10 of the prepayment when a customer cancelled their plan. In October 2018, the Federal Court found that the term in TPG's contracts was not unfair. The Full Federal Court subsequently dismissed the ACCC's appeal against this finding on 30 July 2020.

Despite the ACCC's previous action against **Chrisco** in 2014, and the Federal Court judgment obtained in 2015 that Chrisco's 2014 lay-by agreements relating to its "HeadStart Plan" contained a UCT (discussed above), more recently the ACCC had concerns that Chrisco had entered into or renewed lay-by agreements since 26 October 2018 which contained another Head Start Plan term that allowed Chrisco to continue to take payments from consumers after they had fully paid for their existing lay-by order, unless consumers expressly opted out.

In July 2020 the ACCC accepted a court enforceable undertaking from Chrisco acknowledging that the term may be a UCT and undertaking to increase the transparency of the Head Start Plan term by requiring consumers to opt in to a Head Start Plan and to confirm their participation from year to year.

### September 2020

The ACCC accepted a court-enforceable undertaking from **Back In Motion Physiotherapy Pty Ltd**, a franchisor with a network of over 500 franchises in Australia and New Zealand.

For more than 15 years, Back in Motion Physiotherapy included terms in its franchise agreements it admitted may be unfair. One term prevented franchisees wanting to leave the group from being involved in a competing business within a radius of up to 10km of a Back In Motion Physiotherapy Franchise for 12 months. This restraint of trade clause effectively blocked franchisees from most metropolitan areas because of the number and location of Back In Motion Physiotherapy outlets. Another term allowed Back In Motion Physiotherapy to charge franchisees a 'buy out fee' equal to four times their annual royalty fees if they opted to be released from the restraint of trade.

Among other things, Back In Motion Physiotherapy agreed to not include the terms in future contracts, not enforce the terms in existing contracts, and notify its franchisees of the ACCC undertaking. The restraint of trade terms in Back In Motion Physiotherapy's franchise agreements is now limited to a term restricting former franchisees for nine months from actively soliciting a client they know has been a client of a Back In Motion Physiotherapy franchise located within 10km of the former franchisee's Back In Motion Physiotherapy practice.

## ASIC

### November 2010

Following consultation leading up to and after the introduction of the UCT protection provisions for consumer contracts, ASIC released guidance for mortgage lenders that sets out how provisions in the National Credit Code and UCT protections apply to mortgage early termination fees (exit fees).

Regulatory Guide 220 *Early termination fees for residential loans: unconscionable fees and unfair contract terms* (RG 220)<sup>231</sup> spelled out ASIC's guidance on points including:

- what costs and types of loss can be included in exit fees;
- types of loss that should not be recovered through exit fees; and
- the limited circumstances in which a lender may vary exit fees during the life of a mortgage.

### January 2011

After ASIC raised concerns with **MyBudget Pty Ltd** about a number of potentially unfair and/or unconscionable terms in its Terms of Service Agreement, the budgeting and debt management service agreed to amend or remove these terms which included:

- administration fees payable after termination until full discharge of client's liability, even when MyBudget terminates the agreement on notice;
- failure to inform clients that MyBudget's weekly administration fee has the same priority as weekly living expenses;
- charging a direct debit penalty fee if the client authorises a creditor to debit its MyBudget account; and
- retention of interest on MyBudget accounts without clear disclosure to the client.

### January 2013

**Mr Rental Australia Pty Ltd**, entered into an enforceable undertaking with ASIC following an ASIC investigation into the household goods rental business' standard form rental agreement which included a term allowing the business to charge a 'calculation period adjustment' (that is, an additional fee charged to consumers who terminated their rental agreements early). As part of the undertaking, Mr Rental agreed provide refunds to approximately 1,560 consumers (anticipated to be in excess of \$300,000) advise existing customers that it will not charge a calculation period adjustment in the event they terminate their agreements early and amended the standard form rental contract used by the 52 franchisees operating under the Mr Rental banner.

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<sup>231</sup> Available at: <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-220-early-termination-fees-for-residential-loans-unconscionable-fees-and-unfair-contract-terms/>

## February 2014

ASIC investigated four businesses involved in the hire and sale of water coolers and first aid kits using ‘rent to own’ agreements (**Home Essentials Australia Pty Ltd, I Love My Water Pty Ltd, Triple Bay Group Pty Ltd and Triple Bay Pty Ltd**) as the regulator was concerned the agreements contained UCTs that provided an automatic rollover of the rental term unless the consumer took steps to cancel the contract. ASIC accepted a court enforceable undertaking in which the businesses agreed not to enforce their rights under the agreements.

## October 2014

ASIC concerns led to the **Commonwealth Bank of Australia (CBA)** agreeing to release \$2.2 million for approximately 45,000 customers who had money left on expired CBA Travel Money Cards. The CBA also made changes to all its Travel Money Cards so consumers would not forfeit any funds left on expired cards, but rather the money would be held by the CBA for three years and, if unclaimed by consumers, would be treated as unclaimed money.

## August 2015

ASIC reviewed 16 travel money cards by eight issuers as part of an industry-wide review into travel money cards issued in Australia. Following the industry-wide review, all travel money cards then issued in Australia would now allow customers to reclaim leftover funds, rather than – in some instances – risking forfeiture of funds once cards expire.<sup>232</sup> ASIC’s review resulted in a number of other improvements being made by the eight issuers reviewed including:

- improved disclosure in product disclosure statements about how customers can reclaim funds after expiry;
- removal or reduction of fees, including inactivity fees; and
- improved communications to customers at, or close to card expiry to remind customers of their available balance and explain how funds can be accessed.

This outcome followed similar action by ASIC in relation to the Commonwealth Bank Travel Money card in 2014.<sup>233</sup>

## March 2017

ASIC and ASBFEO completed a review of small business standard form contracts and called on lenders across Australia to take immediate steps to ensure their standard for loan agreements comply with the law.<sup>234</sup>

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<sup>232</sup> See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-229mr-consumers-can-reclaim-funds-on-expired-travel-money-cards-following-asic-action/>

<sup>233</sup> See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2014-releases/14-262mr-asic-concerns-see-cba-release-22-million-for-45-000-travel-card-customers/>

<sup>234</sup> See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-056mr-asic-and-asbfeo-join-forces-to-ensure-bank-lenders-meet-unfair-contract-laws/>

### May 2017

ASIC and ASBFEO hosted a roundtable where the big four banks committed to make significant improvements to their small business loan contracts to ensure they meet the UCT protection provisions.<sup>235</sup>

### August 2017

Following a commitment to further review their small business loan contracts, the big four banks agreed to specific changes with ASIC to eliminate UCTs from their contracts. The changes meant that:

- The loan documents would not contain 'entire agreement clauses' that absolve the bank from responsibility for conduct, statements or representations they make to borrowers outside the written contract.
- The operation of the banks' indemnification clauses would be significantly limited. For example, the banks would now not be able to require their small business customers to cover losses, costs and expenses incurred due to the fraud, negligence or willful misconduct of the bank, its employees or a receiver appointed by the bank.
- Clauses that gave banks the power to call in a default for an unspecified negative change in the circumstances of the small business customer (known as 'material adverse change event' clauses) were removed – so that banks would now not have the power to terminate the loan for an unspecified negative change in the circumstances of the customer.
- Banks restricted their ability to vary contracts to specific circumstances, and where such a variation would cause a customer to want to exit the contract, the banks would provide a period of between 30 and 90 days for the consumer to do so.

The banks agreed that all customers who entered or renewed contracts from 12 November 2016 – when the protections for small businesses began – would have the benefit of the changes agreed with ASIC.

### March 2018

ASIC published Report 565 *Unfair contract terms and small business loans*<sup>236</sup> which details the changes made by the big four banks to their small business loan contracts in order to comply with the UCT protection provisions. The report is also relevant for other lenders who provide loans to small business and assists them in meeting their obligations.

### September 2018

Following an ASIC review, **Prospera Advance Pty Ltd** agreed to make the following changes to its standard form small business loan contract:

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<sup>235</sup> See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-139mr-asic-and-asbfeo-hold-banks-to-account-on-unfair-contract-terms/> and <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-278mr-big-four-banks-change-loan-contracts-to-eliminate-unfair-terms/>

<sup>236</sup> Available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-565-unfair-contract-terms-and-small-business-loans/>



- amend the early repayment clause so that borrowers can prepay their loan early without requiring Prospa’s consent, and removed Prospa’s absolute discretion whether to provide a discount for prepayment;
- amend the ‘unilateral variation’ clause to significantly limit Prospa’s ability to unilaterally vary contracts to specific instances. Prospa has also extended the notice period to 60 days where Prospa intends to vary fees;
- amend clauses defining events of default to add remediation periods and materiality thresholds and to permit changes to control of the Borrower with the lender’s consent (not to be unreasonably withheld);
- remove a broad ‘cross-default’ clause which allowed Prospa to call a default under the loan contract due to any default under another finance document related to the loan (for example, guarantee or security document);
- restrict the borrower’s indemnity to ensure that:
  - the borrower is required to indemnify only Prospa, its employees and agents (and not third parties that are not parties to the contract such as receivers or contractors); and
  - the borrower is not required to indemnify Prospa for losses or costs incurred due to the fraud, negligence or wilful misconduct of Prospa, its employees, officers, agents, contractors or receivers appointed by Prospa;
- remove an ‘entire agreement’ clause which absolved Prospa from contractual responsibility for conduct, statements or representations made to borrowers about the loan contract;
- limit the class of people who can provide guarantees under the loan contract to:
  - people who are actively involved in the management of a borrower’s business;
  - if the borrower is a company, people who are directors or shareholders of the borrower; and
  - if a shareholder of the borrower company is a company, directors or shareholders of that company;
- insert a 5-business-days’ notice provision to guarantors about:
  - borrowers who are 30 calendar days behind their agreed repayment schedule; and
  - the commencement of legal proceedings against a borrower or the appointment of a receiver;
- limit the guarantor’s liability so that the guarantor is not liable for any increase in the amount of the loan principal and interest agreed at the start of the loan (but the guarantor is liable for fees and reasonable enforcement costs);
- insert a provision to obtain consent of the guarantor:

- where there is a discharge or release of any security held by Prospa given by the borrower or a guarantor; and
- where there are multiple guarantors, before releasing a guarantor;
- limit the actions of lender-appointed attorneys where there is an event of default under the loan contract so that an appointed attorney cannot act in a way that prefers the interests of the attorney over the interests of the borrower or guarantor.

### September 2019

The Federal Court of Australia declared several terms within six small business contracts used by **Bendigo** and **Adelaide Bank** to be unfair and therefore void. The Court also ordered that the contracts be varied by replacing the unfair clauses with new fair clauses by the parties following successful negotiations between ASIC and Bendigo and Adelaide Bank. Relevant terms included those which:

- which specified where the borrower was to indemnify the Bank for certain liability, loss or costs incurred by the Bank;
- set out events or circumstances that would constitute a default by the borrower, which in turn would entitle the Bank to take certain action following the default, including applying default interest rates or enforcing security;
- entitled the Bank to unilaterally vary terms of the contract or terminate the contract, without the borrower's consent; and
- provided that a certificate from the Bank stating the amount owed on a facility would be conclusive evidence of the amount owing, unless the customer could demonstrate a manifest error.

ASIC was also successful in having the Federal Court declare the same terms appearing in other standard form small business contracts, entered into by the Bank with its customers in the same time period, to be unfair.

## Appendix B

### List of stakeholders who provided a submission

Below is a list of stakeholders who provided a written submission to the *Enhancements to Unfair Contract Term Protections* Consultation RIS. This list does not include stakeholders who marked their submission as ‘confidential’.

The Australian Industry Group (Ai Group)  
Australia and New Zealand Banking Group Limited (ANZ)  
Australian Association of Franchisees (AAF)  
The Australian Automotive Dealer Association (AADA)  
The Australian Banking Association (ABA)  
The Australian Competition and Consumer Commission (ACCC)  
The Australian Credit Forum (ACF)  
Australian Finance Industry Association (AFIA)  
The Australian Food and Grocery Council (AFGC)  
Australian Furniture Removers Association (AFRA)  
Australian Grape and Wine Incorporated (Australian Grape & Wine)  
The Australian Institute of Credit Management (AICM)  
Australian Lottery & Newsagents Association (ALNA)  
Australian Retail Credit Association (ARCA)  
The Australian Securities and Investments Commission (ASIC)  
The Australian Small Business and Family Enterprise Ombudsman (ASBFEO)  
Bourke, Andrew JP  
Bristow Legal  
Buchan, Jenny  
Business Enterprise Centres (BEC) Australia Ltd  
The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW Ltd  
(CCIA NSW)  
CHOICE  
Clubs Australia  
Communications Alliance  
Consult Australia  
Consumer Action Law Centre, WEstjustice and Financial Rights Legal Centre (joint submission)  
Direct Selling Australia (DSA)  
Disability Justice Australia Inc. (DJA)  
The Federal Chamber of Automotive Industries (FCAI)  
Field, Archer

The Financial Services Council (FSC)  
Gold Coast Family Car Rentals  
Hogg, Bridget  
Housing for the Aged Action Group (HAAG)  
Housing Industry Association (HIA)  
Institute of Public Accountants (IPA)  
The Insurance Council of Australia (Insurance Council)  
The Law Council of Australia (Law Council)  
Malbon, Justin  
Master Electricians Australia (MEA)  
Master Plumbers Australia and New Zealand Ltd (MPANZ)  
MIGA  
Min-it Software (Min-it) and the Financiers Association of Australia (FAA) (joint submission)  
The Motor Trades Association Queensland (MTA Queensland)  
National Electrical and Communications Association (NECA)  
The National Farmers Federation (NFF)  
National Fire Industry Association (NFIA)  
National Independent Retailers Association (NIRA)  
National Precast Concrete Association Australia (National Precast)  
National Road Transport Association (NatRoad)  
NSW Farmers' Association (NSW Farmers)  
NSW Small Business Commissioner (NSWSBC)  
The Office of the Small Business Commissioner South Australia (OSBC)  
Palyga, Stephen M  
Post Office Agents Association Limited (POAAL)  
Priestley, Claire  
Pritchard, Andrew  
Prospa Group Limited (Prospa)  
Queensland Law Society (QLS)  
Queensland Small Business Champion  
Residents of Retirement Villages Victoria (RRVV)  
Screen Producers Australia (SPA)  
Self-Employed Australia  
The Shopping Centre Council of Australia (SCCA)  
Sise, Peter  
Small Business Development Corporation (SBDC) Western Australia  
Spier Consulting  
Swimming Pool and Spa Association (SPASA)

The Tasmanian Farmers & Graziers Association (TFGA)

Tasmanian Small Business Council (TSBC)

Telecommunications Industry Ombudsman (TIO)

The Repair Shed

Victorian Automobile Chamber of Commerce (VACC)

Victorian Government

Well Built Constructions – On The Coast Commercial & Residential

Wiseman, Leanne