



OUT18/19235

Ruth Moore  
Unfair Contract Terms Review  
Consumer and Corporations Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
[consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Ms Moore,

**Re: Review of Unfair Contract Terms Protections for Small Business**

Thank you for the opportunity for the Office of the NSW Small Business Commissioner (OSBC) to contribute to the Commonwealth Treasury's review of Unfair Contract Term (UCT) protections for small business.

The OSBC is committed to supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses in NSW, provides mediation and dispute resolution services, speaks up for small businesses in government and makes it easier to do business through policy harmonisation and regulatory reform.

The expansion of the UCT protections to include small businesses in 2016 attempted to address power disparities between parties to a standard form contract. Small businesses often have less experience with contracts or minimal access to strategic or legal advice, and therefore more exposed to the risk presented by an UCT.

The OSBC is aware that small businesses continue to experience difficulty with UCT, and provides these businesses with assistance through its Dispute Resolution Unit (DRU). The DRU is a team which provides information, procedural advice, and negotiation and mediation services to small businesses. Since 2014, the OSBC has received 326 enquiries relating to UCTs. From November 2016, 132 enquiries have been received. This data also shows a decline in enquiries, from 66 in 2016 to 54 in 2018<sup>1</sup>. While this may not be solely due to the introduction of the UCT protections, it is worth noting that while the overall number of enquiries received by the OSBC has increased from 9773 enquires in 2016 to 17667 in 2018 (to date), the number of UCT enquires is steadily decreasing. In looking at the types of businesses that are seeking assistance, the highest number of enquires came from the retail trade, construction and scientific/technical sectors.

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<sup>1</sup> These statistics reflect UCT enquiries received in the calendar year.

The OSBC has participated in a number of inquiries relating to UCT provisions, including the *Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Businesses* (2015) and the *Inquiry into the operation and effectiveness of the Franchising Code of Conduct* (2018). We offer the following comments in line with the discussion questions posed:

## Thresholds

The OSBC does not define a small business under a particular definition, and remains concerned that some small businesses may be excluded from disputing UCTs under the strict headcount and threshold definitions.

A frequently used definition of small business is a business that employs less than 20 persons, applied most notably by the Australian Bureau of Statistics (ABS). However, the Australian Tax Office (ATO) has recently changed its definition of a 'small business entity' to be a business with less than \$10 million aggregated turnover<sup>2</sup>, an expansion on their previous definition of a \$2 million turnover<sup>3</sup>. In considering whether a headcount is the most appropriate approach, the expansion of the ATO definition should be considered in conjunction with the intent of the UCT protections to ensure that small businesses in Australia are adequately safeguarded.

In the OSBC's 2015 submission to the *Exposure Draft Consultation for Extending UCT Protections to Small Business*, the OSBC presented three options for Treasury's consideration when defining a small business and strongly supported permitting 'a minister or court to use their discretion and make a determination upon request'<sup>4</sup>. This remains our suggested alternative approach.

Similarly, the value threshold should be assessed to understand the exclusionary impact on businesses. The imposition of a value threshold prohibits some small businesses in particular industries, franchising contracts or regional areas from seeking a resolution to a perceived UCT. While the value threshold aims to ensure businesses undertake their own due diligence for high-value transactions, this may not be possible in all cases and excludes small businesses in need of genuine assistance. Therefore the OSBC recommends that the value threshold be lifted to contracts up to \$5 million.

## Coverage

The OSBC notes that only the relevant courts have the ability to determine whether a contract is a standard form contract. However through our ongoing engagement with small businesses, it is apparent that often small businesses cannot identify a possible standard form contract and therefore may have difficulty seeking remedy through the UCT protections. The OSBC supports the development of targeted

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<sup>2</sup> ACCC (2018), *Definitions* [online]. Available at: <https://www.ato.gov.au/Business/Small-business-entity-concessions/Eligibility/Definitions/>

<sup>3</sup> ACCC (2018), *Work out if you're a small business for the income year* [online]. Available at: <https://www.ato.gov.au/business/small-business-entity-concessions/eligibility/work-out-if-you-re-a-small-business-for-the-income-year/>

<sup>4</sup> Office of the NSW Small Business Commissioner (2015) '*Submission to the Exposure Draft Consultation for Extending Unfair Contract Term Protections to Small Businesses*'

educative material to assist small businesses identify whether it is likely that they are a party to a standard form contract.

## Overall effect

The OSBC commends the Australian Competition and Consumer Commission (ACCC) on the enforcement and compliance activity undertaken to date, noting the significant examples highlighted by the discussion paper. The introduction of the UCT protections for small businesses has been a crucial change resulting in some improvement to business to business contractual relationships. The OSBC recognises that this was the first step, and now sees this review as a significant opportunity to progress these protections.

The OSBC welcomed the announcement in October 2018 that the ACCC and Australian Securities and Investments Commission (ASIC) would be granted investigative powers relating to UCTs, enabling them to initiate assessments of terms in standard form contracts<sup>5</sup>. These powers have already resulted in the investigation of waste management contracts, prompting three large companies to review and amend their contracts without the need for further legal action<sup>6</sup>. The introduction of these powers will continue to benefit small businesses as a preliminary step prior to the commencement of lengthy and expensive legal action. However, in light of this expansion of powers, the OSBC suggests due consideration is given to the necessary additional resourcing requirements of both the ACCC and ASIC to ensure they can effectively conduct investigations into suspected UCTs.

For small businesses operating in industries that has not yet been investigated by the ACCC and may need to proceed with challenging a perceived UCT in court, the associated costs such as time, money and mental energy may outweigh the benefit of seeking a legal determination. There are currently no penalties applied to court rulings that a term is unfair – the term will simply be declared void and the rest of the contract will continue to be applicable<sup>7</sup>. Small businesses are also particularly vulnerable to pressure the other party to the contract may apply, such as demanding payment to avoid a debt recovery that would impact their credit rating. As such, a small business may choose to pay the requested amount in exchange for quick settlement to allow them to get back to their core focus, the running of their business.

The ACCC's submission to the *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* highlighted persisting issues preventing stronger protections for small businesses from UCTs. The ACCC recommended that UCT in standard form contracts be made illegal, civil pecuniary penalties and infringement notices be applied to breaches, and that the ACCC be given the ability to obtain

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<sup>5</sup> Treasury (2018), *ACCC and ASIC given stronger powers over unfair contract terms*. Treasury media releases, the Hon. Josh Frydenburg MP, 19 October 2018 [online]. Available at: <http://jaf.ministers.treasury.gov.au/media-release/032-2018/>

<sup>6</sup> ACCC (2018), *Visy Recycling, Cleanaway and Suez remove potentially unfair contract terms*. ACCC media releases, 3 December 2018 [online]. Available at: <https://www.accc.gov.au/media-release/visy-recycling-cleanaway-and-suez-remove-potentially-unfair-contract-terms>

<sup>7</sup> ACCC (2018), *Unfair contract terms* [online]. Available at <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>

evidence on whether a standard from contract contains UCTs.<sup>8</sup> These recommendations were again supported by the ACCC in a media release in August 2018<sup>9</sup>. In supplementary information provided as part of the response to the *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*, the OSBC the ACCC's position, advocating for UCVTs to be made illegal and civil penalties and infringement notices be introduced to improve deterrence. We continue to support these recommendations and consider that the implementation of these changes would result in improved outcomes for small business.

An area excluded from the UCT protections is insurance contracts. This can result in an inability to dispute contract terms that are potentially unfair, and is an issue that impacts both consumers and business. The OSBC notes the Government consultation conducted in June/August 2018 and is currently considering a proposed model to extend UCT protections to insurance contracts<sup>10</sup>. A prominent example of why this is needed is 'choice of repairer' clauses in motor vehicle insurance. I have written to the then Deputy Chair of the ACCC, Dr Michael Schaper, on this matter, and have attached my previous letter for your information. To be clear, the OSBC supports the extension of UCT protections to insurance contracts.

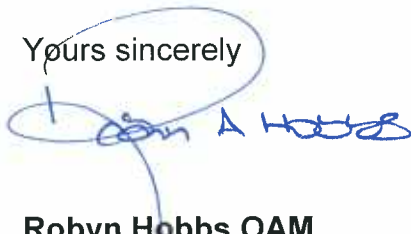
While the courts ultimately have the ability to rule on what constitutes an UCT, all parties to a contract would benefit from greater clarity about the types of terms that are likely to be considered a UCT. Reviewing the existing educative material and updating the examples provided using case studies and established precedence would benefit small businesses, without limiting the scope of the protections.

## Conclusion

The OSBC provides the above comments for Treasury's consideration, and looks forward to ongoing engagement for the benefit of small businesses.

To discuss this submission, please contact Kiara Drinan, Advisor, Advocacy and Strategic Projects, on (02) 8222 4874 or [kiara.drinan@smallbusiness.gov.nsw.au](mailto:kiara.drinan@smallbusiness.gov.nsw.au).

Yours sincerely



**Robyn Hobbs OAM**  
NSW Small Business Commissioner  
21 December 2018

<sup>8</sup> ACCC (2018), *Submission to the Inquiry into the operation and effectiveness of the Franchising Code of Conduct*, p6-8

<sup>9</sup> ACCC (2018), *Major changes needed to get rid of unfair contract terms*. ACCC media releases, 31 August 2018 [online]. Available at: <https://www.accc.gov.au/media-release/major-changes-needed-to-get-rid-of-unfair-contract-terms>

<sup>10</sup> Treasury (2018), Consultation: [Unfair contract terms – insurance contracts](#)





OUT18/7581

Dr Michael Schaper  
Deputy Chairman  
Australian Competition & Consumer Commission

By email to [michael.schaper@accc.com.au](mailto:michael.schaper@accc.com.au)

Dear Dr Schaper

The Office of the NSW Small Business Commissioner (OSBC) has received complaints from smash repairers and consumers concerned about the impact of recent changes to Insurance Australia Group (IAG) branded comprehensive insurance policy that requires an additional premium to be paid for 'choice of repairer' coverage.

On 24 September 2017, IAG changed their Motor Vehicle Policy and Policy Disclosure Statement (PDS) to require a charge for clients who want to have a choice of repairer, for their NRMA and RACV products.

The key concerns raised to the OSBC relate to the impact of monopolisation of the two large insurance companies in regional areas.

One issue is that there is a lack of clarity in the terminology used in the PDS of Insurance Australia Group for their comprehensive insurance policies in relation to "choice of repairer" coverage:

- "Choice of any network repairer" refers to the choice of an insurer's partner repairer. This will not provide insurance cover to a consumer who wants to use an independent repairer, not part of the insurer's network.
- "Any repairer" refers to the choice of an independent repairer who is not in an insurer's scheme of network of repairers.

The consumer would complain that they have lost choice of repairer coverage in the renewal process for comprehensive insurance. The default position is that the "any repairer" option is not selected. If the consumer does choose "any repairer" an additional premium of 10 percent is to be paid.

The impact of the amendment to IAG's comprehensive motor vehicle insurance policy has been that consumers might take their motor vehicle to their choice of independent repairer (as they would expect under the "any repairer" coverage) only to find out that their vehicle has been towed to an insurer's network repairer.

IAG have responded to complaints by stating that the key reason for the amendment to the comprehensive insurance policy was consumer demand for a competitive price. IAG claim that they have responded to their insurance customers who want flexibility to choose the coverage that they want and only pay for what they have selected. The "any repairer" option has been maintained but is now an option for additional coverage. IAG further note that independent repairers can apply to become a partner repairer at any time.

The impacts are more prominent in the regional towns where the local independent repairers are concerned that damaged motor vehicles are being towed long distances to be repaired by an insurer's network repairer. There are concerns about repair times, and the impacts to local employment because of repair shop rationalisation.

Independent repairers claim that it is difficult to compete with the pricing of repair work undertaken by network repairers in regional areas. Both IAG and Suncorp have recommended repairer programs and collectively account for 80 percent of the market in motor vehicle insurance and repairs.

Suncorp vertically integrate the repair process through their corporate repairers (Capital Smart). Both IAG and Suncorp can control their costs and access a lower rate for repairs from their network repairers by supplying their networks with a significant volume of repair work.

IAG have 400 repairers in their network of preferred repairers and have also established retail insurance shopfronts in regional towns.

OSBC is concerned that the insurance duopoly may be accelerating the rationalisation of the repair industry and reducing competition in regional markets. We are currently making inquiries with industry stakeholders to assess the impacts of the major insurance companies.

I request that the ACCC look in to this matter as I believe it is in fact not only unfair, punitive, but also restricts market competition, and has the capacity to close many small businesses in the motor vehicle smash repair industry.

Should you have any further queries please contact Adrian Leopardi, Mediation Manager, by email at [adrian.leopardi@smallbusiness.nsw.gov.au](mailto:adrian.leopardi@smallbusiness.nsw.gov.au) or by phone on 02 8222 4813.

Yours sincerely



Robyn A Hobbs

**Robyn Hobbs QAM**  
NSW Small Business Commissioner  
16 May 2018