

30 March 2020

Consumer Affairs Australia and New Zealand

By email: uctprotections@treasury.gov.au

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

The Australian Institute of Credit Management (AICM) represents the interests of over 2,600 credit professionals who are custodians of cash flow. They assess and mitigate credit risk in all sectors and manage credit terms for the supply of goods, services and finance.

Without our members, businesses are exposed to reputational damage, poor cash flow management, inefficient processes, breaching regulatory requirements and risk of not getting paid for hard won sales and services delivered.

On behalf of our members, the AICM is a vocal advocate for reform that enables all businesses to manage their credit risk and increase resilience to economic shocks and downturns.

We provide these comments from the perspective of our trade credit members. These members are involved on the supply of goods and services on extended payment terms in all sectors of the Australian economy. The value of trade credit to the Australian economy is significant, an RBA report put the total value of outstanding trade credit to be in excess of \$80bn at any one time¹. Additionally, this source of credit is supplied without interest and other charges associated with other types of credit.

Below we have provided specific comment on questions of the Regulation Impact Statement relevant to our members views and emphasise the following:

1- Focus on conduct not existence of terms in contracts

To ensure best out comes for all parties AICM members believe the mere existence of a term should not result in penalties.

From discussion with our members there are very few terms that would be deemed unfair across all situations and scenarios. The inclusion of terms in standard form contracts that may be deemed unfair in certain circumstances but fair in others enables the credit provider to efficiently operate across their customer base and minimise the risk of excluding the term where required. In these circumstances the terms are only relied on when reasonable to do so.

Further AICM members report:

- (a) They routinely provide opportunities for standard terms to be amended and will remove terms not necessary in specific circumstances.
- (b) If a term is not reasonably required, they will not rely or enforce the term.
- (c) Considering the inherent credit risk of trading with small businesses, if trade credit providers were at risk of significant penalties for the existence of an UCT, several members have reported their business may restrict the credit terms offered to small businesses in order to mitigate the risks.

¹ <https://www.rba.gov.au/publications/bulletin/2013/sep/5.html>

Considering the above the AICM believes that strong enforcement and penalties should be applied when a business unreasonably relies on or enforces an unfair contract term but not the mere existence. To penalise due to existence may create a greater unintended consequence of restricting small businesses access to credit.

2- Courts should retain powers to impose sanctions.

Determining whether or not a term and/or conduct is unfair requires a significant element of judgement and assessment of evidence, therefore we are in favour of retaining the courts role as an arbitrator in the issuing of penalties or enforcement of legislation.

3- Access to information on small businesses

AICM members are less concerned with the metrics of the thresholds such as revenue and staff numbers but with the ability to assess this information.

Unlike most comparative jurisdictions, credit providers in Australia are not able to efficiently access reliable information on revenue and staff numbers. For example, in the UK companies of all sizes are required to submit revenue and other information to Companies House². In Australia only companies with a revenue over \$50 million submit any financial information to ASIC³.

As the minimum threshold for reporting financial information to ASIC is multiples that of all small business definitions, this is of no benefit to credit providers in determining when small business obligations apply.

Only once credit providers can efficiently obtain size of business information with reference to trusted source will they be able to effectively manage all requirements currently in place for trading with small businesses.

Questions for comment

- *“Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected”*

Whilst most AICM members have reviewed and updated standard form contracts as a result of the legislation, we are aware of businesses that have:

a) Not reviewed agreements to alter terms that may be deemed unfair

Or

b) Retained terms that may be unfair in some circumstances but required for a significant portion of their customer types.

Where these businesses have retained UCTs they do routinely remove these following negotiations with customers or don't enforce them unless reasonable to protect their interests.

² <https://www.gov.uk/government/publications/life-of-a-company-annual-requirements/life-of-a-company-part-1-accounts> accessed 30 March 2020

³ <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/are-you-a-large-or-small-proprietary-company/> accessed 30 March 2020

- “Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs)”

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

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

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

Education should not just sit with credit providers on unfair contract terms but also new small business start-ups and business generally to ensure that business engaging in contracts are aware of their obligations in a running a business and accepting credit in the first instance.

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

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

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

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

- (a) What an unfair contract term actually is and providing examples of unfair contract terms.
 - (b) The impacts it can have on credit providers from a legal standpoint; and
 - (c) Where to seek proper legal guidance on the terms and the alternatives that can and should be used.
- *“Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response”*

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

There needs to be an appropriate balance between regulating the use of unfair contract terms in standard form contracts, and protecting the credit providers, as it will ultimately be those credit providers who have to absorb the liability. As mentioned previously, an unintended consequence could be credit providers reducing the terms and credit limits offered to small businesses to otherwise mitigate risks.

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

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

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

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

Additionally, any taking of action should be as a result of the enforcement of an UCT not simply its existence.

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

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

Additionally, in the transport industry it is recognised that there are a number of potential UCT, however many of the businesses employ more than 20 people.⁴

However, the major concern of our members is there is no efficient and independently verified way of assessing headcount.

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

⁴ Rod Sims, Chair, Council of Small Business Organisations Australia’s national Small Business Summit, Major changes needed to get rid of unfair contract terms, 31 August 2018 < <https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms>>.

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

- *“Do you consider \$10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business”*

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

- *“Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?”⁵*

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

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

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

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

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

The AICM also notes that the contract threshold level is an efficient way credit providers can assess the application of the legislation.

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

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

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

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

⁵ <https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms>

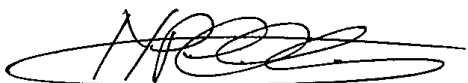
The AICM considers that the best way regulators can promote and enhance guidance on what constitutes a standard form contract is to have the information provided in a simple, and easy to understand format, providing clear examples of what may constitute a standard form contract.

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

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

Should you have any queries arising from our submission please contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Pilavidis', enclosed within a large, horizontal oval scribble.

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