



**ASIC**  
Australian Securities &  
Investments Commission

# **Enhancements to unfair contract term protections**

## **Submission by the Australian Securities and Investments Commission**

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## Executive summary

- 1 The Australian Securities and Investments Commission (ASIC) is Australia's national corporate, markets, financial services and consumer credit regulator.
- 2 ASIC welcomes the opportunity to comment on Treasury's Consultation Regulation Impact Statement [Enhancements to unfair contract term protections](#). We note that some questions in the statement are directed to industry participants. Our submission responds only to questions relevant to ASIC's regulatory functions. It does not indicate a preference for specific options identified in Treasury's consultation document. Instead, it highlights various matters that we consider important to bring to Treasury's attention in deciding which options to choose.
- 3 Since July 2010, ASIC has administered the unfair contract term (UCT) provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) relating to standard form consumer contracts for financial products and services. Since November 2016, these provisions have also applied to small business standard form contracts.
- Note: See Div 2 of Pt 2, Subdiv BA of the ASIC Act (UCT provisions).
- 4 In administering these provisions, ASIC has provided regulatory guidance, conducted compliance reviews, initiated court proceedings and issued reports to promote good industry practices and to highlight potentially harmful practices. We have taken steps to address unfair contract terms in individual circumstances and have achieved systemic outcomes benefiting consumers and small businesses more broadly.
- Note: See Table 1 in the appendix to this submission for a summary of our work.
- 5 Consumers and small businesses are vulnerable to unfair terms in standard form contracts, as the other contracting party will generally offer these contracts on a 'take it or leave it' basis. Consumers and small businesses may lack the resources to understand and negotiate contract terms. Unfair contract terms may allocate contract risks to the party that is less able to manage them.
- 6 Consumers and small businesses should have confidence that the standard form contracts they enter are fair.
- 7 ASIC supports consideration of enhancements to the UCT protections to:
- (a) reduce incentives to include unfair terms in standard form contracts;
  - (b) provide alternative remedies to address the harm caused by unfair terms, where voiding the term would not be in the best interests of the consumer or small business party;
  - (c) ensure that the considerable majority of Australian businesses that need protection are covered by the UCT provisions; and
  - (d) provide certainty and confidence for contracting parties in determining whether the UCT provisions apply to a particular small business.

## A Legality and penalties

### Key points

This section assesses the options that Treasury has identified to address the problem that unfair terms continue to be used in standard form contracts with small businesses

ASIC sees significant value in addressing non-compliance with UCT laws with more significant consequences.

- 8 There are clear benefits to strengthening the protections for small businesses from unfair contract terms: see paragraphs 5–7.
- 9 Treasury has noted that the current framework, in which unfair contract terms are not illegal and do not attract a penalty, may not adequately deter businesses from including these terms in their small business contracts. Additionally, small businesses may not be aware of the existence of the UCT protections.
- 10 We agree with Treasury’s observations. Under the current framework, the only outcome of a term being declared unfair is that the term is void. We have observed that there has been little incentive in practice for financial services businesses to ensure their standard form contracts are free of unfair terms.
- 11 We note the option of strengthening regulators’ compliance and enforcement activities. ASIC has conducted substantial compliance and enforcement activities in relation to the UCT provisions.
- Note: See Table 1 in the appendix to this submission for a summary of our work.
- 12 We continue to allocate resources to regulatory activities in relation to unfair contract terms for small businesses and consumers, and have allocated resources to prepare for the extension of UCT protections to insurance contracts. Any further allocation of resources to strengthen our compliance and enforcement activities would require additional funding. Without this, we anticipate that resources would have to be reallocated from other work.
- 13 ASIC has previously published our approach to enforcing the laws that we administer in [Information Sheet 151](#) *ASIC’s approach to enforcement* (INFO 151). Our efforts to date in regulatory guidance and compliance monitoring have strongly focused on placing responsibility on regulated entities for ensuring their own compliance with the UCT laws. We consider this allows us to focus our regulatory activities on more egregious and systemic conduct.
- 14 We see significant value in addressing non-compliance with more severe consequences for breaches as an initial step. We will continue to monitor compliance with UCT laws, and take action where considered necessary. Prohibiting unfair contract terms and attaching penalties could prevent matters from reaching the enforcement stage in the first place.

- 15 This is likely to have a substantial deterrent effect and to increase incentives for contract-issuing businesses to take proactive steps to review and amend their existing standard form contracts.
- 16 ASIC’s [Report 565](#) *Unfair contract terms and small business loans* (REP 565), while relating to contract terms of the ‘big four’ banks, was intended to put *all* lenders on notice about our 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, we have since observed systemic non-compliance by some other lenders—both authorised deposit-taking institutions (ADIs) and non-ADIs.
- 17 There appears to have been limited incentive for lenders to review their standard form contracts without additional intervention by ASIC. For example, in September 2018, following an ASIC review, Prospa Advance Pty Limited changed terms in its standard form small business loan contract to address alleged unfair terms. And in 2019, ASIC initiated legal proceedings against Bank of Queensland Limited and Bendigo and Adelaide Bank Limited for alleged unfair contract terms.
- 18 Further, in evidence before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2018, Suncorp Group Limited indicated that, as at June 2018, its review and amendment of its small business standard form contracts was incomplete and that at least some of its contracts may still contain terms that could be unfair. This was despite the extension of UCT provisions to small businesses in November 2016 and publication of ASIC’s [REP 565](#).
- 19 It is possible that, had unfair terms in small business standard form contracts attracted a penalty, we would not have needed to use the same level of resources to obtain changes from other lenders. A strong financial and reputational incentive may have encouraged lenders to review and change their contracts without ASIC’s intervention.
- 20 We agree that infringement notices provide a timely, cost-efficient enforcement outcome for relatively minor contraventions of the law. However, we consider that breaches of the UCT provisions by their nature will be:
- (a) systemic—not confined to a small number of contracts; and
  - (b) complex—in that it may not be clear whether a term is in fact unfair without judicial determination.
- 21 As Treasury notes, once an infringement notice is issued and the amount in the notice is paid, the matter is considered addressed. An infringement notice does not directly address any harm suffered by the relevant small business, and regulators are prevented from taking future court action in relation to the conduct set out in the infringement notice.

- 22 We therefore consider that the usefulness of infringement notices in this case would be limited.
- 23 ASIC agrees that any proposal to give the relevant regulators determination powers would require further careful consideration of potential legal and practical implications.
- 24 We agree that ASIC would need additional resources to exercise such powers, whether through additional funding or diverting resources from other regulatory activities.
- 25 We also agree that the public nature of court processes and the public judgements that are produced may act as a deterrent and guide for other businesses.
- 26 It is unclear whether a determinations and appeals process would provide a solution that was faster than internal and external dispute resolution (for resolving private disputes) or litigation.

## B Flexible remedies

### Key points

This section assesses the options that Treasury has identified for addressing the fact that voiding an unfair term may not address the underlying harm.

ASIC considers that the use of flexible remedies would promote the fairness objectives of the UCT laws.

While, in principle, ASIC sees the value in allowing a remedy of preventing unfair terms being used in similar circumstances, the contextual nature of unfair terms is a necessary consideration before reaching a position on this as a remedy.

- 27 The automatic voiding of a term may not be an appropriate remedy in every situation. It may make a contract unworkable, requiring a small business to enter into another contract (with either the same contract-issuing party or another), with no guarantee that the new contract would be any more favourable than the original contract.
- 28 Removing the automatic voiding of unfair terms may promote the fairness objective of the UCT provisions by providing flexibility and ensuring that small businesses have access to remedies that are tailored to the specific circumstances of their case.
- 29 A court's ability to select alternative remedies may also provide an opportunity to demonstrate to industry how the unfairness of particular terms should be addressed. Contract-issuing parties using the same or similar terms in their standard form contracts could then potentially review the terms in light of the court's orders to ensure that their term complies with the law.
- 30 Aligning the remedies available to non-party small businesses with those available to non-party consumers would be consistent with the purpose and intent of extending the UCT protections to small businesses and would clarify what remedies are available.
- 31 The option of preventing unfair terms being used in similar circumstances prohibits contract terms that a court has declared to be unfair from repeatedly being used in similar small business contracts. In ASIC's view, this option would require careful consideration of its potential legal and practical implications.
- 32 Reviewing an unfair term requires the reviewer to consider the contract as a whole, not just the isolated term. While it is possible that an unfair term in one standard form contract would be unfair in a different standard form

contract, it is also possible that the term would be fair in another contract, depending on the context.

- 33 This option would involve a rebuttable presumption that a contract term would be declared unfair if, in a separate case, the same or substantially similar term was used by the same entity or in the same industry sector and declared by the court to be unfair. In our view, it is not clear what benefit this presumption would have, given that a regulator or small business would still be required to initiate court proceedings in order to have the term declared unfair.
- 34 We consider this position to be distinguishable from the rationale for the rebuttable presumption that a contract is a standard form contract. In that case, it is generally more likely than not that the contract-issuing party is using a standard form, whereas in this case it is not clear that an unfair term in one contract is more likely than not to be unfair in a different but similar contract.
- 35 We consider the current law to be unclear about whether an action can be brought by a regulator for an individual contract and all other standard form contracts of the same kind, issued by the same party, which also contain the unfair terms. Clarification in this regard is likely to go some way to addressing the problem that this option also attempts to solve.



## C Definition of a small business contract

### Key points

This section assesses the options Treasury has identified for the definition of a small business contract.

Our comments highlight various benefits and issues with some of the options.

- 36 The current definition of ‘small business contract’ creates uncertainty in circumstances where a small business’s employee headcount fluctuates seasonally (as it does in hospitality and agricultural industries). A higher threshold would arguably address this to some extent.
- 37 In addition, the current definition is not consistent with the way the Australian Financial Complaints Authority (AFCA) applies protections to small businesses (being 100 employees). Aligning these two approaches in the financial services space may simplify the application of the UCT framework. It 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.
- 38 We agree that replacing the headcount threshold with a turnover threshold is likely to resolve issues with seasonal or ad hoc fluctuations in employee numbers. However, this will then exclude those small businesses that have a high annual turnover but low profit margin from accessing the same protections. This will essentially replace one excluded cohort of small businesses with another.
- 39 Additionally, a headcount turnover would be more consistent with a range of definitions of small business across Australian regulation that refer to employee headcount (such as the AFCA Approved Rules, which consider a small business to have 100 or fewer employees).
- 40 We agree 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. It 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.
- 41 A combined headcount and annual turnover threshold would accommodate small businesses with a high annual turnover but low profit margin (e.g. independent petrol stations or grocery stores) and those exposed to significant seasonal fluctuations (e.g. transport and agricultural small businesses).

- 42 While this combined headcount and annual turnover option would include some small businesses that fall outside AFCA's small business jurisdiction (and therefore include small businesses that would not have access to external dispute resolution through AFCA), those businesses would still have access to the courts (albeit at a greater cost than if they were to go through AFCA).
- 43 We agree that the UCT protections are not intended to assist businesses in large corporate groups who have financial and technical resources to protect themselves when entering into a contract. Such availability would, as Treasury identifies, 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.

## D Value threshold

### Key points

This section assesses the options Treasury has identified for the maximum value of contracts to which the UCT provisions apply.

Our comments highlight various benefits and issues with some of the options.

44 The current value threshold (\$1 million) may not capture certain contracts in capital intensive industries or contracts that run for a long time. The current threshold may not adequately address circumstances where the upfront price of the contract is uncertain. For example, 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.

45 We agree that the current threshold is also inconsistent with the thresholds that apply under other regimes (e.g. \$5 million under AFCA's Approved Rules). This creates confusion and requires both small businesses and contract-issuing parties in the financial services industry to consider multiple thresholds.

Note: See AFCA's [Approved Rules](#), effective 1 October 2019.

46 In our submission to Treasury's review of UCT protections for small business, we identified a practice by which some lenders to small business borrowers may aggregate or 're-document' multiple loans as a single facility so that they are treated as a single loan. The potential consequence of this practice is that, if multiple loans are treated as a single loan that exceeds \$1 million, the UCT protections may no longer apply.

Note: See [Review of unfair contract term protections for small business: Submission by the Australian Securities and Investments Commission](#), January 2019, paragraphs 21–22.

47 Raising the value threshold to \$5 million would address the discrepancy between the current \$1 million threshold of the UCT provisions and the \$5 million threshold of AFCA's small business jurisdiction.

48 Alternatively, ASIC could be given a discretionary power under the ASIC Act to make exemptions, modifications and declarations for small business financial services contracts for the purposes of Div 2 of Pt 2, Subdiv BA of the ASIC Act. (This power would be similar to our discretionary powers under the *Corporations Act 2001*.)

49 This power could enable ASIC to issue a legislative instrument to vary the monetary value of specified types of small business standard form contract. ASIC's use of such a power would be subject to administrative review by the Administrative Appeals Tribunal, and to judicial review (for individual

instruments). A legislative instrument using this power to set the monetary value threshold would be subject to parliamentary disallowance under the *Legislation Act 2003*.

50 ASIC agrees 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.

51 We also agree that businesses that already offer small business contracts normally use the same contract template, regardless of whether the contractual value is below or above the threshold.

52 However, we note that a value threshold places some onus on a small business to undertake due diligence for high-value transactions. This could prevent moral hazard arising where the business relies solely on the UCT protections and does not undertake the necessary due diligence. Given the potential lack of awareness of the UCT protections among some small businesses, we do not see the risk of moral hazard as significant.

## E Clarity on standard form contracts

### Key points

This section assesses the options Treasury has identified for clarifying what a standard form contract is.

Treasury's consultation presents an opportunity to provide clarity on what amounts to a standard form contract.

- 53 ASIC considers there is an opportunity to provide additional clarity on what a standard form contract is for regulators, small businesses and contract-issuing parties.
- 54 While we may continue to promote and, where necessary, enhance current guidance on what constitutes a standard form contract, we see benefit in introducing additional clarity into the UCT provisions.
- 55 '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.
- 56 Clarifying the meaning of 'effective opportunity to negotiate' by identifying actions that do not constitute an effective opportunity to negotiate, in the manner outlined by Treasury, may provide additional certainty in the law and assist in its application.
- 57 ASIC encourages changes that would address issues that arise where a contract is made up of multiple documents. Contracts for financial services often contain more than one document. For example, a small business loan contract may be made up of a letter of offer, standard terms and conditions, ancillary terms documents, and mortgage documents.
- 58 While all loan contracts would include the same primary 'terms and conditions' document, the other documents forming part of the contract are unlikely to change the operation of any unfair terms in that document.
- 59 There is some uncertainty about whether a contract comprising a standard terms and conditions document and a customised letter of offer is a standard form contract where all the component documents of the contract can vary. We consider these documents should still amount to a standard form contract. This is because, while the documents are arguably a variation to the standard form terms and conditions, these variations are also provided to numerous borrowers on a 'take it or leave it' basis.
- 60 Similarly, insurance contracts may comprise a Product Disclosure Statement, policy schedule and ancillary documents.

- 61 ASIC is also concerned about a risk that industries which are governed by industry codes of conduct containing provisions designed to minimise the risk of the use of unfair terms (e.g. the Banking Code of Practice) may rely on their code provisions purportedly overriding instances of unfair terms in individual contracts. Effectively, it may be argued that the relevant code provisions are 'read into' the contract.
- 62 If this is the case, we see this as highly undesirable because consumers and small businesses would have to read and understand several documents (the contract and the code) to determine whether a term is unfair.

## F Application of any enhanced protections to consumer and insurance contracts

### Key points

This section looks at whether the enhanced protections should apply to consumer contracts, including insurance contracts.

The rationale for enhancements to small business contract protections appears equally relevant to consumer and insurance contracts.

- 63 Applying any enhanced UCT protections that apply to small businesses to consumer and insurance contracts will avoid inconsistency between the laws that would apply to small businesses and those that would apply to consumer and insurance contracts.
- 64 We consider that the rationale for any enhancements to the UCT protections for small businesses applies equally to consumer and insurance contracts, where such enhancements are applicable. Our comments in this submission on options to enhance the UCT provisions also apply to enhancing the UCT protections for consumer and insurance contracts.

## Appendix: ASIC's work on unfair contract terms

Table 1: ASIC actions and regulatory outcomes

Type of contract	ASIC's concern	Regulatory outcome
Small business loan contract	<p>ASIC and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) conducted a review of small business loan contracts offered by the 'big four' banks. ASIC and the ASBFEO were concerned that the banks had not done enough to ensure their small business loan contracts complied with the UCT provisions.</p> <p>ASIC conducted a further review of small business loan contracts offered by mid-tier lenders, mutuals and fintechs.</p>	<p>The reviews have led to the lenders making changes to their small business loan contracts, and brought about wider change across the industry.</p> <p>ASIC has also commenced proceedings in the Federal Court of Australia against the Bank of Queensland and Bendigo and Adelaide Bank concerning unfair contract terms in small business contracts.</p> <p>Note: See <a href="#">REP 565</a>, <a href="#">Media Release (18-262MR)</a> <i>Prosopa removes unfair loan terms for small business borrowers and guarantors</i> (7 September 2018), <a href="#">Media Release (19-238MR)</a> <i>ASIC sues Bank of Queensland for use of unfair contract terms</i> (4 September 2019) and <a href="#">Media Release (19-239MR)</a> <i>ASIC sues Bendigo and Adelaide Bank for use of unfair contract terms</i> (4 September 2019).</p>
Travel card	<p>ASIC conducted an industry-wide review of travel cards, which allow consumers to transfer funds into one or more currencies for use overseas. Previously, unused funds were forfeited upon the card's expiry.</p>	<p>Our review led to the following outcomes:</p> <ul style="list-style-type: none"> <li>• Four travel card issuers changed their terms and conditions so that customers do not forfeit their funds when the cards expire.</li> <li>• \$5.7 million was released to consumers: funds that otherwise would have been forfeited.</li> </ul> <p>Note: See <a href="#">Media Release (14-262MR)</a> <i>ASIC concerns see CBA release \$2.2 million for 45,000 travel card customers</i> (8 October 2014) and <a href="#">Media Release (15-229MR)</a> <i>Consumers can reclaim funds on expired travel money cards following ASIC action</i> (25 August 2015).</p>
Rental agreement	<p>ASIC investigated four businesses involved in the hire and sale of water coolers and first aid kits using 'rent to own' agreements. We were concerned the agreements contained unfair terms that provided an automatic rollover of the rental term unless the consumer took steps to cancel the contract.</p>	<p>We accepted a court enforceable undertaking, resulting in the businesses agreeing to not enforce their rights under the agreements.</p> <p>Note: See <a href="#">Media Release (14-021MR)</a> <i>Unlicensed rental companies enter into enforceable undertaking with ASIC</i> (4 February 2014).</p>
Household goods rental agreement	<p>ASIC investigated the standard form rental agreement used by Mr Rental Australia Pty Ltd due to concerns that an early termination fee was an unfair term.</p>	<p>We accepted a court enforceable undertaking, resulting in \$300,000 in refunds to approximately 1,560 consumers and a removal of the fee.</p> <p>Note: See <a href="#">Media Release (13-022MR)</a> <i>ASIC accepts enforceable undertaking from Mr Rental</i> (12 February 2013).</p>



Type of contract	ASIC's concern	Regulatory outcome
Debt management contract	MyBudget Pty Ltd provided budgeting and debt management services to people experiencing financial difficulty. ASIC raised concerns about a number of potentially unfair terms in its terms of service agreement.	MyBudget agreed to amend or remove the terms of concern.  Note: See <a href="#">Media Release (11-12AD)</a> ASIC obtains changes to contract terms under new consumer law (20 January 2011).
Home loans early termination fee	ASIC was concerned that early termination fees in some home loan contracts were potentially unfair.	After a public consultation process, we issued <a href="#">Regulatory Guide 220</a> <i>Early termination fees for residential loans: Unconscionable fees and unfair contract terms</i> (RG 220), setting out when we would consider that such a fee may be unconscionable or unfair.  The Government prohibited these fees from 1 July 2011.  Note: See <a href="#">Media Release (10-234MR)</a> ASIC sets out expectations of lender practices on mortgage early termination fees (10 November 2010).

## Key terms

Term	Meaning in this document
ADI	Authorised deposit taking institution, authorised by the Australian Prudential Regulation Authority under the <i>Banking Act 1959</i>
AFCA	Australian Financial Complaints Authority
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Banking Code of Practice	The Banking Code of Practice issued by the Australian Banking Association, which applies from 1 July 2019
consumer protection provisions	The provisions in the ASIC Act relating to unconscionable conduct and consumer protection in relation to financial products and services Note: See Div 2 of Pt 2 of the ASIC Act.
REP 565 (for example)	An ASIC report (in this example numbered 565)
s12GBCA (for example)	A section of the ASIC Act (in this example, numbered 12GBCA), unless otherwise specified
small business loan contract	A standard form contract for a small business loan
UCT	Unfair contract term
UCT laws/protections	See 'UCT provisions'
UCT provisions	The provisions in the ASIC Act relating to standard form consumer contracts for financial products and services, which have also applied to standard form small business contracts since 12 November 2016 Note: See Div 2 of Pt 2, Subdiv BA of the ASIC Act.