



13 March 2020

Manager, Consumer Policy Unit
Consumer and Corporations Policy Division
Treasury
via email: uctprotections@treasury.gov.au

Dear Treasury

RE: Enhancements to Unfair Contract Term Protections – Consultation Regulation Impact Statement

Australia's existing unfair contracts legislation is not strong enough to stop businesses from including unfair terms in their contracts. 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. It is crucial that the Australian Government makes Unfair Contract Terms (UCTs) illegal, and attaches appropriate penalties to businesses that breach the law.

CHOICE welcomes the recent extension of protections from UCTs in insurance contracts. The Government needs to go one step further in reducing consumer harm by making it illegal to include UCTs in consumer and insurance contracts. This would mean that companies would face meaningful penalties for serious breaches.

Recommendations:

1. That the Government makes UCTs illegal in consumer and insurance contracts.
2. That the Government attaches appropriate pecuniary penalties to businesses that include UCTs in consumer and insurance contracts.
3. That regulators are provided additional enforcement powers to issue infringement notices.
4. That courts are provided additional power to determine appropriate remedies for UCTs, other than voiding the UCT.
5. That standard form contracts as a whole should be able to be deemed unfair, and consumers should be able to seek redress for any harm suffered as a consequence of being bound by a UCT.

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The Australian Consumers' Association is a not-for-profit company limited by guarantee. ABN 72 000 281 925 ACN 000 281 925

Problems for consumers

CHOICE is concerned that UCTs are still being used in business-to-consumer contracts to the detriment of consumers. In these standard form contracts, which continue to dominate everyday transactions, consumers often do not have the power to protect themselves from UCTs, as most are generally provided on a 'take it or leave it' basis. This can leave the consumer with little to no power to negotiate or remove potential UCTs.

Through ACCC enforcement actions and CHOICE investigations, we have seen notable instances where consumers have suffered significant financial loss or have had their ability to speak out restricted by UCTs.

CHOICE notes last year's Federal Court ruling that hair loss treatment business, Ashley & Martin, had included unfair contract terms in its 'Personal RealGROWTH Program' (a hair loss treatment program). The terms, which were used for a period of at least three years, required customers to pay for treatment before they had a chance to consider medical advice. Consumers were potentially faced with either losing hundreds or thousands of dollars if they cancelled the contract, which may have been necessary due to medical advice or if they developed side effects to the prescribed medication.¹ It is concerning that over 25,000 consumers were negatively impacted by these unfair terms, yet Ashley & Martin were not penalised for the harm they caused.

The use of non-disparagement clauses excessively restricts a consumer's ability to level the playing field in the market. An example of this was seen in 2018, when the ACCC accepted an enforceable undertaking from home builder Wisdom Properties Group Pty Ltd in regards to non-disparagement clauses in its standard home building agreements that allowed it to control or prevent any public statements, such as online reviews, made by its customers about its services.² When consumers are limited in their ability to speak publicly about poor business practice or quality of service, other consumers are adversely impacted and more generally, competitive markets are compromised.

CHOICE has found UCTs in energy contracts, including terms that allow electricity suppliers to raise rates mid-contract. For example, Energy Australia's 40-page market retail contract says it can:

- vary the tariffs and charges set out in a contract, or introduce new tariffs and charges, "for any reason"; and

¹ ACCC 2019, 'Court orders Ashley & Martin to refund consumers over unfair contract terms', Release 198/19. Accessed on 12 March 2020

<https://www.accc.gov.au/media-release/court-orders-ashley-martin-to-refund-consumers-over-unfair-contract-terms>

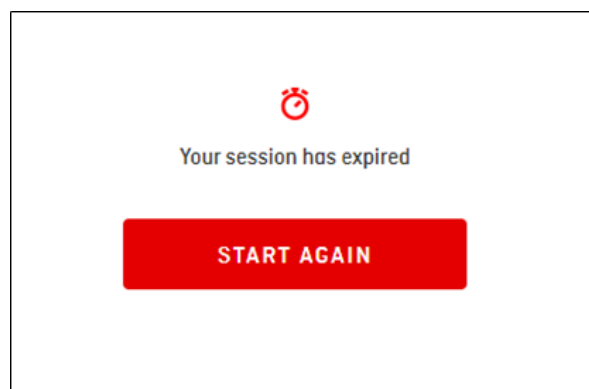
² ACCC 2018, 'Wisdom to remove unfair contract terms', Release 104/18. Accessed on 12 March 2020

<https://www.accc.gov.au/media-release/wisdom-to-remove-unfair-contract-terms>

- absolve itself of responsibility for any loss or damage that occurs due to total or partial failure to supply energy to the premises.³

In effect, Energy Australia, along with other electricity suppliers, reserves the right to change the terms of the contract midstream at the customers' expense. However, the terms in question, which are standard in many energy contracts, have not been tested by a court of law.

Further, standard form contracts can be overly lengthy and complex. This is particularly problematic for consumers engaging in transactions with time limits (such as airline or ticket booking websites) or on smartphones, where it may be difficult for the consumer to read a full contract. For example, the QANTAS booking page times-out after 10 minutes of inactivity. When booking flights, it would be impossible to read the Conditions of Carriage in full on a separate webpage and purchase a ticket within the time allotted. In these instances, the power of the consumer to discover or negotiate UCTs is severely limited.



Screenshot of QANTAS booking website after 10 minutes of inactivity.

Where a consumer believes that a contract term in a contract they have entered into is unfair, they experience barriers to accessing justice. There are considerable costs for an individual consumer to take a business to court to determine that a contract term is unfair and therefore void. Taking into account time, convenience and cost, it is unlikely the benefits of pursuing legal action for an individual consumer outweigh the risks. Supply-side prevention of UCTs is the only way to restore the power imbalance.

Lack of deterrence

An effective legal regime requires strong enforcement. Without penalties, there are no real deterrents for businesses to exclude UCTs in consumer and insurance contracts. Knowing full well that consumers are unlikely to proceed with lengthy court processes to have a term declared 'void' in a contract, businesses can take advantage of the power imbalance inherent in standard form consumer contracts.

³ Energy Australia, *Market Retail Contract - Terms and Conditions*. Accessed on 12 March 2020
https://www.energyaustralia.com.au/sites/default/files/2020-02/EA4004_DL_MKTTC_0320_FINAL.pdf

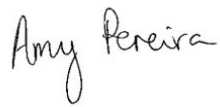
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CHOICE supports strengthened powers for regulators. Regulators should be given the power to issue infringement notices to further strengthen the deterrence effect of the regime.

Further, courts should be given the power to determine appropriate remedies for UCTs, other than voiding the UCT. These appropriate remedies should include that standard form contracts as a whole can be deemed unfair, and consumers should be able to seek redress for any harm suffered as a consequence of being bound by an unfair contract.

For further information please contact CHOICE on apereira@choice.com.au

Yours sincerely,



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