

**COMMUNICATIONS
ALLIANCE LTD**



**Enhancements to Unfair Contract Term
Protections: Consultation Regulation Impact
Statement**

COMMUNICATIONS ALLIANCE SUBMISSION
MARCH 2020

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About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

INTRODUCTION

Communications Alliance appreciates the opportunity to offer our input on the Consultation RIS about Unfair Contract Term (UCT) Protections. While we represent a broad range of organisations, this consultation is on behalf of our RSP, carrier, and digital platform members.

While we understand that some submissions to the review identified concerns about ongoing use of UCTs in standard form contracts, it was undertaken relatively quickly following what was a major change for many businesses. In light of the short time period to implement – and of equal importance, to fully understand – this change, and considering the Government's "commitment to reduce red tape and unnecessary regulation,"¹ **we recommend it would be appropriate to focus on education and compliance on the current protections**, prior to considering additional regulation which would create costs and barriers to productivity.

In fact, the Telecommunications Industry Ombudsman's (TIO) submission to the review stated that "the majority of standard form contracts we look at for small business customers do not cause us concern about terms being unfair," and to increase the effectiveness of this safeguard, they recommended "improved awareness and greater incentives for compliance."²

If additional regulatory burdens are to be considered, it is vital that they are not framed in such a way that will stifle emerging ways of consumers and businesses transacting with one another.

While there is currently some uncertainty in the regime, both around the definition of the term 'unfair' (as is to be expected in a principles-based legal regime) and in determining if a business is a 'small business,' this is both reasonable and manageable due to the balance struck under the current processes.

However, changing the legislation to make unfair contract terms (UCTs) illegal and introduce penalties would – in addition to being unnecessary at this point in time - introduce significant risk, incurring significant legal costs and delaying the development of contracts. This would cause harm to all parties involved in contracts, and the economy more broadly.

¹ Delivering Deregulation for Australian Businesses, The Hon Ben Morton MP. 12 Sep 2019. <https://ministers.pmc.gov.au/morton/2019/delivering-deregulation-australian-business>

² Telecommunications Industry Ombudsman submission to the 2018 Treasury Review of Unfair Contract Term Protections for Small Business. https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/consultation/view_respondent?uuld=341658542

LEGALITY, PENALTIES, AND REMEDIES

While we understand The Treasury's concern on the continued use of UCTs, we do not feel that **Option 3 in 'Legality and Penalties'** (making them illegal and attaching penalties) would appropriately resolve the problem. The uncertainty of what may constitute unfairness in combination with high fines for unfair terms may act as a deterrent to innovation and growth.

These concerns are also relevant to **Option 4 under 'Flexible Remedies'** in the RIS, creating a rebuttable presumption provision.

The Report considered a similar process and concluded that "a broad prohibition of terms previously declared unfair would undermine the nature and intent of the provisions," going on to discuss the importance of a term being declared unfair "in the context of the contract and parties on a case-by-case basis."³

As addressed in the introduction, 'unfair' is a subjective term; thus the importance of a court process, as acknowledged in the Consultation RIS. Imposing penalties will obviously create a strong deterrent to including many terms in contracts, regardless of whether, in the circumstances, it would likely be considered a fair term if tested in the courts. It could also deter companies from using terms that are necessary to protect their business.

On the whole, these risks may encourage businesses to increase prices or to choose not to deal with some customers.

Regarding **Option 4 for 'Legality and Penalties'**, strengthened powers for regulators, we are surprised to see this Consultation RIS canvassing this addition of regulatory powers not recommended by CAANZ in the Australian Consumer Law Review Final Report (the Report). The Report discussed barriers to regulator enforcement, and recommended ensuring regulators can use existing powers to obtain information and evidence.⁴⁵ It did not, however, consider that regulators required further infringement or determination powers.

While we agree with the apparent conclusion of the RIS' impact analysis on regulator determinations – that this would not be appropriate and would, in fact, add delays to the process – we do not agree with the analysis on regulator infringements.

Regulator infringements would allow regulators to take action without the important protections of court consideration. While the RIS states that "regulators may be more likely to issue an infringement notice where the facts are not in dispute or where they consider the circumstances giving rise to the allegations are not controversial,"⁶ there would be no actual protections to ensure the full context of the contract and terms are taken into account prior to the regulator issuing an infringement notice.

This could have the same negative impact as creating a UCT 'black-list,' as companies would not have any confidence that they would have the opportunity to fairly have the full facts heard in front of a court, but would instead need to take

³ The Report. 56.

⁴ Australian Consumer Law Review – Final Report, Consumer Affairs Australia and New Zealand, March 2017. p 54.

⁵ We also do not see that the ACCC requires additional powers for these purposes, as the intention is to investigate 'possible contraventions' of the law - as is already allowed.

⁶ Consultation Regulation Impact Statement, December 2019. p 18.

the precautionary step of not being able to use any term the regulator might consider as a UCT.

Giving regulators the power to issue infringement notices or creating a rebuttable presumption provision would unreasonably expose businesses to risk. It would prevent them from protecting their legitimate interests in contracts because a provision may have been deemed unfair in a completely different context and set of circumstances.

If, despite these negative consequences, Treasury chooses to introduce a prohibition and associated penalties, it will be critical for regulators to provide detailed guidance that businesses can rely upon when making decisions about contracts.

DEFINITION OF SMALL BUSINESS AND VALUE THRESHOLD

Regardless of the definition or value threshold agreed upon, this will remain a complex and difficult aspect to this protection regime.

There is a range of definitions used across the economy. For example, in the telecommunications space, there are protections applied to consumers and certain small businesses, with thresholds and definitions in the *Telecommunications Consumer Protections (TCP) Code*, the ACMA's NBN Consumer Experience rules, the ACMA's Complaints Handling Standard and ACL rules that all businesses must comply with.

Clearly, there is no straightforward delineation that will resolve this problem - whether retaining the current rules or adopting other options. Determining this information can be complex and add significant time and cost to establishing contracts. In light of this, it is vital to note that the addition of penalties or potential regulatory intervention will add severe risks to these complex questions. As addressed in the introduction, this will increase compliance costs and potentially prevent businesses from entering into contracts with potentially small businesses.

APPLICATION OF ENHANCED PROTECTIONS TO CONSUMER CONTRACTS

The concerns outlined above, about the negative impacts of introducing UCT prohibitions and penalties, also apply in respect of consumer contracts. We also note that the 2017 Report examined these questions in depth and did not conclude there needed to be any significant changes to the current structure of these consumer protections. We do not see any benefit to Treasury re-opening these questions for consumer contracts less than three years after that Report's publication.



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