

Victorian Government
Submission to the
Commonwealth Treasury consultation
Regulation Impact Statement on
Enhancements to Unfair Contract Term
Protections

APRIL 2020

ENHANCEMENTS TO UNFAIR CONTRACT TERM PROTECTIONS

VICTORIAN GOVERNMENT SUBMISSION

April 2020

TABLE OF CONTENTS

1	Introduction.....	2
2	Legality and penalties.....	3
3	Clarity on standard form contracts.....	6
4	Value threshold.....	7
5	Additional comments.....	9
6	Further questions.....	10

ENHANCEMENTS TO UNFAIR CONTRACT TERM PROTECTIONS

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1 Introduction

The Victorian Government welcomes the opportunity to provide comments in relation to the Enhancements to Unfair Contract Term Protections Consultation Regulation Impact Statement (RIS) released by the Commonwealth Treasury in December 2019. Victoria has a strong history in this space following our introduction of the first unfair contract terms legislation in Australia in 2003. Victoria is invested in the outcome of this review and is supportive of the objective to strengthen unfair contract terms protections.

This submission supports further consideration of the options set out in the discussion paper, particularly in relation to:

- Opportunities to provide further guidance and education for small businesses on unfair contract terms.
- The need to ensure remedies that seek to strike out unfair terms in similar contracts (or annul similar contracts) are flexible to prevent adverse outcomes for small businesses.
- Whether unfair contract terms protections should apply to all contracts (rather than just standard contracts), as many tailored contracts include unfair contracts terms.
- Revising contract value thresholds.
- Scope for ensuring that all standard form contracts require payment within 30 days given the difficulties that late payments pose for small businesses.

Further detail in response to the consultation paper on the following areas is outlined below:

- Legality and penalties.
- Clarity on standard form contracts.

2 Legality and penalties

Victoria supports improved regulatory guidance and further education campaigns

Victoria supports the objectives to strengthen unfair contract term (UCT) protections for small business to ensure standard contracts continue to reflect a fair proportion of the risk in small business contractual arrangements. As it is noted in the consultation RIS, the UCT Review found that UCTs still appear to be present in standard form contracts owing to factors such as lack of deterrence or incentives for businesses to ensure their standard form contracts are free from UCTs, and likely lack of awareness despite regulators undertaking education programs for small business.

Victoria supports consideration of strengthened compliance and enforcement tools for regulators to deter UCTs in contracts of small business

Victoria supports consideration for strengthened compliance and enforcement activities for regulators to ensure improved incentives for businesses to adopt as standard practice that their standard contracts do not contain UCTs. This would include consideration to expand regulatory tools that are available to regulators such as strengthened compliance and quick enforcement tools to supplement a heavy reliance on court action for its enforcement.

In this regard, consideration should be given to ensure the ACCC's capacity and resourcing to take court action is appropriate, such that it would enable focusing on problem industry sectors and business models. The Victorian Government recognises that any additional allocation of resources to State and Territory consumer agencies would be subject to resourcing priorities – and further notes that the ACCC generally leads on small business issues. As highlighted in Section 4 of the Consultation RIS, the ACCC's enforcement activity in the waste management industry has been effective in changing industry behaviour.

Victoria supports improved regulatory guidance and further education campaigns to promote awareness of UCT protections

The small volumes of dispute resolution cases reported by the Victorian Small Business Commission and Office of the NSW Small Business Commissioner referred to in the Consultation RIS, suggest there is low awareness of the services that these agencies currently provide in resolving disputes about unfair contract terms. To ensure that the cost of pursuing litigation does not hinder small businesses from challenging UCTs – a risk outlined in the Consultation RIS - educational campaigns as proposed in Chapter 4, option 2 of the RIS should incorporate information about the dispute resolution services offered by the States and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). Information promoting these services can also include an overview of their costs and processes so small businesses understand their accessibility.

It is agreed that improved guidance may improve business practice¹. Small Business Victoria would be willing to consult on education campaigns as they have strong existing networks with Victorian small businesses and experience in running campaigns on topics of interest to small business (e.g. the Grand Final Public holiday and Long Service Leave campaign).

It is recommended that consideration also be given to targeting key intermediaries that work with small businesses at different stages of their business journey. The Access to Justice report released by ASBFEO in 2018 surveyed 1600 businesses across Australia and provides useful insights on who businesses choose to consult with during disputes. For example, 41 per cent of businesses stated they sought advice from a lawyer during a dispute and only five per cent sought advice from a dispute resolution service, again providing support for the position that there is a need to raise awareness of existing dispute resolution services.

The Access to Justice report also provided useful information on how regional areas could benefit from targeted education campaigns. For example, 59 per cent of regional businesses advised that they were unable to vary contract terms as opposed to 48 per cent of urban businesses. This suggests that agricultural industries may benefit from educational engagement, particularly given ongoing public dialogue on milk prices. The data in the survey also indicated that regional businesses are more likely to seek advice from another business owner, their industry association, ombudsman or regulator than those in urban environments. This provides guidance as to how education campaigns may strategically target different intermediaries.

Victoria supports further investigation into franchising agreements.

Consistent with the ACCC's submission to a Commonwealth Parliament inquiry², Victoria supports further investigation into franchising agreements. There is evidence that the business model requires franchisees to conform to franchisor preferred suppliers. For example, agreements may require franchisees to use franchisor-preferred suppliers that may not be the cheapest source or participate in promotional campaigns that may not be fit for purpose in relation to the franchisee's location. A Commonwealth Parliament committee inquiry found a mixed response on whether the introduction of unfair contract terms provisions to small business had impacted the terms in franchise agreements³.

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A Law Council of Australia submission to a Commonwealth Parliamentary inquiry suggested that further educational activity by the ACCC and other regulators may be necessary for smaller franchisors – see “The operation and effectiveness of the Franchising Code of Conduct”, report of the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, 2019, p125

2

Ibid, p128

3

Ibid, p56



Consideration could be given to whether an exception to the non-application of unfair contract terms decisions to non-party agreements may be appropriate for franchise agreements. Franchise agreements by their nature may cause an asymmetry in parties' rights and obligations under the contract. The issue of whether a perceived unfair term is considered reasonably necessary to preserve the integrity of the franchising systems (and the interests of both parties) has been a longstanding issue.

Where a franchising agreement term is found to be unfair, a court order to strike out the term and prevent it being used in similar contracts - as outlined in Section 5.6 of the RIS - is more likely to have a consistent impact on each franchisor-franchisee relationship as the foundation of franchising is the application of consistent business systems.

3 Clarity on standard form contracts

Victoria agrees protections against unfair contract terms should be strengthened, including through providing further clarity in the definition of a standard form contract.

The potential for one party to an agreement to circumvent the standard form contract requirement is significant

The potential for one party to an agreement to circumvent the standard form contract requirement is significant. There are many ways a stronger party may purport to negotiate a contract. For example, the party may initially offer a contract on outrageous terms then amend these on request of the other party⁴. In another instance, a Commonwealth parliament committee found that a franchising lawyer advocated that franchisors should “allow the franchisee to review the franchise agreement and at least consider granting one or two concessions” as a means to demonstrate a genuine opportunity to negotiate.⁵

Victoria considers that there may be merit in considering how protections for small business are ensured in non-standard and negotiated contracts

While extending protections against unfair contract terms to non-standard form contracts would afford additional protection to small businesses, Victoria recognises that such a reform could create uncertainty for contracting parties. This uncertainty might be overcome by effective guidance on the other elements of what makes a term unfair – as discussed in part 1 of this submission. Victoria also supports legislative and/or regulatory guidance on the kind of amendments that are considered too minor to constitute a negotiated contracts.

Unfair contract terms were introduced to negotiated contracts with amendments to consumer laws in the United Kingdom, following recommendations of the Law Commissions in 2005 and 2015.⁶ Recent case law in Australia also supports that a negotiated contract may not necessarily be fair.⁷

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Submission from Emeritus Prof Philip Clarke, Deakin University to Review of Unfair Contract Term Protections for Small Business, Commonwealth Treasury, 2018

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“The operation and effectiveness of the Franchising Code of Conduct”, report of the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, 2019, p56

6

Submission from Emeritus Prof Philip Clarke, Deakin University to Review of Unfair Contract Term Protections for Small Business, Commonwealth Treasury, 2018

7

ACCC v Coles Supermarkets Australia Pty Ltd, cited in *ibid*.



Should the protections be extended beyond standard form contracts, consideration of flexible remedies - as discussed in Section 5 of the Consultation RIS - will be important to prevent adverse outcomes which are also discussed through examples in the RIS.

4 Value threshold

Victoria supports consideration of raising the contract value threshold to ensure broader small industry coverage

Victoria believes that consideration should be given to raising the contract value thresholds of \$300,000 for contracts that have an upfront price payable, and \$1 million if the contract runs for longer than 12 months. However, Victoria is not willing to commit to supporting the \$5 million threshold put forth in Option 2 of Chapter 7 the RIS as it is believed that this threshold should be determined following an evidence-based review and cost-benefit analysis of options to better understand the dollar values in small business contracts.

While the rationale for the current threshold is that business should be undertaking due diligence and seeking legal advice on higher value contracts⁸, small business continue to face the same time and cost pressures for these contracts and accordingly should be afforded protection. The risks to small business are also higher for these contracts. It is also unlikely that the current thresholds will trigger a decision by a small business to seek legal advice on higher value contracts. Rather, a small business is more likely to seek redress after the event.

In practice, the requirements for a term being 'unfair' are likely only to be met when a vulnerable party is dealing with a larger and more powerful party

The Queensland Law Society in its submission to a 2015 Senate Inquiry noted that due diligence 'does not provide an answer to, or relief against, the imposition of an unfair contractual term on a 'take it or leave it' basis'⁹. In the same Inquiry the South Australian Small Business Commissioner submitted that 'an unfair term is unfair because of its nature and excluding contracts because of inappropriate and artificially low thresholds [sic] mean that unfair contract terms in those excluded contracts will continue to adversely impact on small businesses being excluded under the initiative'¹⁰.

The current contract value thresholds also present an opportunity for parties to artificially structure their contracts to ensure the unfair contract terms protections do

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Explanatory Memorandum

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The Senate Economics Legislation Committee, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 [Provisions], p.56

10

Ibid.

not apply¹¹. For example, a party could aggregate contracts with a small business so that they exceed the thresholds¹².

Protections against statutory unconscionable conduct were recently extended to publicly listed companies under the Treasury Laws Amendment (Australian Consumer Law Review) Act 2018.¹³ This reflects a commitment from Consumer Affairs Australia and New Zealand in the Final Report of the Australian Consumer Law (ACL) Report to reduce, over time, the scope of exceptions from ACL protections except where there is a strong justification for maintaining them. It is therefore important that thresholds are raised to a point that is sufficiently high enough to mitigate these risks. However, Victoria reserves its position on any specific amounts pending the outcomes of further analysis in this area.

As most small businesses are currently offered higher-value contracts on a negotiated/non-standard basis, an increase to the contract value thresholds should also be considered in conjunction with the guidance suggested in section 3 of this submission to maximise the practical benefits for small businesses.

¹¹

Ibid, p18

¹²

Submission from Emeritus Prof Philip Clarke, Deakin University to Review of Unfair Contract Term Protections for Small Business, Commonwealth Treasury, 2018

¹³

Ibid

6 Additional comments

Victoria is of the view that the extension of protections against unfair contract terms to all contracts could potentially be used to test clauses in motor vehicle insurance contracts that limit the consumer's right to choose a body repairer. This would be a valuable mechanism given that some concerns have been raised with the Victorian Government about the impact of these clauses on independent smash repair businesses.

Victoria further believes that there is scope for the Commonwealth to investigate whether all standard form contracts should require payment within 30 days given the difficulties that late payments pose for small businesses

The Victorian Government currently endorses two systems of payments for small business suppliers. The Fair Payments Policy was introduced in 2004 and requires Victorian Government departments and major agencies to pay invoices up to \$3 million within 30 days of receipt, where there are no disputes relating to the goods or services provided. The Australian Supplier Payment Code (the Code) was endorsed by the Victorian Government in 2017 with the Government officially becoming a signatory in May 2018. It is an initiative run by the Business Council of Australia. Under the Code, signatories agree to pay small business suppliers within 30 days.


Victoria believes that there is scope for legislative reform to ensure that all standard form contracts include payment times of 30 days or less. However, further exploration into the most appropriate vehicle for implementing such a change, as well as the most appropriate enforcement mechanisms, is required at this time to ensure that this proposal does not create an unnecessary burden on the ACCC.

This consideration should be made to all changes supported by Victoria within this submission. It is requested that the Commonwealth have regard to minimising the regulatory burden of any changes to ensure Governments maintain capacity to enforce the ACL and honour the intentions of this review.

7 Further questions

Victoria would be pleased to discuss our submission with the Commonwealth Treasury, if that would be helpful.

Please contact Barbara Cullen, Director, Small Business Victoria, Department of Jobs, Precincts and Regions on 03 9651 9880 if you require further information or clarification on the contents of this submission.



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