



Strengthening Protections Against Unfair Contract terms

SUBMISSION TO THE TREASURY CONSULTATION

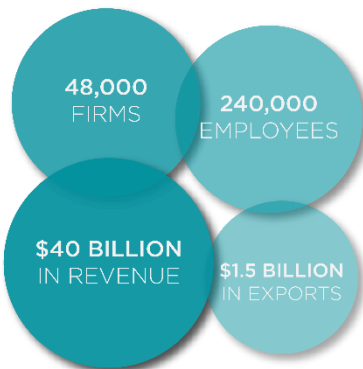
SEPTEMBER 2021

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ABOUT US



Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 48,000 businesses across Australia, ranging from sole practitioners through to some of Australia's top 500 companies, providing solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry is a job creator for the Australian economy, directly employing 240,000 people. The services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



A full membership list is available at: <https://www.consultaustralia.com.au/home/about-us/members>

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EXECUTIVE SUMMARY

Thank you for the opportunity to comment on the release of the exposure draft legislation on unfair contract term (UCT) reforms. It is noted that the exposure draft legislation would amend the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001* (Cth) to implement the reforms agreed by Commonwealth, state, and territory consumer ministers in November 2020.

Consult Australia supports the reforms, noting that a number of our concerns raised in previous consultation on the issues have been reflected in the exposure draft legislation. As previously commented, UCT protections are necessary to mitigate the power imbalance that often exists between individual consumers/small businesses and sophisticated parties. We welcome the strengthening of protections to support our small business members in contracting with larger private sector business. Although, Consult Australia remains disappointed that there has been no further action on extending the UCT protections to cover all contracts with government clients – given that governments hold inherent and substantial power. The UCT protections only apply to contracts with a Commonwealth, state or territory body to the extent that it is carrying on a business, meaning the vast majority of government clients contracting suppliers through day-to-day procurement activities is not considered to be carrying on a business and is therefore not subject to these laws.

Consult Australia notes that problematic contractual terms in consultancy services contracts can have an adverse impact on the professional indemnity (PI) insurance market. In the Australian sector we see significantly diminished access and affordability of PI insurance because Australia's building and construction sector is now considered one of the highest risk industries in the world. Our small business members advise that PI insurance premiums are their largest business expense and year on year premiums are increasing while coverage amounts decrease – irrespective of claim history. We are now seeing small businesses and sole traders face forced business closure and early retirement based solely on the fact they can no longer get insurance at any price (let alone an affordable price). De-risking the market starts with fair and balanced contractual terms.

We support the policy of enhancing protections for consumers and small businesses from onerous and unfair contract terms and we suggest the following implementation strategies to ensure the best public policy outcome:

- Allocate more power and resources to the ACCC to investigate UCT issues raised by small businesses
- Establish a searchable and public register of UCTs to inform and empower small businesses
- Ensure industry involvement in the determination of the exempted clauses.

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SUPPORTING IMPLEMENTATION OF THE REFORMS

Consult Australia supports the reforms proposed in the exposure draft legislation such as:

- ✓ making UCTs unlawful and giving courts the power to impose a civil penalty
- ✓ providing more flexible remedies to a court when it declares a contract term unfair by giving courts the power to determine an appropriate remedy, rather than the term being automatically void
- ✓ clarifying that the remedies available for 'non-party consumers' also apply to 'non-party small businesses'
- ✓ creating a rebuttal presumption provision for UCTs used in similar circumstances
- ✓ increasing the eligibility threshold for small businesses from less than 20 employees to less than 100 employees
- ✓ introducing an alternative threshold based on an annual turnover of less than \$10 million
- ✓ removing the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT protections
- ✓ improving clarity on the definition of 'standard-form contract' by providing further certainty on factors such as repeat usage of a contract template, and whether the small business had an effective opportunity to negotiate the contract.

However, to ensure the best policy outcome, we suggest a number of implementation strategies.

Allocate more power and resources to the ACCC to investigate UCT issues raised by small businesses

While giving the courts the power to impose civil liability is a vast improvement to the current law where courts can only void certain UCTs, we remain concerned that small businesses will still need to take court action to reach a finding that a term is an UCT. The power imbalance is still not addressed, as large businesses know that small businesses do not have the resources to challenge every contract that they are presented with.

It is recommended that the ACCC is allocated more power and resources to investigate UCT issues raised by small businesses. This would provide much more protection to small businesses than relying on small businesses to take action in court.

Establish a searchable and public register of UCTs to inform and empower small businesses

Creating a rebuttal presumption for UCTs used in similar circumstances is a particularly important reform as it has the potential to empower small businesses to push back on similar terms in contracts by large businesses (not just the business found to be in breach of the UCTs).

It is recommended that the government establish a searchable and public register of UCTs. Not only would this inform small businesses – much like the Payment Times Reporting Framework

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register it would also empower small businesses. As a public register this would be a tool for knowledge sharing for all consumers and small businesses.

Ensure industry involvement in the determination of the exempted clauses

In principle we support the reform to enable certain clauses that include 'minimum standards' or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation to be exempt from the protections. However, we have implementation concerns. Too often we see standard contracts drafted to include legislative requirements – and those requirements roll down the supply-chain even where the responsibility should not be transferred.

For example, in recent months we have seen various clients seek to include in standard contracts the legal obligations in respect of the Commonwealth's *Modern Slavery Act 2018*. However, not all businesses need to comply with the requirements, and Consult Australia advocated for flexible language such as 'where applicable to the supplier'.

Therefore, care must be taken with automatically exempting Commonwealth/state/territory legislative requirements and minimum standards in case it leads to these requirements/standards being imposed on parties that do not have the relevant obligations otherwise.

Consult Australia welcomes any opportunity to work with the government to ensure any exemptions are suitably flexible and appropriate.

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CONTACT

We welcome the opportunity to meet with the Treasury to discuss the issues raised in this submission further.

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