



The trusted voice for business
in design, advisory and
engineering

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Treasury

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Review of the Amended Unfair Contract Terms Protections – Submission

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government.

Our industry directly employs over 285,000 people in architectural, engineering, and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Consult Australia is pleased to provide a submission to the Review of the Amended Unfair Contract Terms Protections that came into force in November 2023. Consult Australia supported the reforms that strengthened protections by:

- enhancing the range of remedies and enforcement powers
- expanding the class of contracts that are covered by the unfair contract term provisions
- clarifying and strengthening the unfair contract term provisions more generally.

At the time, Consult Australia did raise concerns that the reforms were not enough without also capturing government contracts. We also suggested 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.

The purpose of the amendments was to deter businesses from using unfair contract terms in standard form contracts and improve consumer/small business confidence when entering standard form contracts with larger businesses. In practice, our members have seen very little change in contract conditions or behaviours since 2023.

In respect of the standard contracts our members propose to clients, they are largely:

- Australian standard contracts, which (should have) balanced obligations for parties

- Consult Australia's Consultant and Subconsultant contract, which proudly has balanced rights and obligations for both parties.

However, in many cases when Consult Australia members contract with larger businesses, it is on government projects and therefore the terms often flow through from the government client. Even in direct contracts between businesses and government, Consult Australia sees imbalance in the contract terms offered by government clients. There is mixed interest in government client's interest in engaging with industry to resolve the unreasonable terms.

Unfair contract terms and claims against professional services providers contribute to the deterioration of the Australian professional indemnity (PI) insurance market. Our members advise that PI insurance at the levels required by government clients is difficult to access, especially at a reasonable price. Without PI insurance, many consultancy businesses lose their ability to operate.

In government contracting we often see:

- government clients providing contracts as a 'take it or leave it' approach where a business is deemed to have a 'non-compliant bid' if it questions contract terms
- terms that allow government clients to unilaterally cancel or terminate an agreement without cause
- broad limitations of a government client's liability, or terms which require a business to indemnify the government client in an unreasonably broad range of circumstances
- requirements for professional service providers to pay significant performance bonds or security deposits, unrelated to the potential loss the government client would face if the professional service was not completed
- contracting out of proportionate liability.

Consult Australia holds that there will not be significant improvement to contract conditions in Australia until the unfair contract term protections apply to government contracts.

I invite you to contact me directly at kristy@consultaaustralia.com.au for more information or to arrange a meeting to discuss.

Yours sincerely,

Kristy Eulenstein
Head of Policy and Government Relations