



16 March 2020

Manager, Consumer Policy Unit
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The Treasury
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To Consumer Policy Unit

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

1. Introduction

1.1 The Motor Trades Association Queensland (MTA Queensland or The Association) submits views pertaining to Unfair Contract Term Protections Consultation Regulation Impact Statement (the RIS). The MTA Queensland's comments are on behalf of its constituent divisions and are confined to issues which relate to the interests of the Queensland's automotive value chain.

1.2 The MTA Queensland has followed the evolution of the unfair contract term (UCT) protections policy, commencing with a contribution to the Productivity Commission's *National Framework for Consumer Policy* in 2007 and supports the contribution the UCT enhancements would make to the development of the overall policy framework.

1.3 The Association appreciates this opportunity to comment on the RIS including the consultation issues: Legality and Penalties; Flexible remedies; Definition of a small business contract; Value threshold; Clarity on standard form contracts; and the various options proposed. Each issue presented for examination has the competence to make a significant contribution to enhancing UCT protections for small business entities and ensuring that processes in respect of standard form contracts provide an opportunity for negotiation, are fair, comprehensible and deliver greater certainty. The Association has formed a view of each of the preferred policy options and these are itemised and presented below.

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1.4 In an address to the Law Council of Australia Competition Workshop 2019, the Chairman of the Australian Competition and Consumer Commission Chairman (ACCC) Rod Sims referred to a speech by the President of the Victorian Court of Appeal, Justice Chris Maxwell, 'on the role of judges in dealing with unfairness and unconscionable conduct in commercial cases.' In his concluding remarks to the address, the ACCC Chairman strongly endorsed the conclusion that Justice Maxwell reached:

Adoption of fairness as a test might not be conducive to greater certainty. But it would certainly promote better understanding by all concerned – and, it might be hoped, higher standards of conduct – if we had a prohibition on conduct which was 'in all the circumstances, unfair'

1.5 Whilst this is the ultimate ideal, and in the absence of achieving such a behavioural prohibition outcome, the enhancement of the UCT protections provides a policy pathway to strengthen protections for small businesses through the proposed legislative amendments where appropriate.

2. Comments

2.1 The Association offers some general observations to some of the issues canvassed in the RIS.

2.2 Issue – Legality & Penalties

2.2.1 The Association's advocacy to members has raised awareness of UCT protections for small businesses. It appears, that some small enterprises continue to experience circumstances in which standard form contracts they incorporate UCT which, in effect, perpetuate unfair business dynamics. In some instances, UCT are common business practice and go unnoticed or small business may simply prefer to remain silent rather than challenge the UCT for fear of commercial retaliation or penalty by way of cost impositions.

Preferred Option:

2.2.2 The Association is of the view that a combination of Option 2 – strengthened compliance and enforcement activities and Option 3 -making UCTs illegal and imposing penalties is a policy combination that may result in increased compliance with the regulations.

2.3 Issue - Flexible remedies

2.3.1 From the perspective of small businesses comprising the automotive value chain, recourse to a court resolution to the incorporation of unfair terms in a standard form contracts is an uncertain pathway, having the potential to compromise the commercial interests of a small enterprise. The RIS states that the ACCC summarised the circumstance as: 'in consideration of potential uncertain or harmful outcomes, the ACCC has, at times, declined to take action against potential UCTs, as the outcome may be worse for the small businesses than the effect of the term itself.'

Preferred Option:

2.3.2 The Association is of the view that Option 3 – align remedies for non-party small businesses would ensure greater certainty and reinforce confidence in the UCT framework for small businesses. The RIS states that this option: 'would put beyond doubt that the remedies available for 'non-party-consumers' would also apply to 'non-party-small businesses.'

2.4 Issue – Definition of a small business contract

2.4.1 Commonwealth agencies lack a mutually agreed definition with the competence to identify small business enterprises. On the one hand, one agency stipulates that small business status should be denoted by an employment threshold of less than 20 employees. Two other agencies define a small business entity as an organisation with less than 100 employees. The RIS states that a 98 per cent of Australia's small businesses are able to satisfy the current legal requirements for a contract to be considered a 'small business contract', that at least one party to the contract shall employ fewer than 20 persons at the time the contract is executed. The issue is that some small business entities are unintentionally excluded from the provisions of the UCT framework as a consequence of this legal limitation. These unintended consequences include businesses such as those with seasonal labour demands which breach definitional thresholds during peak seasons.

2.4.2 Instead of an employee-based definition, the Australian Taxation Office uses a financially based index limiting entities to an aggregate turnover of less than \$10 million to be categorised as a small business for various tax concessions. The Australian Banking Association Banking Code of Practice, defines a business as a 'small business' if at the time it obtains the banking service, it had an annual turnover of less than \$10 million in the previous financial year, had fewer than 100 full-time equivalent employees, and has accumulated less than \$3 million total debt to credit providers .

Preferred Option:

2.4.3 In considering the preferred option, the Association is mindful that the automotive value chain includes a number of small businesses with a high annual turnover but modest profit margins which would otherwise conform to a general competent definition of a small business. These entities should not be excluded from the UCT protections because of their unusual business model. For this reason, the Option 3 which provides for either a definition based on head count or turnover threshold is preferred as it mitigates the UCT framework against the exclusion of small business because of minor unusual business characteristics.

2.5 Issue – Related bodies corporate

2.5.1 The Association notes that the RIS states that the current law is silent on whether ‘related corporate bodies’ such as a subsidiary or a special purpose entity with large parent companies and extensive resources are to be included in the head count for what constitutes a small business contract. These ‘related corporate bodies with access to substantial corporate capital could be unintentionally covered by the protection if they were to meet the headcount threshold.’

Preferred Option:

2.5.2 The Association is of the view that Option 2 – Aggregation ensures that if a business is part of a large corporate group, the UCT protections should not be available to that business because seemingly, it would have access to the financial means or corporate support to mobilise measures to protect its commercial interests when entering into standard form contracts with more substantial parties.

2.6 Issue – Value Threshold

2.6.1 The MTA Queensland has a diverse membership incorporating many trades that contribute to the automotive value chain. The current UCT protections apply to contracts that have an upfront price payable not exceeding \$300,000, or if the contract runs for longer than 12 months, \$1 million. From the perspective of the trades that form the MTA Queensland, this threshold is too low for the majority and a concern is, as stated in the RIS, the difficulties in determining if a contract is covered by the protections, due to the uncertainty around the process to establish the quantum of the upfront price payable.

Preferred Option:

2.6.2 From the perspective of the MTA Queensland, Option 3 – remove the threshold would significantly benefit automotive value chain businesses.

2.7 Issue – Clarity on standard forms Contracts

2.7.1 The identified problem is that it is difficult to determine if a commercial treaty is a standard form contract. The RIS states that the UCT protections for small business only applies to standard form contracts usually offered on a ‘take it or leave it’ basis. In this circumstance, the receiving party has a limited or negligible opportunity to negotiate the contract terms. The current law provides a rebuttable presumption, such that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

2.7.2 Central to ‘proving otherwise’ that the contract is not a standard form contract; is the incorporation as of right for a capacity and opportunity to negotiate the terms and conditions of the contract. Few small businesses may have the capacity, or recourse to an industry organisation to resolve difficulties about negotiating specific contract terms. It would seem appropriate to clarify this situation by establishing mutually agreed characteristics that constitute a standard form contract.

Preferred Option:

2.7.3 The Association is of the view, that Option 3 - clarifying ‘effective opportunity to negotiate’ is the preferred option. It is noted that the RIS states that under the current law ‘negotiation on terms relating to the main subject matter of the contract, the upfront price payable under the contract, and terms required or permitted by a law does not constitute an ‘effective opportunity to negotiate’. This setting will remain. Under Option 3, the law would be amended to further clarify the types of actions which do not constitute ‘effective opportunity to negotiate’ in a number of circumstances.

2.74 Under this option, the law would be amended to further clarify the types of actions which do not constitute an ‘effective opportunity to negotiate’.

3 Applications of any enhanced protections to consumer and insurance contracts

3.1 The Association notes that the Government reaffirmed its commitment to extend the UCT protections to insurance contracts in its response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission).

3.2 As expressed in our 21 December contribution to the Review of Unfair Contract Term protections for small business, the MTA Queensland strongly supports the extension of ‘unfair terms’ in standard form contracts to cover insurance contracts. This initiative would appear to have beneficial consequences for the motoring public as well as supporting the technology transformation the automotive chain is facing. The extension of the UCT regime to insurance contracts ensures that consumers and small businesses that purchase insurance have access to the same protections as they for contracts for financial products and services.

4 Review of UCT protections for small business

4.1 It is noted that the RIS states that under the current law, contracts between governments and small businesses are generally not covered by the UCT regime. Parallel with this RIS, the Association recognises that the Government will undertake further work on the option of extending the UCT protections to apply to government contracts, including consultation with the states and territories.

5 Background

5.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sector of Queensland's automotive industry located in the State. There are some 15,500 automotive value chain businesses employing approximately 88,500 persons generating in excess of \$20 billion annually. It is an industrial association of employers incorporated pursuant to the *Fair Work Act 2009*. The Association represents and promotes issues of relevance to the automotive industries to all levels of Government and within Queensland's economic structure.

5.2 Australia's first automotive hub, the MTA/Q, has been established in specially prepared space at the corporate office. The hub is an eco-system that supports innovation for the automotive industry.

5.3 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering technical, retail and the aftermarket phases of the motor trades industry through the MTA Institute - a registered training organisation. It is the largest automotive apprentice trainer in Queensland employing trainers geographically dispersed from Cairns to the Gold Coast and Toowoomba and Emerald.

Thank you for your deliberation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brett Dale', with a small flourish at the end.

Dr Brett Dale DBA
Group Chief Executive
MTA Queensland