



INSTITUTE OF
PUBLIC
ACCOUNTANTS®

**Enhancements to
Unfair Contract
Term Protections –
Consultation
Regulatory Impact
Statement**

16 MARCH 2020

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the Treasury Discussion Paper on the Review of Unfair Contract Term Protections for Small Business.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The IPA-Deakin SME Research Centre submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA-Deakin SME Research Centre Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre and Phil Chapman from Lease1.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou at vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours sincerely



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Enhancements to Unfair Contract Term Protections – Submission

The IPA-Deakin SME Research Centre lodged a submission in relation to Treasury’s 2018 review of the Unfair Contract Term provisions and now welcomes the opportunity to comment on specific questions raised in this Consultation Regulatory Impact Statement.

Question 6: Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts?

As currently drafted, the unfair contract term prohibition has little deterrent value for parties who include unfair terms in their standard form contracts. The consequence of a term being found to be unfair is a declaration that the term is void. In practical terms, the ACCC has also sought orders that the party does not rely on the terms in existing contracts, does not include the terms in future contracts and publishes a corrective notice. The ACCC has also been successful in obtaining an order for consumer redress (see Ashley & Martin¹). Although it is recognised that these sorts of orders will result in unfavourable media attention, it is unlikely that bad publicity alone will incentivise parties to review and amend unfair contract terms in their contracts.

The deterrent effect could be improved if a declaration that a term is ‘unfair’ also exposes the party to payment of a pecuniary penalty (as is the case with other consumer law provisions such as misleading conduct/false representations and unconscionable conduct). The IPA-Deakin SME Research Centre supports the *Treasury Laws Amendment (2018 Measures No.3) Act 2018* which increased the penalties payable under Australia’s consumer law to align with the competition provisions. This will give the courts the ability to impose significantly higher penalties for breaches of Australia’s consumer law, further increasing the deterrent effect. These penalties could be extended to apply to breaches of the unfair contract term provisions.

Question 10: If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)?

The ability for the court to determine the appropriate remedy (rather than the term being automatically void) gives the court the ultimate flexibility in applying a remedy that is appropriate for the circumstances. The available remedies should include a declaration that the term is void, but, as noted in the RIS, this type of declaration may not necessarily be helpful to a small business party.

¹ [Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd \(No 2\) \[2019\] FCA 1739](#)

Question 11: Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage?

The IPA-Deakin SME Research Centre are of the view that there are significant issues with the ability of small businesses to access justice, and this includes in relation to consumer law breaches. During the recent review of Australia's consumer law, the Australian Consumer Law Review Final Report found:

“A recurring issue raised in the review was the difficulty that consumers and small businesses face in accessing remedies.”²

Small businesses face a number of hurdles in accessing justice:

- The costs associated with bringing an action through the court systems make this avenue to access justice unaffordable for all but very few small businesses.
- Small businesses, that do not regularly engage with lawyers (possibly due to affordability and/or a reluctance to do so) and are not familiar with the court systems, will be at a significant disadvantage compared with their larger business counterparts.
- Small businesses, particularly microbusinesses, are unlikely to have the resources (financial and personnel) available to engage with lawyers and complete the often protracted court process.

Enabling the regulator to bring an action on behalf of a class of small businesses that have suffered loss or damage will go some way to addressing these issues.

Question 15: Do you consider \$10million annual turnover to be an appropriate threshold?

The IPA-Deakin SME Research Centre is generally supportive of a definition that contains multiple criteria as research undertaken by Deakin University shows that the inclusion of several criteria to support definitional correspondence leads to more reliable outcomes.

The use of a \$10 million annual turnover threshold has the support of the IPA-Deakin SME Research Centre as it allows consistency with the ASBFEO definition and the proposed collective bargaining class exemption which will apply to businesses with a turnover of less than \$10 million.

Question 16: Are there likely to be any negative impacts if the contract value threshold were to be removed completely?

The IPA-Deakin SME Research Centre cannot think of any negative impacts for small business if the contract value threshold is completely removed. To the contrary, this places a greater burden on larger businesses to ensure that their contracts with small business do not contain unfair terms.

² Consumer Affairs Australia and New Zealand, Australian Consumer Law Review Final Report, 2017, p 80. Available at <https://consumerlaw.gov.au/consultations-and-reviews/australian-consumer-law-review/final-report>