



Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.independentcontractors.net.au
PO Box 143 Watsonia 3087

Unfair Contract Protections for Small Business People

This submission responds to the proposal by the Federal Government to implement its policy to extend unfair contract protections to small business people. The policy is in fact a 2013 Coalition election commitment which was again committed to in the 2014 Federal Budget.

The Federal Treasury released a Consultation Paper, 'Extending Unfair Contract Term Protections to Small Businesses' in May 2014, inviting responses to the policy and various implementation options.

Independent Contractors Australia (ICA) is a strong supporter of the policy. Specifically, ICA strongly endorses the policy to extend to small business people the unfair contract protections currently available to consumers under Australian Consumer Law (ACL).

This submission is in three parts:

- Part One:** Overview of ICA's views. The principles of unfair contract protections.
- Part Two:** Responses to specific questions in the Treasury Consultation Paper.
- Part Three:** Examples of unfair contracts and situations.

PART TWO

Responses to specific questions in the Treasury Consultation Paper

The Treasury Consultation Paper offers four options for feedback:

- Option 1 — The status quo. No action is taken, contrary to the Commonwealth Government's policy commitment.
- Option 2 — Light touch or non-regulatory responses.
- Option 3 — Legislative amendment to extend the existing UCT provisions to contracts involving small businesses, in accordance with the Commonwealth Government's policy commitment.
- Option 4 — Legislation to require contracts with small business to be negotiated on request.

ICA supports option 3—that is, legislative amendment to extend the existing UCT provisions to contracts involving small businesses, in accordance with the Commonwealth Government's policy commitment.

ICA does not comment on the other options.

Option 3 should be

- Implemented for standard form contracts only.
- Needs to be coupled with dispute-resolution services.
- Should cover both the acquisition and supply of goods and services.

ICA supports the following statement from the Consultation Paper:

“Such an approach (Option 3) would use the enforcement architecture around the unfair contract terms law regarding consumer contracts. It would be relatively less complex to implement and administer given consumer agencies’ and businesses’ experience to date with the current provisions regarding consumer contracts.”

The following are brief replies to a selection of the questions raised in the Consultation Paper. Not all questions are answered.

THE PROBLEM

[Questions raised on page 3 of [Treasury Consultation Paper](#) (PDF version)]

1. How widespread is the use of standard form contracts for small business and what are their benefits and disadvantages?

Answer: The use of standard form contracts is significant and widespread and can particularly be found in the following service areas:

- transport for owner-drivers;
- contract cleaning and maintenance;
- commercial construction, particularly subcontracting to trades small business people and engineering and related consultancy services;
- information technology consultancy services; and
- medical services and support.

The government sector makes substantial use of standard form contracts.

Advantages: More effective management of transactions, including reducing transactions costs. Greater clarity in work requirements if done well.

Disadvantages: The engaging party often constructs contracts to protect only the interests of the engaging party—frequently to an unreasonable extent and beyond what is necessary given the specifics of the work being done. This involves a major transfer of liability from the engaging party to the engaged party.

3. To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?

Answer: Small business people will often read the contract on offer. However, contracts are often written in heavy ‘legalese’ which makes comprehension by laypeople difficult or near impossible. People will obtain a ‘sense’ of the contract, but not be sure if they fully understand the meaning and implications of many of the clauses.

It is not common for small business people to engage legal advice to explain

standard form contracts. Legal advice is expensive and the value of the contracts is not sufficiently high to warrant the expense. Further, small business people know that the engaging party will rarely, if ever, be prepared to negotiate key clauses and that therefore the expense of legal advice does not lead to a better contract.

4. To what degree do small businesses try to negotiate standard form contracts?

Answer: Small business people rarely try to negotiate standard form contracts because they are told up-front that the contracts are 'take it or leave it'. A further problem arises when, as is often the case, the engaging party wants work to start quickly but is tardy in offering the contract for consideration up-front. People often start work without a contract being signed. This is a source of many disputes.

5. Is it the terms or the process by which some contracts are negotiated that is the main concern for small businesses?

Answer: Standard form contracts are rarely negotiated. Where clauses are 'unfair', the unfairness delivers unreasonable levels of power to the managers of the engaging party. This commonly results in unreasonable and arrogant behaviour by managers which in turn can become a cause of disputes.

6. How do small businesses differ from consumers in relation to their interaction with standard form contracts?

Answer: There is no difference between consumers and small business people. Small businesses are not small versions of big business. Small businesses are run by individual people, the operative word being 'people'. Big businesses, including government instrumentalities, are run through management systems. The people who own and run small businesses have the totality of 'management' wrapped up in themselves as an individual.

Small business people are in a consumer-like situation. Their situation is more akin to consumers than the theoretical notion of 'business' as a management system.

7. What terms are businesses encountering that might be considered 'unfair'?

Answer: The main areas of 'unfairness' include:

- Inappropriate transfer of liability from the engaging party to the engaged party.
- Power to terminate without cause by the engaging party with the engaged party locked in.
- Engaging party able to change the terms of the contract, including price, without the agreement of the engaged party.
- Lack of affordable, quick and independent dispute-resolution processes.

8. What detriment have businesses suffered from unfair contract terms?

Answer: Loss of income. Exposure to unreasonable levels of liability. Inability to secure commercial rights. Reputational damage.

9. What protections do businesses currently have when they encounter unfair contract terms and are they sufficient?

Answer: No protections are effectively available. The only option is not to engage in the contract. But once ‘hooked’ into a contract, if a dispute occurs, the cost of engaging the legal system is prohibitive and unlikely to deliver a ‘fair’ outcome. Most people walk away from a dispute situation, writing off any losses.

10. What regulatory responses are already in place that aim to protect small business from unfair contract terms and how effective are these mechanisms?

Answer: There are no effective regulatory mechanisms currently in place. For the most part, the only recourse is to the courts and that is expensive. The *Independent Contractors Act* was introduced in 2006 with a view to addressing ‘unfairness’ but has proven ineffective from a practical perspective. The court cases conducted under the *IC Act* have shown that:

- The legal expense of using the Act is high.
- Decisions of the courts are limited to preventing ‘unfair’ terms in the future. The court is unable to declare a contract term unfair and provide retrospective relief.

The operation of the Small Business Commissioners (SBCs) in Victoria, New South Wales, South Australia and Western Australia has been positive in relation to processes for dispute mediation. ICA strongly supports the SBCs believing they have made a big difference to resolving disputes in a cheap and speedy manner. However, the SBCs do not have specific jurisdiction over unfair contracts and can do nothing to prevent unfair contract terms. The introduction of unfair contract protections combined with the activities of the SBCs should significantly improve the quality of small business activity in the community. There are systems in place for retail tenancy leases under each state’s retail tenancy laws, which is a positive.

THE POLICY RESPONSE

[Questions raised on pages 3–4 of Treasury Consultation Paper (PDF version)]

11. What responses (including by government or industry) could be implemented to help businesses with ensuring contract terms respect the legitimate business objectives and interests of both big and small contracting parties?

Answer: Extend the consumer unfair contract protections to small business people.

13. Given the Commonwealth Government’s commitment to extend existing unfair contract term provisions to small businesses, what should be the scope of the protections?

Answer: The scope should be the same as that which applies currently to consumer unfair contract protections.

14. Should the Australian Consumer Law UCT provisions be extended to cover small businesses defined using contracting party characteristics or transaction size? Should small business to small business contracts be included?

Answer: The identification of ‘small business’ for the purposes of unfair contract protections should be left to the discretion of the authorities responsible for enforcement of the protections. The powers of the states’ Small Business Commissioners in this respect should be used as a model.

Small business-to-small business contracts should also be included.

15. Should the extension of the UCT provisions provide protection for small business when they both acquire and supply goods or services?

Answer: The protections should apply both to the acquisition and the supply of goods and services.

Focus questions

[Questions raised on pages 13–19 of Treasury Consultation Paper (PDF version)]

10. How do unfair terms in standard form small business contracts impact on confidence and trust in the market?

Answer: Unfair contract terms have significant negative impact on trust and confidence in the market. Unfair contract terms reduce levels of trust thereby making transactions in the economy more difficult. Fewer people engage in business activity when trust is low which reduces potential economic activity. For a fuller explanation, see our comments on ‘trust’ in Part One of this submission.

11. Who is including ‘unfair’ terms in contracts to small businesses? Is it larger business and/or a third party (such as a lawyer) drawing up the contract?

Answer: Both the lawyers and larger business play a role.

- Lawyers take the approach that, when engaged to draft contract terms, their task is to do everything to protect the interests of the party paying them. Although no doubt not fully intended, this predisposition can skew the contract towards unfairness.
- Some managers in large firms also take the same view. Their motivation is to ensure that, as a manager, they have maximum flexibility to run their operation and that their liability as a manager is limited or diminished. This is classic ‘protecting one’s patch and career’ motivation. It is in fact a process that leads to poor management. Good management is about ensuring that responsibilities fall to the persons who make decisions and who have control. Bad managers seek to avoid responsibility.

Good managers will give instructions to lawyers to draft balanced contracts which maximize fairness. Such managers understand that commercial transactions that are structured around equality deliver higher quality results.

14. Are there examples of instances where risks have been unfairly shifted to small businesses in contracts?

Answer: Yes—see Part Three of this submission for examples.

18. To what extent are businesses relying on/enforcing unfair contract terms?

Answer: There are some businesses that have structured their entire business model around unfair contracts. See, for example, the Aussie Home Loans and Coca Cola and PepsiCo owner-driver contracts below. Not all large businesses have taken this approach, but many do.

Scope of legislation

[Questions raised on page 31 of Treasury Consultation Paper (PDF version)]:

127. An issue is how small businesses or small business transactions should be defined. Four options include extending UCT provisions to:

- 127.1. businesses that are not publicly listed companies;
- 127.2. transactions that are below a certain threshold;
- 127.3. businesses that have an annual turnover below a certain threshold; or
- 127.4. businesses that employ less than a certain number of employees.

Answer: As per question 14 above, the identification of ‘small business’ for the purposes of unfair contract protections should be left to the discretion of the authorities responsible for enforcement of the protections. The powers of the states’ Small Business Commissioners in this respect should be used as a model.

129. A further issue is whether to extend UCT provisions only to large business contracts with small businesses, or to also include small business to small business contracts.

Answer: Unfair contract protections should apply to both large business (including government)-to-small business and small business-to-small business contract/transactions.

It is essential that in their dealings with small business, government entities should be subject to the unfair contract laws just as big businesses should or will be. ICA’s experience is that government bodies can sometimes be the worst offenders when it comes to engaging in unfair practices and contracts. There should be no exclusion or special treatment for governments when they engage in commercial transactions. All government entities should be subject to the same rules as those the government intends to apply to the private sector.

130. A final issue is whether to extend UCT provisions to contracts for financial products and services.

Answer: In principle the answer is ‘yes’. However, financial services and products underwent considerable change with the introduction of the unfair contract protections for consumers. Specific provisions relating to financial services and products were created around that time.

ICA has had discussions with the Australian Bankers Association on this issue. ICA is open to discussion as to whether further reform to financial services and products is required. If existing unfair contract protections for consumers adequately capture small business people, there should be no need to add further regulations.

However, Part Three of this submission provides a case study of a major scam and fraud conducted against small business people who signed telco contracts that locked them into allegedly unfair contract arrangements with Macquarie

Bank. ICA would want to understand further the issues surrounding financial products or services before making a commitment on this issue.

Focus questions

[Questions raised on page 32 of Treasury Consultation Paper (PDF version)]

32. Would the benefits of a targeted legislative response (such as only deeming specific unfair terms offered to small business as void) outweigh the costs of such an approach?

Answer: We are not sure of the implications of this question. ICA supports the extension of the full consumer unfair contract protections to small business people. The experience with the consumer protection laws has demonstrated a high level of success. This experience leads us to the conclusion that these protections are effective. ICA would not support a selection of terms if it diminished the current list under ACL. (See our comments in Part One of this submission.)

34. Are particular types of terms in standard form contracts (such as unilateral contract variation, or termination rights) more likely to be considered ‘unfair’ by small businesses?

Answer: As per our answer in question 7 above, the main areas of ‘unfairness’ include:

- Inappropriate transfer of liability from the engaging party to the engaged party.
- Power to terminate without cause by the engaging party with the engaged party locked in.
- Engaging party able to change the terms of the contract, including price, without the agreement of the engaged party.
- Lack of affordable, quick and independent dispute-resolution processes.

See, further, our comments in Part One of this submission.