Telecommunications Industry Ombudsman

Submission to the Treasury's consultation on Enhancements to Unfair Contract Term Protections March 2020

Introduction from the Ombudsman, Judi Jones

I welcome the opportunity to comment on Treasury's Consultation Regulation Impact Statement for *Enhancements to Unfair Contract Term Protections*.

I support the Government's intention to strengthen unfair contract term (UCT) protections for small businesses and this consultation is an important step towards that goal. It is also pleasing to see some of the options proposed by Treasury reflect our previous suggestion[1] that contract-issuing businesses could benefit from good practice guidance, including illustrative examples.

Building on our previous submission to Treasury in 2018, this submission provides an updated overview of my office's experience handling complaints from small business. It also offers observations on three of the issues that Treasury has invited comment:

- ways to strengthen UCT protections
- clarity on the definition of standard form contract, and
- application of any enhanced protections to consumer contracts.

I look forward to seeing the outcome of Treasury's consultation.

1. Our experience handling telecommunications complaints from small businesses

In the financial year ended 2019, the Telecommunications Industry Ombudsman received 19,165 complaints from small businesses. Since the UCT protections were introduced in 2016, our office has continued to receive complaints from small businesses involving UCTs.

1.1. UCTs in telecommunications complaints

Where relevant to handling and assessing the merits of a complaint, we will consider the terms of the agreement the small business entered with its telecommunications provider.

We have seen instances where an UCT contributed to the small business's problems with its telecommunications provider, but the small business itself has not referred to the UCT when explaining the complaint.

The Ombudsman can make a Decision about a complaint, which takes into account whether a Court is likely to find a contract term to be an UCT. We may also work with telecommunications providers and the ACCC to explore whether a contract term is potentially unfair and unreasonable.

[1] TIO submission to Treasury consultation – Review of Unfair Contract Term Protections for Small Business dated 21 December 2018.

We have observed that providers are not always deterred from including UCTs in their standard form contracts, even where we may have decided not to enforce the term against the small business.

1.2. Small businesses are at a disadvantage when entering standard form contracts

In our experience, many small businesses do not have a general awareness of UCT protections and may not read the terms of a standard form contract before entering it, given telecommunications contracts are rarely negotiable by a small business.

Even where a small business has attempted to read the terms of a contract, many do not have the legal knowledge to recognise or understand the adverse implications of an UCT until after they have entered into the contract.

Only a Court can find a contract term to be unfair and void. The expenses associated with litigation are a barrier for many small businesses considering whether to bring proceedings against their provider after suffering detriment caused by an UCT. This means small businesses are likely to bear the cost of the financial detriment rather than risk the uncertainty and cost of going to Court.

1.3. Examples of potential UCTs in telecommunications contracts

The case studies below provide examples of complaints involving contract terms that a Court may consider to be an UCT.

There are many small telecommunications providers in the industry whose market niche is to offer services to other small businesses.[1] Our experience is that these small providers are more likely than larger providers to have UCTs in their standard form contracts.

Case study 1: A phone provider's unilateral variation clause

In September 2014, Harriet's Hairdressers* entered a 36-month contract with its phone provider for fixed line services for $100 per month. The phone provider also supplied phone equipment to Harriet's Hairdressers through a third-party financier. In March 2019, after the contract for the phone equipment had expired, Harriet's Hairdressers rejected an offer from its phone provider to enter into a contract for new phone equipment. The phone provider then increased the monthly charge to $350 and charged $1,500 as a "Plan Fee Back Charge".

Harriet's Hairdressers complained about the unilateral increase in charges and the back charge.

The phone provider pointed to a clause in its Standard Form of Agreement that allowed it to increase plan fees to match the rental amount that was in place before the original contract term expired.

The Ombudsman was not satisfied this clause was contained in the Standard Form of Agreement at the time Harriet's Hairdressers entered into the contract and found the phone provider was not entitled to rely on the clause to unilaterally increase monthly charges under the contract.

[1] The Telecommunications Industry Ombudsman had 1,437 total active member providers as of 29 February 2020.

* Names of individuals, organisations and companies have been changed.

In our experience, limitation of liability clauses aimed at mitigating a telecommunications provider's exposure to financial loss are common in the industry. In some cases, these clauses may be considered UCTs.

Case Study 2: A phone provider's limitation of liability clause

Chic Kitchens* asked its phone provider to divert calls to a nominated mobile number, after it experienced problems with its phone services. The phone provider incorrectly directed calls to the wrong number. The phone provider did not fix the incorrect diversion within a reasonable time and Chic Kitchens continued to experience service issues. As a result, Chic Kitchens suffered financial loss.

Chic Kitchens complained that it had lost approximately $50,000 in profit. The phone provider rejected Chic Kitchen's claim, relying on a clause in its terms and conditions that indemnified it from losses incurred from a failure in the supply of its services.

After investigating the complaint, the Ombudsman issued a Decision directing the phone provider to pay Chic Kitchens $10,410 in compensation for financial loss.

Case Study 3: An internet provider's early termination clause was not reasonably necessary to legitimately protect its interests

Coffee Palace* entered a 24-month contract for wireless broadband services and was told the service would support voice calls. Coffee Palace consequently discovered the service was not suitable for voice calls.

When Coffee Palace asked to be released from its contract, its internet provider charged $4,500 as an early termination fee. This figure comprised the monthly cost of the service multiplied by the remaining months of the contract.

The Ombudsman found it was likely a Court would find the clause to be an unfair contract term because the internet provider could not demonstrate the charge was a genuine estimate of its loss.

* Names of individuals, organisations and companies have been changed.

2. Ways to strengthen UCT protections

We support strengthened UCT protections, particularly options which propose increased regulatory powers, greater incentives for compliance, and improved awareness of UCT protections.

2.1. We support changes which deter the use of UCTs

The Consultation Regulation Impact Statement proposes a number of options which could deter the use of UCTs.

2.1.1 Strengthened powers for regulators[1]

We support the proposed option 4 of increasing regulator powers to issue infringement notices and make determinations on whether a contract contains an UCT without going to Court.

Challenging UCTs through individual legal proceedings is inefficient and costly. Most small businesses do not have the resources, time, or knowledge of their legal rights to act. Nor do regulators have the resources to pursue every potential UCT in Court.

Regulators having the power to make determinations about an UCT may provide greater clarity to both contract-issuing businesses and contract-accepting small businesses about whether a particular contract term is an UCT.

Treasury may also wish to consider complementing regulator powers with a warning notice process. This would enable regulators to give contract-issuing businesses an opportunity to amend a problematic contract term by first issuing a warning notice explaining why the term is an UCT.

2.1.2 Make UCTs illegal and attach civil pecuniary penalties[2]

In addition, or as an alternative to option 4, we support the proposed option 3 to make UCTs illegal. If a Court finds a term is unfair, the Court should have the power to determine the appropriate civil pecuniary penalty, up to the maximum amount set under the law.

Making a UCT illegal can deter contract-issuing businesses from including UCTs in standard form contracts. Imposing financial penalties creates a higher risk for businesses and may be more effective than the current framework.

Greater incentives for compliance will be likely to reduce the need for regulators to pursue enforcement action through the Courts.

2.2. We support more flexible remedies when a term is found to be unfair

As noted in the Consultation Regulation Impact Statement[3], where a term is found to be unfair and void in a particular contract, the same, or similar, terms can be used repeatedly in other standard form contracts. We support more flexible remedies than simply a finding that the term is void.

[1] Consultation Regulation Impact Statement 4.6. page 18.
[2] Consultation Regulation Impact Statement 4.5. page 16.
[3] Consultation Regulation Impact Statement page 23.

2.2.1 Courts should have the discretion to grant an appropriate remedy[1]

If voiding a term in a contract renders the entire contract unworkable, we believe the Courts should be able to grant a more appropriate remedy, such as variation of the term, instead of automatically declaring the term void.

2.2.2 Regulators should be able to commence legal proceedings on behalf of a class of small businesses[2]

We support regulators having the power to commence legal proceedings on behalf of a class of small businesses. This option would promote consistency and ensure small businesses, who cannot afford the cost of pursuing litigation, are not at a disadvantage.

2.2.3 Contract-issuing businesses should be prevented from using UCTs repeatedly in similar circumstances[3]

If a Court declares a term is unfair, we believe the business should be prevented from repeatedly using the same unfair term in similar small business contracts.

If a contract term is found to be unfair, then all businesses should be prevented from relying on it in similar standard form contracts to ensure consistency for all parties.

2.3. Contract-issuing businesses and small businesses will both benefit from regulatory guidance

What is considered to be an UCT is often subjective. Regulatory guidance will provide clarity for both parties about their rights and obligations. There is less room for ambiguity and dispute if the regulators were to clarify minimum expectations and provide examples of what constitutes a UCT, preferably tailored to different industries.

3. Clarity on the definition of standard form contract is needed

We believe the test for determining whether a contract is a standard form contract should be broadened to include the 'repeat usage' test as a mandatory consideration and provide examples of what is an 'effective opportunity to negotiate'.

Clarifying what is an 'effective opportunity to negotiate" will provide further clarity for both contract-issuing businesses and contract-accepting businesses alike.

We believe it would be useful for regulators to promote awareness and education by developing fact sheets and examples of what constitutes a standard form contract.

[1] Consultation Regulation Impact Statement 5.4. page 24.
[2] Consultation Regulation Impact Statement 5.5. page 25.
[3] Consultation Regulation Impact Statement 5.6. page 25.

4. Any enhanced UCT protections should extend to consumer contracts

We support the extension to consumer contracts of any enhanced protections against UCTs.

Our office continues to receive complaints from consumers that involve UCTs in telecommunications standard form residential contracts. Consumers are as, if not more, disadvantaged than small businesses when entering such contracts.