

10 January 2019

Manager
Unfair Contract Terms Review
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600



By email: consumerlaw@treasury.gov.au

Dear Sir/Madam

**REVIEW OF UNFAIR CONTRACT TERM PROTECTIONS FOR SMALL BUSINESS –
SUPPLEMENTARY SUBMISSION**

On 20 December 2018, the Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) provided a submission in response to the Discussion Paper entitled Review of Unfair Contract Term Protections for Small Business (**Discussion Paper**).

Since providing that submission, the Law Council has received additional comments in relation to the Discussion Paper from one of its Constituent Bodies, the Queensland Law Society (**QLS**).¹

The Law Council appreciates the opportunity to provide the additional comments (see **Attachment A**). Please attribute the comments to the QLS.

If you require further information from the Law Council, generally or in regard to the submission of the SME Committee, please contact Jessica Morrow, Section Administrator, Business Law Section, Law Council of Australia on (02) 6246 3737 or at Jessica.Morrow@lawcouncil.asn.au.

Should you have any queries regarding the submission of the QLS, in the first instance please contact Vanessa Krulin, Senior Policy Solicitor, Queensland Law Society on (07) 3842 5872 at v.krulin@qls.com.au.

Yours sincerely



Arthur Moses SC
President

¹ The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law. The Law Council represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

ATTACHMENT A – SUBMISSION OF THE QUEENSLAND LAW SOCIETY

Thank you for the opportunity to provide comments on the Treasury's discussion paper, developed as part of the review of the effect of extended unfair contract terms protections to small business contracts (**the Discussion Paper**). The Queensland Law Society (**QLS**) appreciates being consulted on this important review.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Banking and Finance Law Committee who have substantial expertise in this area.

In our response to the Discussion Paper we have identified particular questions, and have addressed these as follows:

Question 1 - thresholds and employee numbers

Our members report that the headcount definition does not work in practice, and creates uncertainty. Contracting parties often have no way of determining the headcount information.

Ideally a simpler approach should be taken, with perhaps a different terminology adopted (e.g. small trader) so as to avoid multiple definitions in different legislation for the same term namely "small business".

A possible approach would be to simply ensure that the application of the unfair contract terms (**UCT**) provisions would apply to all sole traders and private companies unless the party proffering the Standard Contract can show that the small trader had stated in writing to it under the hand of that sole trader, partner or director that it had an annual turnover in excess of a stated amount in the previous year. This statement could be in a required form and would be prima facie evidence of its accuracy in the absence of contrary knowledge of the contracting party (similar to the approach that was adopted to the application of the Consumer Credit Code to "business and investment" loans).

Question 4 - factors and circumstances which make it difficult to determine whether a contract is a standard form contract

QLS is of the view that the current definitions work adequately in practice.

Question 5 - are the exemptions appropriate?

The exemptions appear appropriate (but we agree with the suggested reforms which are noted in the discussion paper at paragraph 3.2).

Question 6 - should industry 'minimum standards' prescribed by state and territory laws be exempt from the UCT protections?

No. There is sufficient protection for these already under the protection of mandatory provisions imposed by law.

Question 7 - Do you think the current UCT regime offers an appropriate level of protections to small businesses?

Yes, in general but subject to clarification of the issues noted in this letter.

Question 8 - additional examples

We do not think additional examples are necessary to be included in the legislation, with exception of those already noted above. However, further examples in the Regulatory Guidance would be appreciated.

Question 9 - any other relevant issues

We submit that the following issues could be addressed in the Regulatory Guidance:

- a) clarification as to adequate minimum levels of "transparency" having regard to objective tests upon comprehensibility (e.g. use of readability formulae such as the Gunning FOG index or Flesch Ease of Readability Scores all widely available on standard IT software packages, and suitable "targets" for readability ease e.g. Grade 8 average comprehension level).
- b) flowchart of and helpful tips for consumers wishing to negotiate/complain about suspected UCT's (particularly providing links to applicable EDR schemes).
- c) combination of business UCT guidance and examples from the 2016 review, to form a comprehensive Business UCT guide similar to the consumer guide; and
- d) including in the guidance further case examples based upon decided legal cases and EDR decisions.