



Submission on
Review of
Unfair Contract Term Protections
for Small Business
Discussion Paper

Dec 2018

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

Email: consumerlaw@treasury.gov.au

EXECUTIVE SUMMARY

The Swimming Pool & Spa Association of Australia (SPASA) welcomes the opportunity to provide a submission to The Treasury on the [Review of Unfair Contract Term Protections for Small Business](#).

The Swimming Pool and Spa Association of Australia (SPASA) is the peak industry body representing the interests of the swimming pool and spa industry - *most of which are considered "Small Business"*.

As the voice of the industry, SPASA represents pool builders, manufacturers, suppliers, retailers, technical servicemen, subcontractors, installers, consultants and other allied trades, all of whom set themselves apart from the rest of the industry by setting standards of skill, workmanship and ethical business behaviour in the best interests of pool and spa owners.

SPASA is also a Registered Training Organisation (RTO) that provides training and assessment to the swimming pool and spa industry. Our courses are designed in consultation with key industry stakeholders and our qualifications and accreditations are highly valued by government, employers and the wider community.

The Swimming Pool and Spa Industry is diverse and includes but is not limited to the following sectors:

Manufacturers of Equipment & Chemicals	Suppliers of Equipment & Chemicals
Pool Builders	Pool and Spa Service Technicians
Pool Shops	Consultants
Online Retailers	Portable Spa Retailers
Prefabricated Pool Manufacturers & Retailers	Tiling/Paving Suppliers & Retailers
Pool & Spa Heating Manufacturers/ Retailers	Pool Cover Manufacturers & Retailers
Ancillary Retailers	Other Sub Trades

NUMBER OF EMPLOYEES

DISCUSSION QUESTION

1. Does the headcount approach work in practice?

SPASA disagrees with the headcount approach.

For example, in the swimming pool and spa industry, it is not unusual for a larger pool building or service company to have relatively few fulltime employees whilst most of the on-site construction and infield activity is performed by independent subcontractors, casuals and seasonal employees.

Moreover, it is impossible and impracticable, for any business whether a "big business" builder, supplier, retailer, service or otherwise, to know whether or not the business they are contracting with, is a "small business" based on headcount.

The number of employees that a business has under its employ is not often publicised and is rarely common knowledge. Further, businesses whose staffing levels fluctuate may enter contracts over the course of a year and have some contracts where protections do apply and some where they don't.

If so, is an employee number of 20, appropriate to define a small business for the purpose of UCT protections?

As per above and below responses.

If not, what are alternative approaches and what would be the benefit of adopting them?

In SPASA's view, a 'better indicator of a businesses' financial and bargaining capacity' would be annual turnover. In the absence of raw data, SPASA is not in a position currently to suggest a proposed figure, however, it should be noted that the 'ATO defines a small business as one with an annual turnover less than \$2 million.

SPASA does not accept the unworkable proposition that businesses should simply ensure that before signing a contract both parties indicate the number of employees that they have and therefore, whether the contract will be subject to the unfair term's regime.

MONETARY VALUE OF A CONTRACT

DISCUSSION QUESTIONS

2. Does the value threshold appropriately cover contracts that warrant UCT protections? If not, how should the thresholds be altered and why?

SPASA raises the following concerns:

- Retaining the Monetary Value thresholds for Small Business Unfair Contract Terms for contracts with an upfront price of \$100,000 or \$250,000 for durations more than 12 months may lead to contracts being entered into at \$100,001 and \$250,001 respectfully in order to avoid proposed protections.
- Over time, the threshold amounts will be eroded by inflation or other sizeable changes to the cost of activities.
- Whilst the onus was on small business to undertake due diligence for more expensive transactions, due diligence does not provide an answer to, or relief against of an unfair contractual term.

3. Do you have experience or are you aware of any contracting practices designed or undertaken to avoid the UCT protections?

SPASA supports the use of clear and plain English contracts for both business-to-business and business-to-consumer relationships.

Even with clear and plain English contracts, business-to-business and business-to-consumer contractual relationships are complex.

Small construction and service businesses have the capacity to make an informed decision based on the assessment of all the risks, including the transactional risk against their return on investment.

Business owners may reasonably decide not to obtain advice or not properly review the terms of a contract to assess the risk. In fact, some business owners may decide to not negotiate obvious contractual terms on the understanding that, by enlarge, the entire contractual arrangement benefits them.

Equally, many consumers dealing with small construction and service businesses also make informed decisions based on risk and may also decide not to negotiate because its benefits them in the overall.

COVERAGE

DISCUSSION QUESTIONS

4. In your experience, what factors and circumstances make it difficult to determine whether a contract is a standard form contract?

In Australia every year, many hundreds of thousands of contracts are entered into for various levels of swimming pool and spa construction and service work. These contractual relationships rely upon the use of a standard form contract.

Standard form contracts reduce transaction costs for everyone involved and leads to better efficiency, project delivery and management.

Many of the standard form contracts used in the swimming pool and spa industry are entered into through a process of negotiation and dialogue with the consumer or business.

The SPASA standard contract reflects the specific needs of the swimming pool and spa industry and are clearly set out and well understood by all the contracted parties. Importantly, these contracts are often amended to reflect the specific nature, requirements and needs of all the parties.

Like other industries, the swimming pool and spa industry desperately needs young pool builders and service technicians entering the market to offset and replace our aging workforce. The growing and complex burden of excessive red tape and regulation is often cited by SPASA members as the number one reason they leave the industry and deters new entrants.

SPASA and other respected associations do not support bad behaviour or practices that negatively impact consumers or other businesses, but we do support and advocate less red tape which is very likely to affect the contractual freedoms of our members whilst adding to the cost.

Additional costs are ultimately passed onto consumers and other businesses.

EXEMPTIONS

DISCUSSION QUESTIONS

5. Are the exemptions appropriate? Can you provide examples of where the exemptions to the UCT protections have been ineffective? Is there evidence that would justify an expansion of the exemptions, for example, as a result of regulatory overlap?

Industry Standard form Contracts should be exempt.

6. Should industry 'minimum standards' prescribed by state and territory laws be exempt from the UCT protections? Is there data and evidence to support your opinion?

Yes. The last thing small business needs is more and unnecessary complexity.

OVERALL EFFECT

DISCUSSION QUESTIONS

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

SPASA does not want to see additional complex amendments and a *one-size-fits-all* approach to the current Unfair Contract Terms regime.

8. Do you think additional examples are needed to clarify unfair terms?

No. It is generally accepted that the determination of a contract term as 'unfair' is a holistic exercise. This means one must consider the overall circumstances of the contractual arrangement in considering whether or not a term is unfair.

Accordingly, a court may take into account matters as it thinks relevant but must take into account the extent to which the term is transparent; and how the contract performs as a whole.

9. Are there any other issues relevant to the Government's review of UCT protections for small business that impact on the effectiveness of the regime?

Reduce the complexity, red tape and additional cost.

FOR FURTHER INFORMATION:

Spiros Dassakis - COO
Swimming Pool and Spa Association of Australia (SPASA)
Toll Free: 1800 802 482
Ph: (02) 9630 6300
Email: info@spasa.com.au
Web: www.spasa.com.au