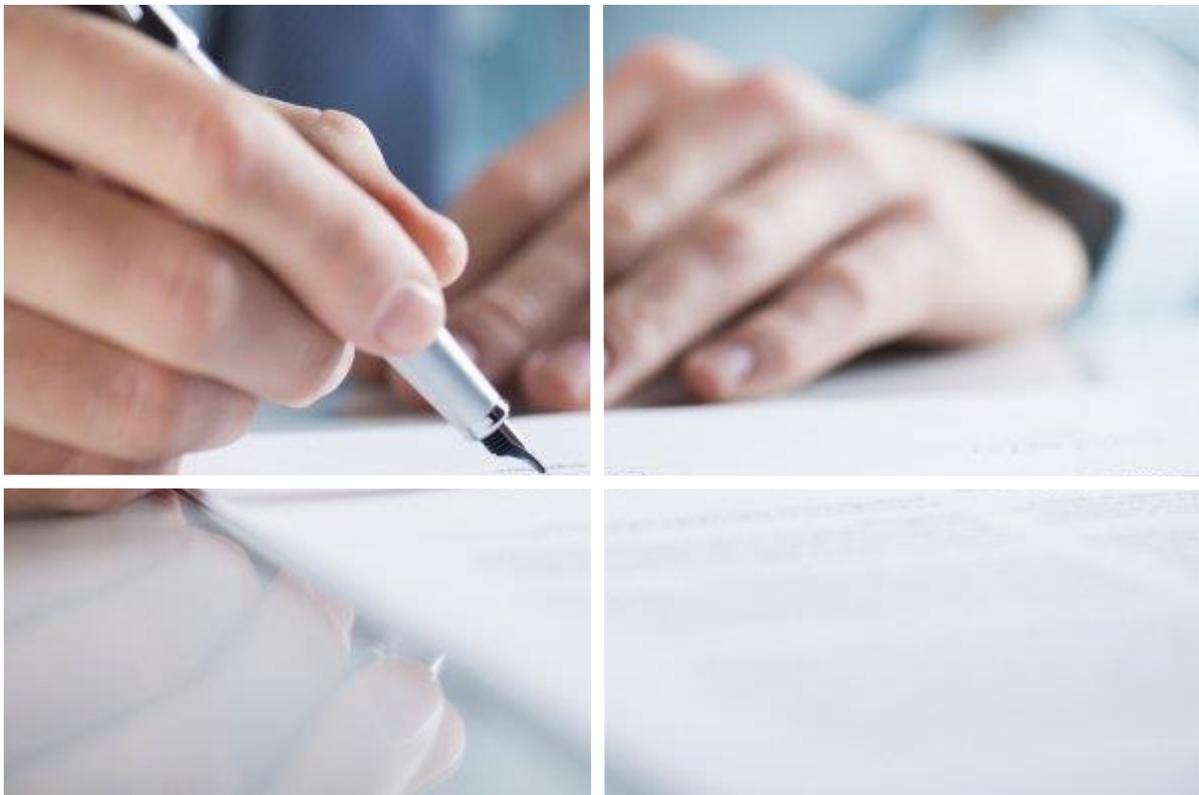


VACC Submission:

Strengthening Protections Against Unfair Contract Terms

September 2021



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About VACC

The Victorian Automotive Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,500 members in over 20 retail automotive sectors that employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. tyre dealers, specialist vehicles, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

VACC is also an active member of the Motor Trades Association of Australia (MTAA) and contributes significantly to the national policy debate through Australia's peak national automotive association.

Contact

Steve Bletsos
Senior Research Analyst
Industry Divisions

VACC

Level 1 | 464 St Kilda Road | Melbourne Vic 3004
P: 03 9829 1143 | M: 0438 385 881 | W: vacc.com.au

Kathy Zdravevski LLM(JD)
Industry Policy Advisor – Industry Divisions
BRD, TOD

VACC

Level 1 | 464 St Kilda Road | Melbourne Vic 3004
P: 03 9829 1142 | M: 0418 329 527 | W: vacc.com.au

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VACC Recommendations

Recommendation 1:

The Bill should be amended to disallow the parties to file joint submissions and have jointly proposed declarations and orders for the purpose of resolving the proceedings.

Recommendation 2:

*That in addition to ‘A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term’ that there also be included ‘**and where a court accepts an undertaking**’ on page 10 of the Exposure Draft Explanatory Materials.*

Recommendation 3:

*That under the heading ‘Remedies available under the scheme’ of the Exposure Draft Explanatory Materials, point 1.31 should be expanded to include: ‘when proceedings either by a person or a regulator are **preventative in nature** and the terms are declared likely to cause a class of persons to suffer loss or damage only, then, and only then is an undertaking appropriate’.*

Recommendation 4:

*That under the heading ‘Remedies available under the scheme’ of the Exposure Draft Explanatory Materials, points 1.38 and 1.39 should be amended so that both regulators and courts **must** be compelled to issue written notices to the public about persons who breach the unfair contract term provisions.*

Recommendation 5:

That a large proprietary company as defined under section 45A(3) of the Corporations Act 2001, must once every two years have their contract terms, in consumer and small business standard form contracts, reviewed by an external auditor. For all consumer and small business standard form contracts provided by an insurer to a consumer, or to a business who is a ‘fulfilment provider’, this process must occur every 12 months irrespective on the duration of the contractual term.

Recommendation 6:

That further clarity be provided in the Bill and Exposure Draft Explanatory Materials concerning the treatment of annual business turnover in respect to affiliated companies of small businesses.

Recommendation 7:

If the aggregate turnover of all affiliated companies to small businesses is required under the Bill, then the small business contract turnover threshold should be revised from \$10 million to \$50 million.

Recommendation 8:

That all automotive retail franchisees should qualify for UCT protections, irrespective of any thresholds.

1 Background

The Victorian Automotive Chamber of Commerce (VACC) welcomes the opportunity to comment on the Exposure Draft Legislation and Explanatory Materials regarding Unfair Contract Terms (UCTs), as proposed by the Treasury.

As the peak automotive body in Victoria, VACC is charged with a responsibility to communicate to government where legal matters adversely affect operations within industry, and amongst VACC member businesses.

VACC commends the Treasury's initiative to amend the Australian Consumer Law (ACL) and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*, to implement the agreed reforms as per the exposure draft legislation. These reforms have a direct bearing on the 72,521 automotive businesses that represent Australia's automotive industry, of which over 95 per cent are small and family-owned automotive retail, service, and repair businesses.

Whilst VACC supports the UCT reforms and the draft legislation in principle, VACC believes that some aspects of the exposure draft legislation require further clarity and amendment, particularly as they apply to small businesses within the automotive industry. This submission will review both the exposure draft legislation and explanatory materials and highlight key areas for further development within each.

2 Exposure Draft Explanatory Materials

2.1 Summary of new law

VACC proposes that in the Explanatory Draft Materials, under page 9 *Summary of new law*, point 1.12, that there be an addition to the Treasury Laws Amendment Bill 2021 ('The Bill') that prohibits the lodging of joint submissions by parties to proceedings. In particular, the Bill should be amended to disallow parties to file joint submissions that have jointly proposed declarations and orders for the purpose of resolving the proceedings.

Small business owners deserve the right to be able to enter a fair contract, especially where they have little or no ability to negotiate the contract terms. Where action is taken against a contract that is deemed to be unfair, regulators such as the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) must not conspire through joint submissions to recommend or declare undertakings that may be further accepted by the courts as an acceptance of unfair contract terms in standard form small business contracts.

Whilst the ACCC and ASIC may act against unfair practices in standard form contracts, whether it be for consumers or the small business community, they must not show to be working together with the respondent in claims against the respondent involving contraventions of the ASIC Act or the ACL.

ASIC, the ACCC and the courts have specific duties conferred upon them by the general law, the ASIC Act, and the ACL, to deter other businesses from entering contracts containing unfair terms. The Court especially serves to record their disapproval of the contravening conduct and vindicate the claim by the regulators to carry out the duties independently as conferred upon them: see *ASIC v Bendigo* at [90]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (ACCC v Coles) at [78].

Therefore, VACC recommends the following:

Recommendation 1:

The Bill should be amended to disallow the parties to file joint submissions and have jointly proposed declarations and orders for the purpose of resolving the proceedings.

2.2 Comparison of key features of new law and current law

Under the section titled *Comparison of key features of new law and current law*, on page 10 of the Exposure Draft Explanatory Materials, it states that:

‘A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term’.

Whilst this is a welcome addition to the UCT legislation, VACC believes that in practice, there is a likelihood that Courts may rely on accepting undertakings from respondents to refrain from using UCTs rather than imposing pecuniary penalties, as shown in recent cases involving UCT law.

A key example of courts accepting undertakings lies in the recent case of *ASIC vs Bank of Queensland Limited* [2021] FCA 957. The judgement handed down in this case on 12 August 2021, was that the Bank of Queensland had entered unfair terms into standard form loan contracts with its small business customers after 12 November 2016 (see ASIC link <https://bit.ly/3g02koy>).

Page 77/93 point 44 of the judgement states that: *However, ASIC does not contend that the Bank has deployed these terms unfairly. Further, ASIC does not allege that the Bank has relied upon any of the clauses in the Standard Form Contracts in a manner that is unfair, or that has caused any customers detriment or to suffer loss or damage. This application is preventative in nature.*

Point 44 of the judgement demonstrates that ASIC’s intent to litigate against the Bank of Queensland was purely preventative in nature. Page 66 of the judgement also refers to the joint submissions made in this case. VACC contends that such practice is unacceptable, especially when it is a regulator litigating against a large corporation.

To deter such practice under the new UCT law, VACC recommends the addition of the phrase: ***‘including if a court accepts an undertaking’***, to that of *‘A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term.’*

Recommendation 2:

That in addition to ‘A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term’ that there also be included ‘and where a court accepts an undertaking’ on page 10 of the Exposure Draft Explanatory Materials.

2.3 Remedies available under the scheme

Point 1.31 on page 16 of the Exposure Draft Explanatory Materials states that:

'Under the Bill, a person will only need to show that the orders will prevent loss and damage that may be caused. If loss and damage has already occurred, then the court will need to be satisfied that the orders made will remedy this'.

VACC believes that the above point should also include a reference to undertakings made by courts where proceedings are **preventative in nature**. Specifically, only when proceedings either by a person or a regulator (ACCC/ASIC) are preventative in nature and the terms are declared *likely to cause* a class of persons to suffer loss or damage only, then, and only then is an undertaking appropriate. At all other times a pecuniary penalty as a remedy available under the ACL and ASIC Act ought to be ordered by the court in addition to making any declaration that a term is unfair to the UCT regime, and in addition to any other remedy the court sees reasonable to apply.

As shown in the case of the *Australian Securities and Investments Commission Vs Bank of Queensland Limited [2021] FCA 957*, the question for the Court when deciding whether an undertaking is appropriate as a *sole* remedy, in addition to declaring the term unfair, becomes confirmed only once a person(s), ASIC or the ACCC accept that the respondent *has not* relied upon the impugned terms in a manner that is unfair, or that has caused any persons to suffer loss or damage.

VACC therefore recommends the following:

Recommendation 3:

That under the heading 'Remedies available under the scheme' of the Exposure Draft Explanatory Materials, point 1.31 should be expanded to include: 'when proceedings either by a person or a regulator are preventative in nature and the terms are declared likely to cause a class of persons to suffer loss or damage only, then, and only then is an undertaking appropriate'.

In addition, point 1.38 on page 17 of the Exposure Draft Explanatory Materials, refers to the fact that the Bill will extend the power of the courts and regulators to issue public warning notices about persons who breach the UCT provisions. VACC believes that having this power as an *option* only is not sufficient, and ideally, this should be made a mandatory requirement on both parties to be an effective deterrent. Both regulators and courts must issue to the public written notices about persons who breach the UCT provisions, and not simply if they choose to do so. This would ensure a firm and consistent approach towards the publication of written notices to the public by courts and regulators.

By extension, VACC also believes that the same argument should apply to point 1.39, where regulators such as ASIC and the ACCC must use their powers against persons that have contravened the ACL or ASIC Act using an UCT, to publish that they have breached the unfair contract term regime on their website or in another public domain.

Recommendation 4:

That under the heading 'Remedies available under the scheme' of the Exposure Draft Explanatory Materials, points 1.38 and 1.39 should be amended so that both regulators and courts must also be compelled to issue written notices to the public about persons who breach the unfair contract term provisions.

2.4 Rebuttable presumption for a term that has been declared by a court to be unfair

Point 1.45 on page 18 of the Exposure Draft Explanatory Materials, states that:

'The rebuttable presumption is intended to encourage contract issuing parties to maintain thorough monitoring and record keeping of their contracts to ensure that unfair terms are removed from or not included in standard form contracts'.

Whilst VACC agrees with this in principle, VACC would recommend that there be a legal compliance for large corporations to submit their standard form contracts for regular review by an external auditor. This would help ensure the successful operation of the rebuttable presumption.

VACC therefore makes the following recommendation:

Recommendation 5:

That a large proprietary company as defined under section 45A(3) of the Corporations Act 2001, must once every two years have their contract terms in consumer and small business standard form contracts reviewed by an external auditor. For all consumer and small business standard form contracts provided by an insurer to a consumer or to a business who is a 'fulfilment provider' this process must occur every 12 months irrespective on the duration of the contractual term.

2.5 Contract thresholds

VACC believes that both the removal of the upfront contract value thresholds and the expansion of the class of contracts captured by the UCT provisions in the Bill, represent commendable progress towards strengthening protections for small business.

VACC contends, however, that the new definition of a small business contract in the Bill, still contains many anomalies that require further clarity. First, there is the issue of aggregated turnover, and how, or if, it applies to the definition of a small business under the Bill. For example, there are many car dealerships, tyre dealers or automotive workshops that appear to fit the requirements for UCT coverage under the Bill by employing less than 100 people and having an annual turnover of less than \$10 million. However, many of these small automotive businesses may be connected or affiliated with other entities that operate under the same or separate Australian Business Numbers (ABN). The Bill needs to clarify whether in these cases it is the aggregated turnover of all the connected entities that applies to the definition of a small business under the Bill, or whether small business affiliations with entities that have separate ABNs are excluded for turnover purposes.

If the annual turnover requirements under the Bill include all small business connections with other entities with separate ABNs, then this may push many small business owners above the \$10 million annual turnover requirement for UCT protections. A similar argument also applies to the less than 100 employee's threshold under the Bill.

VACC has raised these matters in its original submission on the review of UCTs reforms for small business, with regard to the automotive industry. The Chairman of the ACCC, Mr Rod Simms, also articulated his concerns with car dealers and other automotive businesses being effectively excluded from UCT protections by virtue of the high value of their trading stock during his address

to the Council of Small Business Organisations Australia (COSBOA) National Small Business Summit in August 2018.

Whilst the contract thresholds are now broader in the Bill, it is still unclear as to whether the changes amount to any real UCT reforms for many automotive businesses. It appears that many small automotive businesses may still be excluded from UCT protections under the current iteration of the Bill, and this includes the following:

- Car dealers
- Motorcycle dealers
- Farm machinery and power equipment dealers
- Commercial vehicle dealers
- Marine equipment dealers
- Tyre Dealers
- Car rental firms

VACC therefore makes the following three recommendations about these matters:

Recommendation 6:

That further clarity be provided in the Bill and Exposure Draft Explanatory Materials concerning the treatment of annual business turnover in respect to affiliated companies of small businesses.

Recommendation 7:

If the aggregate turnover of all affiliated companies to small businesses is required under the Bill, then the small business contract turnover threshold should be revised from \$10 million to \$50 million.

Recommendation 8:

By exemption, all automotive retail franchisees should qualify for UCT protections, irrespective of any thresholds.

3 Conclusion

VACC contends that any UCT legislative amendments made by the government in strengthening protections for consumers and small businesses against UCTs must factor in both consumer and small business efficacy and procedural fairness.

This submission raises several practical recommendations that would strengthen the exposure draft legislation and will amend the ACL and the ASIC Act to implement the agreed improvement. VACC hopes this will assist government and businesses in its planning. VACC restates our willingness to work with government on the development of any legislative amendments for UCTs in our pursuit for surety and clarity for our members as we all prepare for the protections under the Bill.