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Manager, Consumer Policy Unit
Treasury
Langton Cres
Parkes ACT 2600

Via email to uctprotections@treasury.gov.au

Dear Manager

Re: Enhancements to Unfair Contract Term Protections

I seek to make the following submission in relation to the current consultation concerning “Enhancements to Unfair Contract Term Protections”.

I am a director of an engineering construction company which carries out projects in the water industry Australia-wide.

I am also a lawyer practising part time. I was admitted to legal practice in 1980 and, since then, developed expertise as a building lawyer. I have been extensively involved in building disputes, as well as the negotiation of construction-related contracts.

Summary of submission

1. Grossly unfair standard-form contracts are rife in the commercial construction industry.
2. It is now usual and common for a building contractor (**subcontractor/purchaser**) to be offered draconian contract terms on a “take it or leave it” basis either when tendering for construction work, or seeking to purchase building materials.
3. The other party (**contractor/supplier**) is invariably a company with significant resources and market strength, typically a publicly listed company, a large proprietary company, or a national or multi-national company.
4. It is quite common and usual to see such contracts terms operating to –
 - exclude liability for faulty information provided, or defective goods supplied
 - shift risk to the subcontractor/purchaser although the risk is in the complete control of the contractor/supplier
 - exclude any liability of the contractor/supplier for delays it causes
 - deny fair claims for variations, extensions of time and delay costs if time bars are missed
 - otherwise deny outright such fair claims for variations, extensions of time and delay costs.

5. The problem is so rife that the UCT regime in the *Competition and Consumer Act 2010* should be extended to construction contracts across the board (that is, regardless if the disadvantaged party also qualifies as a consumer, or a small business).

The existing law

The UCT laws relating to standard form business-to-business contracts to supply goods and services entered into or renewed on or after 12th November 2016, require both that –

- at least one of the parties is a “small business” (i.e. employs less than 20 people, including casual employees employed on a regular and systematic basis) and also that
- the upfront price payable under the contract is no more than \$300 000, or \$1 million if the contract is for more than 12 months.

In general terms, a standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it is effectively offered on a “take it or leave it” basis. It is assumed that an agreement is a standard form contract unless the party that prepared the contract is able to prove that it is not.

Examples of potentially unfair terms given by the ACCC¹ in 2016, and subsequently endorsed by the courts,² include unfair indemnities, excessive liability limitations and unfair liquidated damages clauses.

The problem

Many, many a subcontractor/purchaser in the commercial construction industry employs 20 or more people.

Many, many work and/or supply contracts in the commercial construction industry are for \$300,000 or more.

But time and again the contractor/supplier refuses to negotiate the most unreasonable and one-sided contracts.

It is not an answer to say to the subcontractor/purchaser that they should go to another supplier (especially if the supplier is the sole Australian vendor of equipment which has been specified to be provided), or that the the subcontractor/purchaser should refuse to tender.

In the latter case, what usually happens is the tendering subcontractor puts in a list of commercial exceptions to objectionable terms in the contractor’s contract with its tender. Then it is told it has won the tender, but the contractor’s terms are not negotiable.

The tenderer, which has already applied significant at-risk resources to putting in a tender, endeavours to negotiate on the terms, all the while incurring further preliminaries costs, only to be met by a refusal to negotiate. By this point, the tenderer is boxed in, and, ultimately, gives up and takes the risk.

The limits imposed to take advantage of the current UCT laws (less than 20 employees, as well as less than a contract value of \$300,000) are no doubt benchmarks set by Parliament on the assumption that, once exceeded, the disadvantaged party then becomes big enough and powerful enough to negotiate on a reasonably equal basis, and from a reasonably equal position of power. But this is not the case for the reasons given above, as these larger contractors and/or suppliers are determined not to negotiate, and indeed will often say that they are not allowed to do so.

As a result, supply and work contracts in the commercial construction industry are rife with grossly unfair contract terms, as even the most cursory survey of subcontractors and/or purchasers would verify.

It is thus submitted that the time has come to extend the UCT protections across the board in the commercial construction industry, regardless of employee numbers or contract values.

¹ See <https://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts>.

² *ACCC v J J Richards* [2017] FCA 1224 (unfair indemnity and liability exemption) and *ACCC v Servcorp* [2018] FCA 1044 (unfair liability limitation).

Examples of the problem

The following are examples of terms which are repeatedly seen in commercial construction industry work and supply contracts.

Example 1 - Pump supply contract

Pumps (and associated valves) were purchased from Weir Minerals Australia (“Weir”) in 2012. The works contract specified the pumps were to be Weir pumps, so Weir were the sole source of supply.

Weir would not agree to supply unless its contract included a liability limitation, set out below. Weir advised that they were required to insist that their standard liability limitation is in all supply contracts. It thus appeared to be inflexibly required as part of a risk management regime for the group.

11.6 Limitation of Liability

- (a) *Subject to 11.6(b), Weir’s total liability under any contract of which these General Conditions of Sale form part shall in no event exceed the total price of the Goods and/or Services supplied.*
- (b) *If any term, condition, guarantee or warranty is implied into these General Conditions of Sale by law, including the Australian Consumer Law, which cannot be excluded or modified, then the term, condition, guarantee or warranty shall be deemed to be included in these General Conditions of Sale, and the exceptions and limitations in 11.1 to 11.5 do not apply to such term, condition, warranty or guarantee, Provided That Weir’s liability for a breach of or failure to comply with any such term, condition, warranty, or guarantee (other than a guarantee under sections 51, 52 or 53 of the Australian Consumer Law) including any consequential loss which the Purchaser may sustain, shall be limited, at the option of Weir, to either replacing or repairing the Goods or, in the case of Services, to supplying the Services again.*
- (c) *Subject to 11.6(b):*
 - (i) *All conditions, warranties, terms, undertakings, representations, guarantees and obligations, not expressly set out in these General Conditions of Sale or in any written contract of which these General Conditions of Sale form part, whether arising under statute, common law, equity, custom, trade usage or otherwise (including without limitation, any implied condition, warranty, term, representation or guarantee as to the correspondence of the Goods or Services with any contract description or as to merchantable quality, fitness for any purpose or safety of the Goods or Services, or operating performance where such performance is conditional on empirical factors or on the whole installation or on the individual or overall operation or on the skills of an operator), whether made known or not and any liability of Weir to compensate or indemnify any person or persons in respect of the foregoing, are expressly negated and excluded;*
 - (ii) *In no event shall Weir be liable for any special, indirect, consequential, incidental or punitive losses or damages whether in contract, tort (including without limitation negligence), equity, under statute or on any other basis, and whether or not such loss or damage was foreseeable. The term "consequential damages" in these General Conditions of Sale shall include, but not be limited to, economic loss including loss of actual or anticipated profits, business interruption, loss of use, revenue, reputation and/or data, .increased cost of working, loss or damage to equipment or other property, and liabilities of the Purchaser to its customers or third persons.*

Example 2 – Commercial construction contract

A “not negotiable” multi-million dollar subcontract included the following terms, as the contract was ultimately entered into:

Clause 7.1

For clarity, the Subcontractor assumes all risk associated with the weather conditions that may affect the Site, including all inclement weather which may eventuate and the effects that such weather conditions may have on the Site, or at the Site, including any effects that such weather conditions may have on the Subcontractor's Activities, or the Subcontract Works, and is not entitled to make any Claim against the Contractor arising out of, or in connection with, such matters.

Clause 7.8

The Subcontractor:

(a) *warrants that it did not in any way rely upon:*

- a) *any information, data, representation, statement or document made by or provided to the Subcontractor by the Contractor or anyone on behalf of the Contractor; or*
- b) *the accuracy or adequacy of any such information, data, representation, statement or document,*

for the purposes of entering into the Subcontract, except to the extent that any such information, data, representation, statement or document forms part of the Subcontract;

- (b) *warrants that it enters into this Subcontract based on its own investigations, interpretations, deductions, information and determinations; and*
- (c) *acknowledges that it is aware that the Contractor has entered into the Subcontract relying upon the warranties in paragraphs (a) and (b).*

Example 3 – Ebro Armaturen Pacific Pty Ltd standard terms of supply (2013)

9.1 ACL exception: *The exclusions and limitations in this clause 9 are subject to clause 10 (Statutory Rights).*

9.2 Excluded rights: *All express or implied representations, conditions, statutory guarantees, warranties and provisions (whether based on statute, common law or otherwise), relating to these Terms + Conditions, that are not contained in it, are excluded to the fullest extent permitted by law.*

9.3 Limitation of liability: *Any liability arising in relation to Goods the subject of your Order or that we supply to you, however arising and whether for consequential loss or otherwise, including any liability arising by virtue of any representation or warranty, whether express or implied by law, is hereby excluded to the fullest extent permitted by law.*

9.4 Limitations: *No warranty is given and we will not be liable for:*

9.4.1 alterations to Goods for which we are not responsible;

9.4.2 damage or failure caused by unusual, non-recommended or negligent use or application of the Goods;

9.4.3 loss caused by any factors beyond our control; or

9.4.4 loss, damage or failure of the Goods where the Goods have not been handled, stored in installed in accordance with any instructions provided with the Goods.

9.5 Indirect loss: *We will not be liable for any special, indirect, consequential or economic loss or damage or loss of profits (in contract or tort or arising from any other cause of action) suffered by you or any other person resulting from any act or omission by us (including breach, termination or non-observance of the terms of an Order or agreement which incorporates these Terms + Conditions).*

9.6 Total liability: *Our total liability for breach of these Terms + Conditions or breach of our contractual obligations or duties at law or in equity (however arising) is limited at our option to:*

9.6.1 the replacement of the Goods or the supply of equivalent goods; or

9.6.2 the repair or rectification of the Goods.

Example 4 – Another organisation’s standard form subcontract conditions

3.1 The Subcontractor acknowledges and agrees that the Sub-contract contains all express terms agreed between the parties and no regard will be paid to any or all previous dealings between the parties.

12.3 The Contractor shall not be liable to the Sub-contractor in respect of any error or omission in the information it supplies to the Subcontractor in respect of the Site conditions.

22.1 The Contractor will not be liable upon any claim made by a Subcontractor in respect of or arising out of a breach of the Sub-contract by the Contractor unless within 5 days after the first day on which the Sub-contractor should reasonably be aware of the breach, the Subcontractor has given to the Contractor’s Representative the prescribed notice.

22.2 The Contractor shall not be liable upon any other claim by the Subcontractor for any extra cost or expense in respect of, or arising out of, any direction or approval by the Contractor’s Representative unless within 5 days after the day on which the Contractor issued that direction or approval, the Sub-contractor has given the Contractor’s Representative the prescribed notice.

23.6 Notwithstanding anything in this clause to the contrary, the Contractor is not required to:

(a) pay the Sub-contractor any costs, compensation or damages for any delays howsoever caused;

(b) approve an extension of time claim in circumstances where the Contractor is not entitled (in respect of the subject matter of the claim) to a corresponding extension of time under the Head Contract;

Also, it is common for contractors to provide non-negotiable special conditions amending standard form construction contracts (such as AS2124 or AS4900) to –

1. exclude payment of any variation costs fully, or unfairly limit payment to only a few types
2. exclude payment of any delay costs fully, or unfairly limit their applicability to only a few causes of delay
3. deny extensions of time, either fully, or unfairly limit their applicability to a few causes of delay
4. put the liability for all costs associated with sub-surface latent conditions on the subcontractor
5. provide for a time bar or a series of time bars, often with extremely short timeframes, and also provide that if the time bar is not strictly met, that precludes any claim.

Yours faithfully



Steve Palyga
Principal