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Director
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The Treasury
Email: UCTprotections@treasury.gov.au

Dear Sir/Madam

TREASURY EXPOSURE DRAFT LEGISLATION AND EXPLANATORY MATERIALS – UNFAIR CONTRACT TERMS

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on Treasury's Exposure Draft Legislation (and Explanatory Materials) that it proposes will strengthen protections against unfair contract terms (UCT).

We note that this Exposure Draft Legislation (and Explanatory Materials) follows from Treasury's Consultation Regulation Impact Statement (RIS) consultation last year, in which Ai Group also made a submission.

1. General comment regarding proposed Treasury reforms

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. As previously stated, we generally support initiatives that promote business growth and competitiveness, including for small businesses. Legislation and regulation can, in the right circumstances, reduce transaction costs and facilitate exchange, for instance by reducing information asymmetries and giving buyers greater confidence in sellers. The neutral enforcement of the law of contract by the legal system has been extremely valuable in this regard. However, we maintain that it is unnecessary for there to be further government intervention in legitimate commercial contractual relationships between businesses, irrespective of size. As a matter of public policy, governments should respect the freedom for businesses to agree on legitimate contractual terms, unless there is persuasive evidence that intervention would effectively remedy significant existing problems or further boost exchange.

If the proposed reforms were implemented, we remain concerned that they would create uncertainty and risk causing harm for businesses that take reasonable steps to ensure their contracts do not set unfair terms¹ on small businesses. Given the difficulty faced by a contract-issuing party in determining whether the other party is a small business, introducing civil penalties may have a dampening impact on the competitive negotiating environment broadly. If the only practical means to manage risk was to ensure that all standard-form contracts included safeguards intended only for small businesses operating in particular contexts, this would diminish the international competitiveness of Australian businesses and very likely harm consumer welfare.

In addition, the current COVID-19 pandemic presents an additional impost on businesses that needs to be taken into consideration. We note there are several consultations underway, including those being undertaken by Treasury (e.g. strategic assessment on the implementation of an economy-wide consumer data right), and we are mindful of consequences that a range of reforms could have for businesses that are already stretched in meeting the needs of consumers during this pandemic.

¹ Unless otherwise specified, reference to "unfair" in this submission is as defined in section 24 of the Australian Consumer Law (ACL).

Additional unnecessary regulatory costs could stifle business investment, innovation and competition, while providing little value (if any) to consumers.

This will become an even more critical issue once we emerge from the ongoing uncertainty and adverse impacts of the pandemic. We continue to face a health crisis and economic crisis, leading to massive economic dislocation and unfolding hardship. Proper measures need to be in place to ensure that businesses remain sustainable and globally competitive, rather than hinder them through activities that create unnecessary compliance costs for, and potentially threaten, businesses and fail to increase benefit for consumers.

While consultation on a Consultation RIS has occurred for the UCT reforms and a Decision RIS has subsequently been made, a proper cost-benefit assessment should take into account the current unstable environment in which these reforms are being undertaken.

2. Latest iteration of UCT reforms

Treasury previously indicated in its 2020 Consultation RIS that it included consideration of the ACCC's Recommendation 20 from its Digital Platforms Inquiry Final Report, which proposed to prohibit UCT in any standard form consumer or small business contract and attach civil pecuniary penalties. As we had specifically raised concerns about this ACCC recommendation during its inquiry, our submission continues to be primarily focussed on this issue, as well as addressing the scope of the UCT regime.

Since Treasury's Consultation RIS stage, we understand that the latest iteration of the proposed UCT reforms incorporates the following considerations:²

Commonwealth, state and territory consumer ministers agreed to proceed with reforms in November 2020, including to:

- *make UCTs unlawful and give courts the power to impose a civil penalty;*
- *provide more flexible remedies to a court when it declares a contract term unfair by:*
 - *giving courts the power to determine an appropriate remedy, rather than the term being automatically void;*
 - *clarifying that the remedies available for 'non-party consumers' also apply to 'non-party small businesses'; and*
 - *creating a rebuttable presumption provision for UCTs used in similar circumstances;*
- *increase the eligibility threshold for the protections from less than 20 employees to less than 100 employees, and introduce an annual turnover threshold of less than \$10 million as an alternative threshold for determining eligibility;*
- *remove the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT protections;*
- *improve clarity around the definition of standard-form contract, by providing further certainty on factors such as repeat usage of a contract template, and whether the small business had an effective opportunity to negotiate the contract; and*
- *enable certain clauses that include 'minimum standards' or other industry-specific requirements contained in relevant Commonwealth, state or territory legislation to be exempt from the protections.*

Changes relative to what was consulted on previously include:

- *Retaining the current automatic voiding provisions in the law. That is, if a court finds a term in a standard form consumer or small business contract is unfair, that term is considered void under the law, without the need for further action or orders to be made. (Previous consultation considered removing these provisions from the law.)*
- *Streamlining the court's power to make orders to void, vary or refuse to enforce part or all of a contract (or collateral arrangement).*
- *Clarifying the court's power to make orders that apply to any existing consumer or small business standard form contracts entered into by a respondent (whether or not that contract is put before the court) that contains an unfair contract term that is the same or substantially similar to a term the court has declared to be an unfair contract term.*

² <https://treasury.gov.au/consultation/c2021-201582>.

- *Clarifying the court's power to issue injunctions against a respondent with respect to existing or future consumer or small business standard form contracts entered into by a respondent, containing a term that is the same or is substantially the same as a term the court has declared to be an unfair contract term.*

Reasoning provided from the Consumer Affairs Ministers' November 2020 meeting to support their decision:³

More than ten years after Australia's introduction of unfair contract term (UCT) protections for consumers and nearly four years since their extension to small businesses, evidence shows that UCTs remain prevalent and there is uncertainty around the scope of the protections.

Ministers considered a Decision Regulation Impact Statement (RIS) and agreed that action is required to protect consumers and small businesses from UCTs.

These enhancements will help reduce the prevalence of UCTs in standard form contracts, providing a fairer and more efficient allocation of risk in these contracts, and will improve consumer and small business confidence when entering into standard form contracts.

In principle, we support the Consumer Affairs Ministers' intention and reasoning, and providing courts with clarity in undertaking their function when having regard to UCT matters. However, we are not altogether convinced that relevant stakeholder views have been sufficiently taken into account by Government, with options developed and consulted on that address the underlying issues. For instance, it is not clear whether relevant issues that we raised in our previous submission to Treasury's proposed options have been adequately taken into consideration.

It is also unclear whether consideration has been given to non-legislative options such as awareness raising of the UCT protections, and other alternative approaches to assist businesses such as alternative dispute resolution mechanisms. This is despite the Explanatory Materials acknowledging the following:⁴

On 21 November 2018, the Government released the Review of Unfair Contract Term Protections for Small Business: Discussion Paper ... the review found that some aspects of the current regime appear to have created ambiguity, uncertainty, and practical difficulties for businesses to comply with the law. Submissions to the 2018 review also highlighted the need for regulators to promote awareness of the unfair contract term protections and to improve the guidance provided to business, to support compliance with legislative requirements.

3. Issues and recommendations previously raised by Ai Group

Our previous 2020 submission raised a range of issues and recommendations to help overcome these concerns, including:

- Substantial regulations on unfair conduct exist, with current notions of unfairness in Australian law are at the core of several provisions in the Australian Consumer Law (ACL) and other provisions in the *Competition and Consumer Act 2010* (Cth) (CCA), and a range of sector-specific norms that would overlap with a general unfairness provision, notably rules on "good faith" in franchising and insurance.
- Lack of evidence about an existing problem on whether the existing provisions are insufficient to protect consumers that would require the introduction of penalties, leading to the imposition of unnecessary red tape and regulatory costs.
- Practical compliance considerations including:
 - potential regulatory overlap between a proposed prohibition of UCTs and Privacy Act to protect consumers in relation to data collection;
 - problems with linking the penalty threshold value to a percentage of group turnover (or another amount) that could be a disproportionate response to the actual impact

³ Meeting of Ministers for Consumer Affairs (Meeting 12, Friday 6 November 2020, Communiqués), <https://consumer.gov.au/consumer-affairs-forum/communiqués/meeting-12-0>.

⁴ Treasury, Exposure Draft Explanatory Materials, p. 8.

- arising from a UCT matter for a small business – in this respect, greater guidance will be required on the imposition of penalties by a court (e.g. a range of penalties), which should be in proportion to the particular contravention of the UCT regime having considered the circumstances as a whole;
- imposition of significant compliance costs and leaving businesses in a position where they could not legitimately and reasonably protect their interests, leading to distorted consequences such as increased consumer prices or refusal to do business;
 - effective use of existing enforcement of the current UCT provisions could help to drive compliance;
 - if there were evidence demonstrating unfair conduct (excluding UCTs) not being effectively addressed by the existing provisions that regulated such conduct, then it would be more prudent to review the effectiveness of these other existing provisions, as opposed to creating new and separate regulations dealing with unfair conduct;
 - grandfathering issues with respect to existing contracts in place and need for these contracts to be protected and not subject to legislative retrospectivity that could lead to open-ended challenges and inconsistencies with the execution of contracts;
 - previous legitimate grounds for rejecting the introduction of penalties for UCTs on the basis that the standard of assessment is too ill defined to be applied directly; and
 - previous legitimate grounds for rejecting a proposal to make it illegal to include terms in a contract that had previously been found unfair by a Court – this was partly because contractual terms should be considered in the context of individual contracts on a case-by-case basis; otherwise businesses would be left in a position where they could not include terms necessary to protect their legitimate interests (which may differ from those of other businesses), and does not take into account the broader context within which a term is used.
- Defining small businesses and associated value thresholds of contracts under the current UCT regime are areas fraught with complexity, contention and confusion, with proposed changes that could:
 - lead to inappropriate outcomes that are not fit for purpose such as harming small businesses that act as both purchasers and sellers, and potentially create a burden on the same small business as a supplier;
 - the application of the threshold value amounts to a blanket coverage for all business purchases under a threshold value – this goes beyond the small business consumer that CAANZ hoped to protect by using the threshold approach and was never its original intention;
 - contributing to a wider inconsistency with the small business definition across various legislations, regulations and regulators, highlighting a significant Government problem in understanding the scope of applicable parties, including determining the appropriate threshold, and accounting for change in variables that define the small business such as fluctuations in employee size due to seasonal changes;
 - considering the Payment Times Reporting Framework (PTRF) and whether its approach of defining small business through a lookup tool could provide a practical and targeted basis for identifying small businesses; and
 - considering the introduction of an efficient and effective mechanism for clarifying whether a business is a “small business” or not at the time a contract is entered into.
 - Consideration of other options to better assist businesses to resolve issues with unfair contract terms such as a dispute resolution process in the first instance (before resorting to a regulator) and regulatory approval of a “reasonable steps” for contract-issuing parties to follow to demonstrate avoidance of UCTs.

In consideration of the above issues, we note the grandfathering issue may be partially resolved in the latest iteration of the Bill. In particular, we understand that the Bill will not operate retrospectively, and will only apply to contracts or variations to contracts that are made after the date in which the legislation commences operation.⁵ However, there may be complexity for courts to assess contracts that may be varied, and for businesses to comply with multiple versions of UCT legislation. For

⁵ Ibid, p. 24.

simplicity and certainty, our preference would be that if Government decides to proceed with the legislation, it should only apply to new contracts and not extend to variations of existing contracts.

Notwithstanding the above, we consider that a range of our issues and recommendations remain pertinent to this stage of consultation. Without reiterating our previous submission, we include the following link to our previous submission and strongly encourage Treasury to take our previous views into consideration for the purposes of its latest consultation:

https://www.aigroup.com.au/globalassets/news/submissions/2020/enhancements_to_unfair_contract_term_protections_apr_2020.pdf.

That being said, despite our outstanding concerns, our reading of the communique of the Consumer Affairs Ministers' November 2020 meeting suggests that the Ministers have already decided to proceed with the UCT reforms (as noted above). This could infer that this consultation stage is not open to addressing our relevant outstanding issues.

Should there be no further opportunity to address our concerns, we would like to raise the following four areas that we consider can and should still be seriously addressed within the Government's framework and consulted further with stakeholders:

- update guidance to address the types of data collection practices that the ACCC is likely to pursue as a UCT;
- court's power to declare contracts void where the contract and context is not before the Court;
- definition of a "small business"; and
- definition of a "standard form contract".

3.1 Updated guidance on ACCC's data collection practices for UCTs

Given the significance of the penalties available for getting it wrong, the existing guidance on UCTs⁶ must be updated to address the types of data collection practices, to the extent they are encapsulated in a contractual "term", would be unfair. If these are terms that the ACCC is likely to commence enforcement proceedings against under the UCT regime (as suggested in its Digital Platforms Inquiry Final Report), this needs to be clearly identified in the guidance and explained how they would satisfy the definition of "unfair" in section 24 of the ACL.

Businesses and legal advisers across Australia need to have this clarity in order to advise and amend accordingly if required. An important element of education and guidance is required before the implementation or enforcement of penalties in novel areas such as these.

3.2 Court's power to declare contracts void

The court's power to declare contracts void where the contract is not before a court is a concern. While a rebuttable presumption may be a way to provide a level of guidance for businesses, it takes it a step too far to enable courts to declare a class of contracts void because they contain a term similar to one that has previously been declared unfair, without even hearing from the parties affected by a possible voiding declaration as to why that term is not in fact unfair in the context of their particular contracts.

The published guidance itself on unfair contract terms reinforces that context is everything in the analysis of what is "unfair":⁷

The fairness of a particular contractual term cannot be considered in isolation but must be assessed in light of the contract as a whole. Some terms that might seem quite unfair in one context may not be unfair in another. Conversely, if a particular term was decided by a court in one case to be fair, this does not mean it will always be fair.

An apparently unfair term may be regarded in a better light when seen in the context of other counterbalancing terms.

⁶ ACCC, "Unfair contract terms: A Guide for Businesses and Legal Practitioners" (April 2016), <https://www.accc.gov.au/publications/a-guide-to-the-unfair-contract-terms-law>.

⁷ Ibid, p. 12.

If businesses cannot be sure that the context of their terms will be considered before they are rendered ineffective by a Court, they are likely to avoid including terms altogether which could, if taken in the context of counterbalancing terms, actually be pro-consumer. For example, if a company does not have to take on the same level of risk because it has a little more flexibility on being able to terminate a contract, it is likely to compensate the customer for that reduced risk with cheaper prices. It may no longer provide this option if it believes the counterbalancing term will not be considered in a UCT assessment. Some guidance or explanation (possibly in the updated guidance as requested above) would be welcomed on how this will be addressed in light of these proposed amendments to ensure the rules do not have unintended stifling consequences on consumer benefits.

3.3 Definition of “small business”

With respect to defining “small businesses”, we previously identified various versions of small business definitions being used across various areas of legislation. Concurrent to the UCT reforms last year, the Department of Industry, Science, Energy and Resources also grappled with a similar challenge to define small businesses as part of its Payment Times Reporting Framework (PTRF) Review. Given the timing of the introduced PTRF reforms, it would be prudent to consider the feasibility of aligning the definition of “small business” under the UCT regime with the one legislated for in the PTRF i.e. an entity with annual turnover of less than \$10 million for the most recent income year.

We note that subsequent to its review and commencement of the PTRF, a small business identification (SBI) tool has been developed, aimed at reducing the compliance burden for reporting entities subject to the PTRF.

Further details about the SBI tool are provided on Treasury’s website:⁸

The SBI tool reduces the compliance burden for reporting entities. It assists reporting entities to identify which suppliers they need to report on.

For the purposes of the scheme, a business is small if it is identified as such through the SBI tool. The tool identifies businesses as small businesses if they carry on an enterprise in Australia, have an ABN and their annual turnover was less than \$10 million for the most recent income year.

...

The SBI tool only contains the ABNs of large and medium sized businesses. It does not include any information on small businesses. The SBI tool works as a ‘negative screen’ for small businesses. ABNs uploaded are matched against the database, and any ABNs that do not have a match are assumed to be small businesses. The SBI tool returns a list of ABNs that excludes the identified large and medium sized businesses within a reporting entity’s list of supplier ABNs.

Given that this tool is now available and managed by Treasury, we suggest that it would be logical and prudent to consider whether it is appropriate for this tool to be extended and applied in the UCT context. It could provide not only certainty and clarity for businesses already subject to the PTRF, but also avoid creating an additional compliance burden for businesses required to comply with both PTRF and UCT reforms. If there is concern that this new tool is relatively immature and its performance has not been properly evaluated, it may be prudent to delay the commencement of the UCT reforms until the tool has been given sufficient time to mature (as well as undertaking proper cost-benefit assessment on the tool’s application in the UCT context).

Otherwise, we consider the additional definition of small business of “under 100 employees” proposed under the UCT reforms is not needed to achieve the objective of the regime and will simply create another inconsistency in legislative drafting with respect to the definition of small businesses and therefore unnecessary regulatory compliance burden for businesses (which would also be inconsistent with the Australian Government’s deregulation agenda).⁹

⁸ <https://treasury.gov.au/small-business/PTRS/PTRS-guidance-reporting-entities/how-to-report/indentification-tool>.

⁹ <https://deregulation.pmc.gov.au/>.

3.4 Definition of “standard form contract”

While the draft legislation does provide some clarity on what is a “standard form contract”, given the introduction of significant penalties, we recommend that this phrase be defined to ensure businesses and legal advisers can clearly understand the legislative requirements and identify certain contract types and forms, to review positions, if needed.

The draft legislation requires the court to take into account repeat usage when determining whether a contract is a “standard form contract”. As such, there is a broad discretionary standard to determine what is a “standard form contract” as opposed to a fixed position that produces a consistent conclusion. As an alternative, to provide greater clarity, we suggest that the updated guidance (which we have proposed above as necessary) sets out practical examples (considering different contract types across different industries) where consideration has been given to the type and form of contract which would be determined to be a “standard form contract” by a court.

If there is an opportunity to be consulted with further, we would welcome working closely with Treasury and bringing together a range of industries who may be affected by this consultation, as well as arranging a briefing by Treasury or the regulator regarding the UCT reforms.

Yours sincerely,

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