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Dear Director

Consultation on Proposed Unfair Contract Term Reforms

1. I am writing to you as part of the consultation for the proposed contract term reforms as set out in the *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms* (**the Bill**).

Summary

2. The clauses in the Bill[1] which seek to impose a duty on suppliers not to include an unfair contract term in standard form contracts ought not be enacted for two primary reasons:

    a. The nature of the standard for determining whether an impugned term is an unfair contract term is fundamentally imprecise. The Commonwealth Parliament should not be enacting laws which subject a contracting party (in this case suppliers) to a legal duty the content of which suffers from such an inherent flaw. Imagine, in setting the speed limit for your residential street, a state or territory parliament has two options:
        (a) You are obliged to travel no faster than 50km/h (**Option A**); or
        (b) You are obliged to travel no faster than a "fair speed". A fair speed is to be determined by a judge having regard to: (i) the experience of the driver; (ii) the safety standards of the car being driven; (iii) the condition of the tyres on the car; (iv) the amount of traffic on the road; (v) the number and age of pedestrians on the adjacent footpath; (vi) the weather; (vii) the level of visibility; and (viii) any other matter the judge thinks is relevant (**Option B**).

    Option B is the type of law which is being proposed in the Bill. Option A is ideally how legal obligations ought to look.

    b. The Bill makes the unfair contract terms regime increasingly complex. It is unclear whether the proposed reforms will ultimately benefit consumers.

[1] Particularly, clauses 1 and 2, but also the associated remedial provisions set out between clauses 5–36.

Author details and background

3. I am a Senior Lecturer in Private Law at the University of Western Australia. I previously worked as the High Court of Australia's Legal Research Officer (working out of the Chambers of the Hon Chief Justice Robert French AC) and practised as a solicitor in Melbourne. On becoming a legal academic I first worked as a Teaching Fellow at the Faculty of Laws at University College London where I completed my PhD as the inaugural Peter Birks Memorial Scholar. My PhD thesis was published as the monograph titled *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (The Federation Press 2019). I also hold a Master of Laws (Dist) from University College London (ranked first in the cohort and studied on the Sir John Salmond KC Scholarship) and a Bachelor of Laws (Hons I) from the University of Western Australia. I publish and teach in the areas of contract law, equity, remedies, unjust enrichment, legal history, and jurisprudence.

4. I have no relevant conflicts of interest. I am writing to you in my personal capacity albeit as a private law academic with subject matter expertise.

Imprecise nature of the legal duty

5. Clauses 1 and 2 of the Bill will impose a primary duty on suppliers *not* to include an unfair contract term in certain standard form contracts. If this primary duty is breached the Bill provides for certain remedial rights. Namely, the consumer or the state (via the regulator[2]) may seek a pecuniary penalty or damages as against the supplier. Indeed, in the case of the ASIC Act, breaching this duty may even result in a managing director being disqualified from managing a corporation.

6. One may legitimately ask what is objectionable with what I have identified in paragraph 5 above? If a supplier has included an unfair contract term in a standard form contract, then should there not be consequences? True that a supplier has allowed for the impugned clause to enter the contract. But it does not stand to reason that the appropriate remedy is the imposition of a pecuniary penalty or damages. In order to understand what the appropriate remedy is in such circumstances it needs to be borne in mind how the unfair contract term regime operates.

7. Sub-section (1) of s 24 of the Australian Consumer Law[3] requires the three elements in pars (a) to (c) to be satisfied before a term of a consumer contract is unfair. It provides that:

> (1) A term of a consumer contract is unfair if:
> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The remainder of s 24 provides for further substantive and procedural considerations that must be taken into account when applying the above test:

[2] Being the Australian Competition & Consumer Commission or Australian Securities and Investments Commission.
[3] Competition and Consumer Act 2010 (Cth), Schedule 2 (**Australian Consumer Law** or **ACL**) See also the Australian Securities and Investments Commission Act 2001 (Cth), s 12BG (**ASIC Act**).

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
(a) the extent to which the term is transparent;
(b) the contract as a whole.

(3) A term is transparent if the term is:
(a) expressed in reasonably plain language; and
(b) legible; and
(c) presented clearly; and
(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

8. The remedial consequences of an impugned term being an unfair contract term under the statute as presently in force are quite limited. This is rightly so. Important for present purposes, the existing regime does not oblige suppliers not to include an unfair contract term within a standard form contract. Rather, the regime has a "lighter touch". The regime works by making an unfair contract term void (ie, it negates the exercise of consent which creates the contractual term). More specifically, the existing regime provides that:

   a. The impugned term is void (ie, it imposes no binding rights and obligations between the consumer and supplier), the contract will nonetheless remain binding to the extent it can operate without the impugned term;[4] and
   b. In circumstances where the impugned term has been declared void a further duty is then placed on suppliers to not use that term;[5] if this duty is breached, only then are further remedies possible including (i) injunctions;[6] and (ii) compensation orders.[7]

9. One notorious difficulty for determining whether an impugned contract term is unfair is that the legal standard deployed in s 24 of the ACL is not sufficiently certain to be applied with predictability in any case. This is because the standard requires the court to apply what is a syllogistic absurdity. That is, when applying the standard to determine whether an impugned term is an unfair contract term there is no set of fixed considerations that will produce a consistent and necessary conclusion in every case. Rather, the standard requires a judge to weigh a series of incommensurable[8] and intermediate[9] factors or general "evaluative criteria"[10] to reach an outcome on which reasonable minds can, and

[4] ACL, ss 23(1)–(2) and 250; ASIC Act, ss 12BF(1) and 12GND.
[5] ACL, ss 237 and 239; ASIC Act, ss 12GM and 12GNB.
[6] ACL, s 232; ASIC Act, s 12GD.
[7] ACL, ss 237 and 239; ASIC Act, ss 12GM and 12GNB.
[8] See, eg, Robert Stevens, *Torts and Rights* (OUP 2007) 308–11.
[9] See, eg, Julius Stone, *Legal System and Lawyer's Reasonings* (Maitland Publications 1964) 263–4: "[t]he 'legal standard' as opposed to the 'legal rule' is the typical category of intermediate reference. Its requirement that the courts shall evaluate the concrete situation [between the supplier and consumer] rather than apply a formula mechanically is so well recognised today as to require only brief discussion. When courts are required to apply such standards [of indeterminate reference] ... then judgment cannot turn on logical formulations and deductions but must include a decision as to what justice requires in the context of the instant case."
[10] *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33, [39] (Edelman J).

will, differ. As Edelman J rightly observed in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited*:[11]

> Section 24 of the ACL is an example of a legislative technique that was historically less familiar to the common lawyer than it was to the civilian lawyer. It is a technique which creates broad evaluative criteria to be developed incrementally. In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222, the United Kingdom Supreme Court considered a legislative provision that permitted reopening of credit transactions where the relationship between the creditor and the debtor was "unfair". Speaking of the provision, Lord Sumption in the leading judgment said, at 4227 [10], *that it was not possible to state a precise or universal test for its application*.

10. Put simply, where a legal standard requires the "weighing up" of many incommensurable factors the language of legal judgment will often provide a thin covering for matters of individual judicial taste. There is considerable force to such a criticism. This is for the primary reason that the general law and associated coercive power of the state should ultimately "be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used".[12] It is a point well made that the law ought to define its rules in advance and give subjects stable expectations as to how such rules will be deployed. [13]

11. The fundamental problem is that the unfair contract terms regime was originally designed to contain no set of fixed considerations that produce a consistent and necessary conclusion in every case. As such, the existing legislative arrangements are defensible *only* because the consequences of a finding that an impugned term is unfair are appropriately limited in scope: the term is void and therefore does not bind the consumer and supplier. Importantly for present purposes, this outcome does not involve the state directly coercing either party. Rather, on the present state of the law, the existence of an unfair contract term results only in a lack of coercion between the parties. The proposed changes to the unfair contract term regime, however, seeks to turn all this on its head. The proposed changes will use a broad discretionary standard that was designed to ascertain whether a contract term is valid to now impose a *new* legal duty (ie, state backed coercion) on suppliers. Given the indeterminate nature of the standard in order to determine whether an impugned contract term is unfair, the proposed reforms unwittingly seek to impose an indeterminate obligation on suppliers. No legislature that takes the rule of law seriously ought to enact such an obligation. This is because, if the legislature is going to coerce suppliers to behave in a particular way, it needs to be clear how one must behave. That is, the proposed law is tantamount to placing suppliers under a duty not to do X in circumstances where X could mean an indeterminate number of things.

12. To illustrate the point made in paragraph 11, imagine that in setting the speed limit for your residential street the state or territory parliament has two options available:

    a. A law will be enacted that provides "motorists are obliged to travel no faster than 50km/h" (**Option A**); or

[11] [2015] FCA 1204; (2015) 239 FCR 33, [39] (Edelman J) (emphasis added).
[12] FA Hayek, *The Road to Serfdom* (Routledge 1944) 62. See also J Dinwiddy, 'Bentham' in W Twining, *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press 2003) 54. As FA Hayek notes, "[t]he importance which the certainty of the law has for the smooth and efficient running of a free society can hardly be exaggerated. There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here. This is not altered by the fact that complete certainty of the law is an ideal which we must try to approach but which we can never perfectly attain": *The Constitution of Liberty* (Routledge & Kegan Paul 1960) 208.
[13] Francis Lieber, *Legal and Political Hermeneutics* (Charles C Little and James Brown 1839) 88.

b. A law will be enacted that provides "motorists are obliged to travel no faster than a 'fair speed'". A "fair speed" is then defined as to be determined by a judge having regard to each of the following mandatory criteria: (i) the experience of the driver; (ii) the safety standards of the car being driven; (iii) the condition of the tyres on the car; (iv) the amount of traffic on the road; (v) the number and age of pedestrians on the adjacent footpath; (vi) the weather; (vii) the level of visibility; (viii) any other matter the judge thinks is relevant (**Option B**).

13. Option B is the type of law which is being proposed in the Bill. It is a poor law as it does not have the necessary content for the motorist to know in advance whether she is complying with what the law expects of her. Her position is no different than that of the supplier under the reforms proposed by the Bill. Option A, on the other hand, is ideally how legal obligations ought to look. The motorist has no good excuse for not knowing the "rules of the game" ahead of time where there is a clear obligation to travel no faster than 50km/h. It is for this reason that the hypothetical potential members of any political community would opt for Option A over Option B.

14. A final demonstration of how the existing regime quite eloquently accounts for the concerns raised in my submission can be discerned by looking at the circumstances in which a supplier is presently liable in damages. Under the current law the supplier is only subject to direct state coercion (eg, the imposition of a compensation order or injunction) in circumstances where the supplier seeks to enforce a term that has already been declared unfair. By imposing an obligation on the supplier not to use a term that has been declared unfair the existing law appropriately takes into account the indeterminacy concerns raised above. This is because once a court has made a declaration that an impugned term is unfair the obligation on the supplier not to rely on that term is precise enough to justify further state coercion. Put another way, suppliers are under a duty not to do X, and given the declaration of the court we are able finally to know what X is in each set of circumstances. The indeterminacy concerns thus (mostly) fall away.

15. The *Exposure Draft Explanatory Materials* provide that "some aspects of the current regime appear to have created ambiguity, uncertainty, and practical difficulties for business to comply with the law".[14] The Bill ultimately makes these ambiguities, uncertainties, and practical difficulties worse by taking the most difficult aspect of the unfair contract terms regime and giving it a more widespread operation.

Objections to the argument that I have raised

16. There are four potential responses to the argument that I have raised. None of them are convincing.

a. *The issues concerning indeterminacy can be solved by courts applying the unfair contract terms regime objectively.* It is important to emphasise that this problem cannot be resolved by saying that the unfair contract terms regime requires the case to be objectively determined by a curial process. This is because there is no syllogism (ie, there could be no agreement on the major premise of the syllogism) that will produce a consistent and transparent answer: reasonable minds can and will differ when applying the unfair contract term standards and, accordingly, the "objective" judge would all too often be justified in going in any number of directions.[15]

[14] See *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair Contract Terms Reforms - Exposure Draft Explanatory Materials*, at [1.9].

[15] See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, Cambridge, Cambridge University Press 2012) [4:418]: "one cannot therefore act on determinate principles, but only according to empirical

b. *There are other areas of private law where balancing tests apply*. This is true. There are other examples of where indeterminate balancing tests apply in private law.[16] This is, however, ultimately a bootstrapping argument. Just because poor decisions have been made elsewhere it does not stand to reason that the Commonwealth Parliament should make further poor decisions. Take, for instance, the unconscionable conduct provisions in the ACL. These provisions also suffer from the fundamental vice raised in this submission. It is poor legislation. It should not be further replicated. This is evident from the fact that when a controversial case such as *Australian Securities and Investments Commission v Kobelt*[17] comes before the High Court of Australia the various judges placed weight on different factors and legitimately came to different conclusions on the same set of facts. Simple cases ought not to create such controversy. It is unfortunate, however, that given the legislative criteria that applies that the unconscionable conduct provisions will continue to do so.

c. *Other submissions have not raised this issue.* This is by the point. The right answer is not arrived at by noting that most submissions are not concerned about imposing an indeterminate obligation on suppliers. Most lawyers have little training in formal logic (it is not a typical part of a law school curriculum) nor jurisprudence and legal theory. Many submissions are drafted by non-lawyers. Further, consumer advocates (who have a vested interest in the enactment of the Bill) are unlikely to be sympathetic to placing suppliers under uncertain obligations. Naturally, I assume those same advocates would have little objection to having the speed limit set on their residential streets set to a "fair limit" as outlined in paragraphs 2 and 12 above. While some may have little sympathy for suppliers, equal treatment under the law dictates that such indeterminate obligations should not be reserved for a special class of subjects.

d. *Judges will do the right thing.* Naturally, it will most likely be the case that sensible judges will make difficult legislative provisions work. It is, however, a sorry situation that the law's subjects need the aid of a benevolent judge in order to make sure that imprecise laws ultimately are not used to create injustices.

Potential benefits to consumers unclear

17. The *Exposure Draft Explanatory Materials* provide that the current "unfair contract term regime … [does] not provide strong deterrence against businesses using unfair contract terms in their standard form contracts".[18] There are three final points I wish to make in response to this observation.

a. First, given the indeterminacy issues noted in this submission, deterrence should not be a part of any sensible remedial principles for the unfair contract term regime. This is for the simple reason that it is inappropriate for the law to deter someone from behaving a particular way in circumstances where it is fundamentally unclear *how* one has to behave in the first

counsels, eg, of diet, of thrift, of politeness, of restraint, and so on, which experience teaches on average [to] advance the well-being most. From this it follows that the imperatives of prudence cannot, to be precise, command at all".

[16] Three examples are (i) the saliant features approach to determining a duty of care in novel negligence cases (see, eg, *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649, [103] (Allsop P)); (ii) the application of statutory prohibition on unconscionable conduct (ACL ss 21-22); and (iii) the legitimate interest standard in the context of the penalties doctrine (see, eg, *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525).

[17] [2019] HCA 18; (2019) 267 CLR 1.

[18] See *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair Contract Terms Reforms - Exposure Draft Explanatory Materials*, at [1.8].

place. The current approach of suppliers taking the risk that an impugned term is void is as far as the law ought to go absent a fundamental redraft of the concept of an "unfair contract term".

b. Second, it is unclear whether the reforms in the proposed Bill will ultimately benefit consumers. This is not made clear in the explanatory materials. It should be incumbent on those justifying the reforms to make the positive case for change. A sceptical response would be to observe that larger companies will, as a general rule, be able to better absorb the compliance costs associated with the proposed reforms. This will ultimately alter the price consumers pay for goods. The upfront price for goods is exempt from the unfair contract terms regime.[19] Such reforms could then inadvertently give larger firms a competitive advantage over smaller and medium sized firms. At the end of the day, effective competition, and not the regulator, is the most effective guarantor of consumer rights.

c. Third, the common law and equity have developed two basic forms of intervention that courts may employ in order to deal with parties' attempts to create rights which are regarded, for some reason, as objectionable. The first response consists of a court holding that the parties did not have the power to create the purported objectionable right. The most direct means of doing so is to say that the purported right is void: it was never brought into being or acquired by either party (being the typical approach of the common law). The second response consists instead of recognising that the right does exist, but limiting the extent to which it can be enforced or asserted (being the typical approach of equity in making transactions voidable or disabling the strict exercise of legal rights). Important for present purposes is the fact that over centuries and thousands of decisions neither the common law nor equity has taken the step which is being proposed in the Bill: placing a positive obligation on a contracting party to not include an objectionable term in a contract. The creation of incoherence between the statutory unfair contract terms regime and the way the common law and equity deal with objectionable contract terms should give the Commonwealth Parliament and the Commonwealth Treasury the impetus to take a moment to pause and reflect on the proposed obligations contained in the Bill.

Conclusion

18. For the reasons provided in the submission the provisions of the Bill which seek to impose an obligation on suppliers not to include an unfair contract term within their standard form contracts ought not be enacted. If further evidence is required, I am happy to make myself available.

Yours sincerely

Dr NA Tiverios

[19] ACL, 26; ASIC Act, s 12BF.