MASTER ELECTRICIANS AUSTRALIA

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TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL 2021: UNFAIR CONTRACT TERMS REFORMS

J ODwyer / September 2021

Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

MEA would agree that the problem of unfair contracts clauses continues to a scourge in the Electrical and Telecommunications industry and related building and construction industry. Attached at the end of this submission (Appendix 1) you will find a list of clauses that are of concern to various parts of the industry. Whilst the changes as listed in the draft legislation are welcomed MEA is still of the belief that declaring certain clauses null and void in legislation where they can be easily idenitifed should be done so.

In addition to specific clauses a significant issue is the industry relies heavily on the Australian Standards form contract AS 4000 and AS 2124 which have not been reviewed or updated since 1997 and 1992 respectively. This is against a back drop of significant contract law evolution and legislation including GST and Unfair contract law regimes has moved significantly in the last 28 years. Our position continues that the Government through the Minster should as a matter of urgency compel Standards Australia to reconvene the committee to review and update these contracts as soon as possible to reflect the changes in precedent that have occurred in the last 30 years.

The unfair contract term protections will apply to a small business contract if one party to the contract is a business that employs fewer than 100 employees or has a turnover for the last income year of less than $10,000,000. Casual employees are excluded unless they are employed on a regular and systematic basis. Part time employees are to be counted as an appropriate fraction of a full-time equivalent.

MEA agrees and fully supports the change

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

MEA agrees and supports the change

In addition to the current law, if a court has declared a term of a contract to be unfair, the court can make orders it considers appropriate to prevent or reduce loss or damage that has or may be caused by the unfair term. These orders can be made on application of a person or by the regulator on behalf of and with consent of a person.

MEA agrees and fully supports the change

In addition to the current law, if a court has declared a term of a contract to be an unfair contract term, the court can make orders it thinks appropriate to prevent or reduce loss or damage that has or may be caused by the declared term. These orders can be made in relation to any existing standard form contract that contains a similar term to the term that has been declared as unfair. These orders can be made on application of the regulator only.

MEA does not agree that only the regulator should be able to make these applications. The regulator with limited budgets and resources may wel not take on these applications for all respondents that may have similar terms. It should be available for those who have the same clause / contract to be able to apply particularly for form contract situations

In addition to the current injunction powers, the court can make orders injuncting a person from entering into any future contract that contains a term that is the same or similar in effect to a term that has been declared an unfair contract term. The court can issue an injunction to prevent a person from applying or relying on a term in any existing contract that is the same or similar in effect (to a term that has been declared unfair) whether or not that contract is before the court.

MEA agrees and fully supports the change

A contract term will be presumed to be unfair in a proceeding unless another party proves otherwise if that term is the same or similar in effect as a term that has been found to be unfair in another proceeding. The presumption only applies where the contract term subject to the proceeding is being proposed by the same person who proposed the term that was found to be unfair or the contract is in the same industry as the contract that contained the unfair term.

MEA for sees that the definition of industry may be a contention in the operation of this clause. MEA wishes to see the specific of how this would be interpreted. Is the “same industry” that which to proposer of the clause works in, or is it the industry that the client or subcontractor operates in. There will be instances of both that will apply but the courts will need clarity to ensure the intent of the legislator is clear as to the scope of this law. MEA believes that a broad interpretation should be taken and that is should be the contract clause proposer that should have the onus of proof as to it not being in the same industry.

In addition to the current matters that must be taken into account when determining whether a contract is a standard form contract, a court must also take into account whether one of the parties has used the same or similar contract before.

MEA agrees and supports this change

When determining whether one party was required to reject or accept the terms of a contract in the form in which they were presented, and whether another party was given an effective opportunity to negotiate the terms of the contract, the court must not consider:

- whether a party had an opportunity to negotiate minor or insubstantial changes to terms of the contract;
- whether a party had an opportunity to select a term from a range of options determined by another party; or
- the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.

MEA agrees and supports the changes.

In addition to the current exemptions to the unfair contract term provisions, contractual provisions that are taken to be included in a contract by operation of a law are also excluded. Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law, is exempt from the unfair contract term provisions.

MEA accepts this change

The law refers to non-party to clarify the law applies to both consumers and small businesses.

MEA agrees and supports this change.

Jason ODwyer

Manager Policy and Advocacy

No	Term and Condition	Reason for considering unfair term
1	Clauses which confer power to assign and/or novate that contract to the detriment of the other party without that other party's consent.	These clauses empower the contractor to act as the subcontractor's attorney with authority to execute documents on the subcontractor's behalf to give effect to a novation of the subcontractor's agreement. It has the effect of enabling one party to unilaterally assign the contract and causes imbalance between the parties.
2	Indemnity clauses that excessively extend liability to the subcontractor	Most contracts contain various provisions under which the subcontractors indemnify the head contractor against all types of losses, including those resulting from the negligence or conduct of the head contractor themselves. For many of these, the subcontractor cannot be insured.
3	Defects rectification by third parties' clauses	They allow the head contractor to have a third party carry out defect rectification without notifying the subcontractor, thereby denying them the opportunity to attend to it themselves. Often this will result in the head contractor having the right to call on the subcontractor's bank guarantee or retention moneys.

4	No-collusion clauses	Some contracts seek to prohibit subcontractors from communicating in any way with relevant industry associations. Whilst these clauses might be interpreted as a measure to prevent collusion (which is clearly illegal regardless of the clause's inclusion in the contract), they in fact prevent subcontractors from obtaining cost effective legal advice offered by their association.
5	Payment of deposit before the subcontractor can sue	These clauses require the subcontractor to pay a sum (in some cases equivalent to ten percent of the amount being claimed) to the head contractor before action can be taken (court, dispute resolution, etc.). Such clauses effectively grant security for costs to the head contractor without a court order.
6	Release upon claim made	Where a subcontractor makes a progress claim or request for valuation, these clauses have the effect of preventing subcontractors from any further claim for any prior work. Subcontractors can therefore be left with out of pocket for expenses incurred on the job, but which have not yet been billed to the subcontractor (by the supplier, for example).
7	Warranties for design and document accuracy	Design risk occurs where the plans and drawings supplied by the main contractor to the subcontractor with the tender documents (relating to, for example, existing site conditions or design of the work) are inaccurate or incomplete. These inaccuracies result in the subcontractor incurring costs which cannot be recovered, as the subcontractor has provided a "warranty" in the subcontract that it has reviewed the relevant plans and documentation and satisfied themselves as to their accuracy and completeness.
8	Wrongful termination deemed to be for convenience	In the event that a head contractor's termination of a subcontractor is found to be wrongful by a court or arbitrator, these clauses have the effect of deeming the termination to be one of convenience, and therefore protected under the contract.
9	Deeds of release to obtain practical-final completion	If a subcontractor wants to be given practical completion (and get 2.5% of their retention money), they are forced to sign a deed of release, which requires them to release the builder from any further claims. It feels like such a practice has a subcontractor 'over a barrel'.
10	Termination for convenience clauses	They only allow for one party to terminate the contract. These clauses usually permit one party (usually the principal) to terminate the contract due to "convenience". Both the nature and the one-sidedness of this clause also flags it as a potentially unfair contract term.
11	Limited Liability-clauses that exclude or disproportionately limit the liability of the main contractor even if they are partially at fault.	A common feature of most construction contracts is a limitation of the parties' liability to each other. These limitations of liability may be considered unfair.
12	Any statement that restricts or denies rights to implied warranties	Potentially unreasonable limitations on implied warranties, for example, the head contractor does not warrant the fitness or suitability of any services it provides, such as electricity or lighting.

13	Provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention.	It limits a supplier's rights and it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.
14	Obligation to accelerate without compensation	These clauses oblige the subcontractor to accelerate works if directed by the head contractor, but do not allow for compensation for any extra costs incurred.
15	Prior works warranty	Before commencing work on a particular part of a site, subcontractors are being asked to warrant that prior works carried out by other trades are "suitable" for them to do their work. It is unreasonable for subcontractors to determine the completeness, and potentially carry the liability for, another party's work.
16	Unilateral variation clauses	It provides that a contractor is bound to execute variations to their scope of work if directed by a principal. In *ACCC v Bytecard Pty Limited* (Federal Court 24 July 2013) it was held that the right to unilaterally alter a contract was unfair.
17	Variation claims and unreasonable notification period for extensions of time	They are onerous and unnecessary preconditions or bars on claims for delay or for disruption caused by the principal. For example, where claims require high level of details to complete within unreasonably timeframes that can be as little as two days. These short time bars are designed to make it difficult for subcontractors to meet notice obligations and thereby lose entitlement to payment.
18	Termination clauses generally	Clauses of this type can result in an imbalance of power and risk where the legitimate interests and rights are not proportionate. Particularly where powers are provided to the recipient of goods and services to terminate but more limited powers are conferred on the supplier of those goods and services to terminate.
19	Clauses which entitle a principal or head contractor to exercise its absolute discretion against the interests of another party	Causes imbalance of power as it gives one party unilateral decision-making powers. It has the effect of enabling one party (e.g. the head contractor) to unilaterally determine whether the contract has been breached or to interpret its meaning.
20	Liquidated damages especially in the case of residential building	Underestimates the home owner's loss due to delay caused by the builder or construction company.
21	A clause requiring any dispute to go to arbitration (a compulsory arbitration clause)	Clauses which mandate participation in a dispute resolution process before the subcontractor can lodge a payment claim under security of payment legislation. This has the effect of slowing down cash flow and increasing legal costs, thereby increasing pressure on subcontractors to resolve disputes by giving up justifiable claims.
22	A cost escalation or 'rise and fall' clause, unless the contract price exceeds $500,000.	The onus is on the builder to calculate into the contract price any likely rise in costs caused by inflation, wage increases and the like. In Victoria, if a builder wants to include a cost escalation clause, the Director of

		Consumer Affairs Victoria must approve it. The director has not yet approved any cost escalation clauses.
23	Delay claims	Delay claims relate to the right of a party to claim damages for delays such as inclement weather or industrial action. Subcontractors are now commonly deemed to have taken into account any such delays when submitting their tender price and time for completion of the project which can be unrealistic.
24	Intellectual property transfers & warranties	Some contracts specify that a subcontractor must warrant its ownership of all intellectual property used in the works, which may be unrealistic. Furthermore, some contracts require that the subcontractor assigns all intellectual property to the head contractor.
25	Restrictions on key people	Some contracts prevent the subcontractor from reallocating or replacing key persons on the job without the head contractor's consent. Not only does this interfere with a subcontractor's business operations, but head contractors have alternative remedies if the subcontractor fails to perform the contract adequately.
26	Right to inspect records	Clauses that give the head contractor the right to inspect a subcontractor's records at any time can be drafted so broadly that it could be used during a dispute to gain access to documents they are not otherwise entitled to.
27	Right to vary down scope	These clauses allow the head contractor to vary the scope of work under the subcontract without limitation and are vulnerable to misuse.
28	Seizure of equipment	Some contracts will include clauses that give head contractors the right to seize a subcontractor's equipment to pay moneys claimed to be owing to the head contractor.
29	Statutory declarations and releases	These clauses require a subcontractor to submit a statutory declaration with their payment claim or request for valuation stating that all workers and suppliers have been paid. Some even require subcontractors to declare that all sub-subcontractors and suppliers have paid their staff.
30	Termination for inadequate progress	Clauses that entitle the head contractor to terminate a subcontractor's contract for inadequate progress are generally fair and reasonable. Clauses which give that right where the subcontractor fails to comply with a project program are also reasonable, provided the head contractor cannot unilaterally alter the program. However, increasingly common are clauses that allow the head contractor to terminate the contract for unsatisfactory progress without any reference to objective criteria (such as the project program).
31	Ipso facto clauses- Termination for insolvency	Termination for insolvency clauses can be drafted in such a way that the definition or determination of insolvency is at the discretion of the head contractor.
32	Automatic rollover	Automatic renewal terms that do not provide reasonable notice to notify and/or a period to exit the renewal may be unfair. This occurred in *ACCC v Chrisco Hampers* (Federal Court 2016), where it was held that an automatic rollover clause was unfair.