Submission to the Treasury

Unfair Contract Term Protections: Exposure Draft Bill

20 September 2021

EXECUTIVE SUMMARY

The Bill's objectives are on point and supported. It is designed to reduce the frequency of use of unfair terms in standard form contracts. That will help small transport businesses entering into standard agreements with larger, more powerful customers and contractors. The draft legislation has been prepared for comment following detailed consultation last year when NatRoad made extensive submissions. Commonwealth, state and territory consumer affairs Ministers then agreed to pursue a number of reforms, having found unfair contract terms to be used all too often in small business contracts. The Bill is based on the Ministers' agreed reforms.

One of the reforms sought by NatRoad is present in the draft Bill: prohibiting the use, application and reliance on an unfair term. When you combine this reform with the ability of courts to impose a financial penalty for a contravention, the legislation is a step forward.

At the moment an unfair contract term can be considered "fair" in one context even though it was held by a court to be unfair in another contract. This issue is addressed with the law saying that a term is unfair if a court has already found a similar term used in similar circumstances is unfair, although evidence can be given to show why that prior ruling should be set aside i.e. the new law introduces what is known as a "rebuttable presumption" that the first finding of unfairness continues.

The draft law would also increase the eligibility of businesses covered by the protections by expanding the coverage from businesses that employ fewer than 20 employees to those which employ fewer than 100 employees. It also introduces an annual turnover threshold of less than $10 million instead of using staff size to determine eligibility. We support extending the reach of the law.

Whilst NatRoad supports the Bill more reform is needed, particularly in relation to protection of small businesses against unfair payment terms clauses. We also want to see the need to go to court on all matters relating to unfair contracts dropped and for the ACCC as regulator to be given more power.

Despite these issues concerning more reform, we submit that the changes proposed in the draft law should be enacted as soon as possible.

INTRODUCTION

1. The National Road Transport Association (NatRoad) is pleased to provide a submission on the exposure draft Bill[1] and related explanatory materials[2] that set out the changes to the law about unfair contract terms agreed by consumer affairs Ministers.[3]

2. The subject of greater regulation of unfair contract terms is an extremely important issue for the road transport industry, as was made plain in prior submission to Treasury on this subject. In particular, there is a predominance of small business in the road transport sector. Less than 0.5% of all operators own a fleet of more than 100 trucks, and 70% have just one truck in their fleet.[4] Small business protection from unfair contract practices remains a vital policy concern for NatRoad.

3. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from subcontractors to large fleet operators, general freight, road trains, livestock, tippers, express, car carriers, as well as tankers and refrigerated freight operators.

4. NatRoad has a strong commitment to improving the law as it relates to unfair contract terms. Accordingly, from the outset we express support for the amendments to the law which would introduce a civil penalty provision prohibiting the use of unfair contract terms in standard from contracts. We also support the expansion of the class of contracts that are covered by the unfair contract term provisions.

5. This submission is structured so as to first express the view that there remains a pressing need for further reform in addition to that proposed in the exposure draft Bill, particularly the deeming of some provisions that should be per se unfair. That analysis is then followed by an examination of the exposure draft Bill as it amends the Australian Consumer Law, indicating support or otherwise for each reform proposal. **In the event, despite our call for further reform, we submit that the Government should fast track these laws through federal Parliament whilst considering the additional measures set out in this submission.**

FURTHER REFORM

6. In prior submissions to Treasury (particularly the March 2020 submission) NatRoad has outlined that reform of the unfair contract terms law should include the deeming of some provisions as per se unfair.[5] In particular NatRoad has, in the past, mounted a number of arguments to show that the payment of monies owing beyond 30 days from the date a service is provided should be deemed to be unfair and substituted by a 30-day minimum payment period or even a lesser period. This is not an approach embraced in the exposure draft Bill. It is a critical issue for industry and one where we seek discussions with Treasury officials about a way forward.

7. We would urge Treasury to recommend to Government such a change, a matter we have also previously communicated to the then Deputy Prime Minister and Minister for Infrastructure and Transport where we urged the Government to take action to limit the maximum invoice payment period in the transport supply chain to 30 days. In NatRoad's view this is a critical reform especially in light of the fact that many companies are using COVID-19 as an excuse to push

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[1] https://treasury.gov.au/sites/default/files/2021-08/c2021-201582_edl.pdf
[2] https://treasury.gov.au/sites/default/files/2021-08/c2021-201582_em.pdf
[3] Id at para 1.11
[4] http://www.truck.net.au/sites/default/files/submissions/DAE%20Economic%20benefits%20of%20improved%20regulation%20in%20the%20Australian%20trucking%20industry%20March%202019%20Final.pdf
At p 13
[5] See the NatRoad submission dated 16 March 2020 to Treasury on the consultation regulation impact statement for the exposure draft Bill

payment times out further than 30 days. The federal Government took a small step in the right direction by passing its Payment Times Reporting legislation.[6] But NatRoad's assessment of that legislation is that it is unlikely to result in useful change because it is not legally binding and does not directly impact the unfairness induced by long payment period provisions in contracts. The substance of this matter is so important we submit that Treasury should recommend to Government the introduction of laws to ensure that small businesses are paid promptly and in a time frame no greater than 30 days from completion of the relevant transport service.

8. The best means of assisting the road transport industry would be for the federal Government to introduce a compulsory Code for the industry under Part IVB of the *Competition and Consumer Act, 2010* (Cth) (CCA). The CCA formulated Code would regulate payment times in the manner discussed in the prior paragraph, introducing a maximum payment period of 30 days from the date of service as well as containing a prohibition on set-offs and pay-when-paid arrangements. The other pressing issue is that many contracts which are established for a long period e.g. five years are able to be terminated by the customer on short notice with highly adverse financial consequences for the freight operator. These are major and long-standing issues affecting the road transport industry that should be fixed as soon as possible and **we would recommend immediate measures to stop the problem of payment terms provisions adversely affecting small transport businesses**.

THE TERMS OF THE BILL: Prohibiting the use, application or reliance of an unfair contract term

9. Proposed subsections 23(2A) to 23(2C) of the ACL are important. They establish prohibitions against inclusion or reliance on an unfair contract term in a standard form contract. Read together with the amendment to section 224, these provisions mean that where a court finds that a person has contravened the new prohibitions, it can order payment of a pecuniary penalty. This is commended. However, reliance on court proceedings remains front and centre of the new unfair contracts regime.

10. Members are loathe to commence court proceedings against larger contracting companies or customers as they fear the commercial consequences of taking that step, as well as often being unable to meet the cost of litigation. These are matters we emphasised in the March 2020 submission and in subsequent discussions with Treasury. We then said and we reiterate that an ideal reform would comprise the regulator being given power to intervene where it reaches the view that a contractual term is unfair. At that point the regulator could request the contract-issuing party to vary the term or invite the initiator of the provision to take the matter to court to challenge the regulator's finding.

11. This enforcement mechanism is absent from the current reform proposals. Currently, the Australian Competition and Consumer Commission (ACCC) is unable to use its mandatory information gathering powers under s155 CCA to investigate whether a term is unfair and, instead, the ACCC must rely on evidence being provided voluntarily. Whilst some of the provisions of the Bill assist the regulator (discussed infra) we submit that this difficultly will remain because of the reluctance of small businesses to be identified and thereby suffer commercial consequences, next discussed.

12. The relevant evidence is often not provided to the ACCC because members who are small businesses are loathe to complain for two reasons. First, where they might be identified and lose work; they fear the commercial consequences of making a complaint or supporting legal action. Secondly, they are not aware of the unfair terms provisions because they only become aware where an event triggers the unfair provision against them e.g. missing a time slot with major implications (rather than the usual minor consequences under most contracts) under a standard form contract. **Accordingly, we would recommend that the Bill be amended to provide the ACCC**

[6] Summarised here : https://treasury.gov.au/small-business/PTRS

as regulator with power to act where it reaches the view that a term of a standard form contract is unfair.

13. Proposed s23(2B) is notable in that it sets out that the prohibition on including an unfair contract term in the relevant contract may lead to a breach of this prohibition multiple times in a single contract. This is because each individual unfair term contained in a contract proposed is considered a separate contravention of the prohibitions. We support this provision.

14. The multiple breach consequence also applies in relation to breach of the law if the drafter of a contract applies or relies on an unfair term of a standard form small business contract per proposed s23(2C). We similarly support this provision.

THE TERMS OF THE BILL: REMEDIES

15. Paragraphs 120-127 of the explanatory materials set out the current remedies that the courts apply when a court determines a term in a standard form contract to be unfair, inclusive of the fact that the term is void.

16. The Bill retains the automatic voiding provisions present in the existing law and gives the courts the power to declare a provision to be void, or to vary or refuse to enforce part or all of a contract if the court thinks this is appropriate to prevent or reduce loss or damage that may be caused. This is a power that flows from a finding that the relevant term is unfair in accordance with the statutory construct: proposed section 243A(2). These remedies are supported.

17. In addition, we support the remedy which allows the court to make orders, upon the application of the regulator, preventing a term that is the same or substantially similar in effect to a term that has been declared as unfair, from being included in any future standard form small business contracts by the respondent to a proceeding.

18. Principally through proposed section 248 of the ACL, the Bill would extend the court's power to issue public warning notices and make orders disqualifying a person from managing a corporation. These powers will be extended to breaches of the unfair contract term provisions in the ACL. This will allow the regulator to issue to the public a written notice about persons who breach the unfair contract term provisions, a matter that will assist in drawing attention to unfair contract practices and which is fully supported by NatRoad. Accordingly, NatRoad also supports the new power given to the regulator under the ACL to obtain adverse publicity orders against those found to have breached the unfair contract terms law.

REBUTABLE PRESUMPTION THAT A TERM IS UNFAIR

19. A matter of concern to NatRoad that was set out in the March 2020 submission has been described in the explanatory materials:

    There is no restriction in the current law on a person using a term in a standard form contract that is similar or even identical to a term that has been declared unfair in previous proceedings. Such terms can be used repeatedly by a person in similar standard form contracts to those which have also been issued by that person and assessed by a court to be unfair. Similar or identical terms to those previously assessed by a court and found to be unfair can also be widely used by others in standard form contracts within the same industry.[7]

20. Principally through a change to s24 of the ACL, the Bill provides that if a term of a contract has, in previous court proceedings, been found to be unfair, it will be presumed in a subsequent proceeding that a term that is the same or substantially similar in effect as the original term, is also unfair. The presumption applies where the term is proposed by the same person who proposed the original unfair term or where the term is part of a contract that is in the same

[7] Above note 2 at para 1.40

industry as the contract that contained the original unfair term. We support this measure as a means of solving the problem set out in the prior paragraph.

21. As noted in the explanatory materials[8], without this proposed provision, the regulator could be required to undertake legal prosecutions of the same provisions every time they were used by the contract-issuing party, despite those same provisions having previously been declared unfair and a contravention of the ACL.

WHEN IS A CONTRACT A STANDARD FORM CONTRACT?

22. The current and proposed unfair contract term protections apply to standard form contracts. The law currently sets out matters that the court must take into account when determining whether a contract is a standard form contract.[9] The Bill adds to these provisions.

23. The first change is that the Bill sets out that the court must take into account whether a party has entered into a contract that is the same or substantially similar to another contract entered into by that person and the number of times this has been done. This is consistent with the actual practice of issuing standard form contracts and is supported as an indicator.

24. Secondly, one of the current criteria for showing that a contract is not a standard form contract is to argue that the party the subject of the alleged unfair term was given an effective opportunity to negotiate the contract's terms.[10] The Bill would give the courts greater clarity around this requirement.

25. The Bill would require a court, when determining whether a party was able to genuinely negotiate a contract, to disregard instances where a party has negotiated minor or insubstantial changes to the terms of a contract. A party's ability to select from a pre-determined range of terms within a contract is also to be disregarded as evidence that an effective opportunity to negotiate is provided to that party. These provisions are supported as a means to strengthen the law. The court is also to disregard that a party to another similar contract has been given an effective opportunity to negotiate the terms of that contract. As explained in the explanatory materials this latter provision:

    (C)larifies that even if a small subset of consumers or small businesses are able to negotiate the terms of a contract that is issued to a broader group of consumers or small businesses, the court is not to take this into consideration when determining whether the contact issued to the broader group is a standard form contract.[11]

CONTRACT THRESHOLDS

26. Currently there are contract value thresholds that frame the definition of a small business contract. These are:

    • the upfront price payable under the contract does not exceed $300,000; or

    • if the contract has a duration of more than 12 months, the upfront price payable under the contract does not exceed $1 million.

27. These thresholds have created perverse outcomes. NatRoad, for example, has recently examined a contract for a member where a costs schedule is able to be changed on short notice by the contractor and the upfront price is not able to be established because the current cost schedules are not part of the contract. The small business was expected to sign up to the contract without a clear indication of its value. The amendments take away the uncertainty that

[8] Id at para 1.46
[9] S27(2) ACL
[10] S27(2)(d) ACL
[11] Above note 2 at para 1.53

surrounds this contract and others of its kind by removing the current thresholds, a change fully supported.

CLASS OF CONTRACTS CAPTURED

28. The Bill amends the definition of small business contract to expand the class of contracts that will be captured. Instead of the current small business definition of a business that employs fewer than 20 people, a more expansive test has been introduced to define a small business. In the new regime, the contract is covered where one party to the contract is a business that either employs fewer than 100 persons or has an annual turnover of less than $10,000,000 for the previous income year. A party can satisfy one or both of these conditions to fall within the definition.

29. In the March 2020 submission we made it clear that we supported the expansion of the coverage of the unfair contract terms law. NatRoad's position is that because so many of the businesses that operate in the road transport industry are price-takers, given the level of competition referred to in detail in that submission, the widest possible ambit should be given to the unfair contract laws. **Further, we believe that the principles underpinning the unfair contract terms law laws should form the basis of a general business duty to act fairly**.

OTHER CHANGES

30. NatRoad supports the provisions relating to the exemption of terms that are read into a contract by the operation of a law of the Commonwealth, a State or a Territory. We also support the technical amendments to make it clearer on the face of the law that remedies for a breach of the unfair contract term provisions are available for both non-party consumers and non-party small businesses. We also support the application and transmission arrangements.

CONCLUSION

31. NatRoad supports the provisions of the exposure draft Bill. We submit that more reforms are needed, particularly in the road transport industry. But the need for further reform should not slow down the sensible reforms that are the subject of the current consultation.

32. We believe that the draft Bill should be presented to Parliament in final form as soon as possible.