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Submission on Strengthening Protections against Unfair Contract Terms, Exposure Draft 2021

We generally support the draft exposure and the concepts underpinning the strengthening of Australia's unfair terms provisions. We are, however, of the view that further consideration should be given to a number of provisions which, as currently drafted, could result in ambiguous and uncertain operation. We have summarised our key concerns below.

In this submission, the sections referenced are those related to the proposed amendments to Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and should be read as applying to the equivalent provisions of the *Australian Securities and Investments Commission Act 2001* (Cth).

Our key concerns are as follows:

1. The use of "proposed" in determining whether a contravention has occurred.

The new s 23(2A)(e) provides that a person contravenes the section of the person 'proposed' the unfair term. It is unclear what definition will be applied to the term 'proposed'. For example, has consideration been given to how this contravention will operate in 'off the plan' building contracts? This is not made clearer by paras [1.15]-[1.16] of the draft explanatory memorandum.

It would appear that the intention is to create a prohibition against the inclusion of such a term, regardless of whether the term has, or has not, been relied upon by the consumer. If that is the case, then the phrase "prepared", as in the new s 27(2)(ba) and current s 27(2)(b), might be a better alternative to "proposed". Regardless, it is unclear why prepared vs proposed have been used in drafting and this could lead to ambiguities in applying the legislation.

If "proposed" is to be retained, we would recommend that the legislation include some further definition of the phrase and/or examples of how the phrase "proposed" should be applied to clarify the legal meaning of that phrase.

Similarly, the use of "proposed" in ss 23(2B), 24(5)(d) and 27(3) is unclear.

2. The rebuttable presumption that a term is unfair and categories of contracts

Our view is that the proposed rebuttable presumption of unfair terms in s 37 has been cast too broadly and, consequently, may create an additional burden on the legal system. Whether a term is unfair or not requires consideration of the term in the context of the whole contract, not in

insolation.[1] Accordingly, it will be necessary for any term that is declared unfair to be categorised in the context of relevant industry usage and other factors that impact the Court's decision on a declared unfair term.

It is unclear at this stage as to how the industry categories referred to in s 24(5)(d)(ii) will be defined and how this presumption will apply in each context. Whilst the draft explanatory memorandum recommends that parties within an industry review and amend terms of standard form contracts, we suggest that this may be cost prohibitive and is likely to lead to an increase in litigation related to parties contending the presumption should be set aside. Furthermore, it is our view that the legislation should introduce formalities regarding the 'declaration' made under s 250 for this presumption to operate as intended.

A better approach would be to create and fund a National Database that coordinates a whole of government approach to listing previously declared unfair terms and provides relevant and meaningful information on the context in which the term was so declared.

3. The use of 'turnover' and 'employee' as a threshold measurement

The measurement of a 'small business contract' by reference to the definitions provided for in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('GST turnover) is problematic as may be legislatively complex to apply. The GST turnover is not a measure that can be readily applied to all business structures, a highlighted with the Economic Response to Covid-19 in 2020 and, in particular, the entitlement to JobKeeper payments. While it may be simple to obtain if a business is lodging a Business Activity Statement, it should not be assumed that all small business entities are, in fact, registered for goods and services tax or that lodgement is occurring in a timely manner. Similarly, it may be difficult to determine the number of employees given that s 23(5) includes casual employees employed on a "regular and systematic basis".

We would recommend the threshold measurements be more carefully defined.

We thank you for the opportunity to respond to the draft exposure.

Kind regards
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[1] *Australian Competition and Consumer Commission v Chrisco Hampers Australia* (2015) 239 FCR 33. See generally SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (The Federation Press, 2nd ed, 2018) [2.5.2.2].