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The Treasury
Langton Crescent
PARKES ACT 2600
AUSTRALIA

Via email: UCTprotections@treasury.gov.au

Dear Sir/Madam,

RE: Strengthening protections against unfair contract terms

The Australian Chamber welcomes the Government's commitment to enhancing the unfair contract terms (UCT) regime, as it relates to standard form contracts and notes that a number of member associations with an interest in this area have made submissions in response to your call for comments on the proposed legislation. As a complement to those submissions, we take the opportunity to highlight a few key issues.

Generally, we are broadly supportive of the objectives of the proposed *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms*.

Standard form contracts are a commonly used and cost-effective option when conducting business, as they avoid the transaction costs associated with negotiated contract terms. To ensure the effective functioning of transactions and binding contractual arrangements amongst businesses, particularly small businesses, UCT protections are necessary to protect the legitimate interests of the party that would be disadvantaged by an 'unfair term'.

The proposed Bill addresses key concerns raised in our earlier submission, particularly the need to improve clarity on the application of, and accessibility to, UCT protections. We encourage our small business members to undertake their own due diligence when entering into a contractual agreement. Hence, clarification to all parties on whether the standard form contract is likely to fall under the UCT protections is necessary.

However, we are concerned that the government has underestimated the implications of making UCT illegal, as it impinges on the freedom of contracts. Introducing pecuniary penalties creates a significant potential burden.

These changes may result in unnecessary costs in business-to-business transactions and, in sectors such as in building and construction, cause uncertainty for contracting and subcontracting.

We have previously raised concerns on the efficient operation of the UCT protections. In particular, where the court or tribunal declares a term is unfair, the judgement only

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extends to the specific term in the contract and does not preclude the same or similar terms being used in other contracts in future.

The proposed law will make UCT illegal whilst attracting pecuniary penalties. We express caution on this approach to contractual arrangements where there is inadequate case law to be applied.

The proposal for new pecuniary penalties if a person relies or purports to rely on an unfair contract term should not proceed, and Treasury is encouraged to confer with those of our members most potentially impacted to discuss concerns and the effect the proposed changes may have on the credit market as well as the potential next steps.

Making UCTs unlawful may create uncertainty and risk, causing harm to businesses that act in good faith and take reasonable steps to ensure their contracts do not set unfair terms. In addition, there may be difficulties with implementation, particularly where the contract-issuing party may not be able to readily determine whether the other party is a small business as defined in the legislation. This will influence the negotiation process. We recommend caution, as imposing civil penalties may result in unfair costs on businesses. Before courts are granted the power to impose a civil pecuniary penalty for contravention, we recommend businesses be provided appropriate guidance and education to enable them to distinguish between terms that may be 'unfair' and terms that are necessary to protect the legitimate interests of the contract-issuing party.

The Bill's aim to strengthen the remedies and enforcement powers of the court to make orders to void, vary or refuse to enforce part or all of a contract (or collateral arrangement) and clarify a court's power to make orders that apply to any 'existing' consumer or small business standard form contract is supported. However, it is critical that the law is prospective, applying only to future contractual arrangements so that it does not interfere with existing contractual obligations.

The Bill should be amended to disallow the parties to file joint submissions and have jointly proposed declarations and orders for the purpose of resolving the proceedings. Additionally, on page 10 of the Exposure Draft Explanatory Materials where the wording 'A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term' appears, the following should also be included **'and where a court accepts an undertaking'**. Further, when setting out matters for the court, consideration should be given to whether an effective opportunity was provided to a party to negotiate the contract.

There is need for further clarity to the proposed amendments in relation to the definition of a small business to incorporate businesses with up to 100 employees or with a turnover for the last income year of less than \$10 million. In the Bill and Exposure Draft Explanatory Materials the treatment of annual business turnover in respect to affiliated companies of small businesses need to be clearly set out. We also urge consistency in the definition of a 'small business' in legislation to avoid confusion and should it be decided to extend the operation of this Act to businesses with up to 100 employees, let




that extension be particular to this act rather than creating yet another definition of “small business”.

In addition to the above, below are some issues our members have raised of which ACCI supports further examination:

- The proposed rebuttable presumption, being terms that have been found to be unfair and are subsequently included in relevant contracts in the same industry, seems not to be proportionate and scalable, but more of a ‘one size fits all approach’ to regulation. According to our members from the finance sector the inclusion of the rebuttable presumption will likely impact the availability and/or cost of consumer and small business lending products as lenders will have to make material changes to their legal and compliance settings, including upfront changes to their contracts and loan documentation, updates to their credit policies, and new training programs for their frontline and customer service staff as well as credit assessment and financial hardship teams.
- The proposed removal of contract value thresholds will impact businesses who offer products to both retail and wholesale clients and who do not obtain information about a customer’s number of employees. The contract value test is the only test that does not fluctuate in comparison to the number of employees or turnover.
- The need that if the proposed changes are introduced an implementation timeframe of at least 12 months, preferably 18 months, allowing for our members to focus on supporting the national plan for economic recovery post the COVID-19 global pandemic as well as complete the current reform program.

In summary, ACCI is supportive of enhancing UCT protections in clarifying the use of terms and in general education and awareness. However, we recommend against making UCTs illegal with pecuniary penalties, particularly where the existing laws already provide sufficient protections when there is evidence of misuse of market power or deceptive conduct. Standard form contracts play a key role in a number of sectors and it is critical that the balance of protections and efficiencies in business to business relations are respected. ACCI has also used this opportunity to raise some key areas our members have raised as points of concern.

Yours faithfully


JENNY LAMBERT
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