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Consumer Branch, Market Conduct Division  
The Treasury

Via email: [uctprotections@treasury.gov.au](mailto:uctprotections@treasury.gov.au)

### Unfair contract terms reforms – consultation on Exposure Draft legislation

Thank you for the opportunity to offer our comment on the *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms* (Exposure Draft). The proposed amendments provide important updates to unfair contract term (UCT) provisions in the Australian Consumer Law<sup>1</sup> (ACL) which will provide further safeguards for the rights of consumers and small businesses.

Care strongly supports the proposed amendments to strengthen UCT provisions to further protect consumers and small businesses. We welcome reforms that will expand the class of contracts to which the UCT provisions apply; the extension of the courts' powers to offer further remedies and general deterrence in relation to UCTs, such as pecuniary penalties; and the introduction of a rebuttable presumption that a contractual term is unfair where that term has already been declared as being unfair by a court. We believe that these changes will greatly increase the effectiveness of the current UCT regime.

Our two key comments are:

1. The drafting of the Exposure Draft legislation is heavy with legalese. To ensure the provisions are accessible to the wider Australian community, where possible, we would like to encourage the use of plain English language.
2. There is no definition for 'standard form contract' provided in the ACL. While the Exposure Draft legislation expands on matters a court must consider when determining if a contract is standard form, including the concept of repeat usage, defining the term while leaving room for judicial interpretation would assist consumers and small businesses to identify a standard form contract, thereby increasing the preventative role of the ACL.

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth), Schedule 2.

## About Care

Since 1983, Care has been a significant provider of financial counselling, legal and related services for low to moderate income and vulnerable consumers in the Australian Capital Territory (ACT). Care's core services include the provision of information, support, and advocacy through our financial counselling service, and legal advice, casework, and advocacy.

Care Consumer Law is a program of Care and is an accredited community legal centre under the National Accreditation Scheme administered by Community Legal Centres Australia. We help consumers in the ACT to resolve disputes with the financial services sector, the telecommunications and utilities sector, and the suppliers of goods and services. Given the protection of consumer rights is at the core of our practice, we are invested in ensuring the ACL continues to provide essential safeguards and coverage to all consumers, including those in our community who are most vulnerable.

## Comment on the Exposure Draft

### *Review of the ACL to ensure drafting is in plain English*

The ACL is beneficial legislation and as such should be clear and accessible to everyone in the community. In our view, the drafting of the Exposure Draft legislation, while in line with the broader ACL, falls short of this standard.

In our view, the drafting of the ACL could be significantly improved by an increased focus on plain language, so that it is clear and accessible to the consumers. Otherwise, use of complex or overtly legalese language may result in the preventative role of the ACL being abrogated, and problems then only being addressed after damage or loss has occurred. Also, more accessible plain language drafting would aid interpretation and application of the law by courts and practitioners, especially in relation to the legislative meaning or intent.

### *Suggested edits to the Exposure Draft legislation*

In our view, there is an immediate opportunity, absent more wholesale changes to the drafting approach outlined above, to improve the Exposure Draft legislation's operation and accessibility for consumers and small businesses. For instance:

- a) Amendment 1, (2B), remove 'and that the person proposed'.
- b) Amendments 1 and 2, (2C), the provision, as currently drafted, may catch a consumer who 'applies or relies on, or purports to apply or rely on' an unfair term in a contract. This is in opposition to the intent of the reforms and the ACL which is to protect the consumer and put the onus on the person who is proposing the term.

- c) Amendment 51, (1), remove 'but only to the extent'. Further, insertion of '(Unfair terms of consumer contracts and small business contracts)' after 'Section 23' would provide further context and convenience around what matter the section relates to without needing to refer to the particular provision.
- d) Amendments 54 and 63, the definition of 'non party' should be extended by noting this person could include someone who is not a party to current enforcement proceedings but is affected by the same or substantially the same term in a contract, either now or in the future.

Definition of 'standard form contract'

Noting our comments above regarding drafting in plain English, and in line with the scope of the UCT reforms agreed by Ministers for Consumer Affairs, adding a definition of what a standard form contract is, even at a basic level, would greatly enhance the amendments and ACL's overall accessibility for consumers. This is because consumers will be better equipped to identify if they are a party to a standard form contract and will be able to avail themselves of the UCT provisions of the ACL before damage or loss occurs or seek legal advice at the earliest opportunity.

**Care contact information**

Thank you for giving this short comment your consideration.

Yours faithfully

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