CHOICE

SEPTEMBER 2021

STRENGTHENING PROTECTIONS AGAINST UNFAIR CONTRACT TERMS

Submission responding to Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms

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About us

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

Introduction

Unfair contract terms are still being used by big businesses despite the prohibition on their use coming into effect in 2011. CHOICE welcomes the Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms (the Draft Bill). The Draft Bill, if passed by Parliament, will strengthen and clarify existing unfair contract term provisions. These changes are overdue as businesses have continued to rely on unfair contract terms over the past ten years since their initial prohibition.

CHOICE believes the Draft Bill will reduce the use of unfair contract terms. We recommend that the Draft Bill be introduced to Parliament and passed as quickly as possible.

By making unfair contract terms illegal and giving courts the power to impose strong penalties, this Draft Bill will deter businesses from using unfair contract terms and, in turn, mean that consumers will be subject to fewer unfair contract terms.

The Draft Bill does have some shortcomings. The Draft Bill continues to expect consumers and regulators to take action in court to determine which contract terms are unfair. Taking large companies to court is out of reach to many, if not most, individual consumers. While there are powers for regulators to take action on behalf of consumers, this omission still limits what issues can be addressed. Contracts that are outside of the regulator's priorities may continue to be used by businesses without challenge. These shortcomings could be addressed by an amendment to give regulators the additional powers that would allow consumers a lower barrier way of addressing unfair contract terms.

Our submission focuses on the issues that affect consumers, but we recognise that the changes proposed in the Draft Bill will improve the situation for small businesses as well as consumers. We also **endorse** the submission of the Consumer Action Law Centre, which also focuses on the experience of consumers.

Recommendations

Recommendation 1:
That the Draft Bill retains the provisions that make unfair contract terms illegal.

Recommendation 2:
That the Draft Bill retain penalties in line with those for other offences in the ACL.

Recommendation 3:
That the explanatory memorandum produced for the Draft Bill is updated to explain that the application of remedies to non-party consumers does not limit non-party consumers from taking up external dispute resolution.

Recommendation 4:
That the ACCC and ASIC be given powers to void terms that are the same or similar as terms that have been deemed unfair by the courts. If this change is not incorporated into the Draft Bill, then a review of the operation of the changes contained in the Draft Bill should be undertaken within three years. The review should assess whether regulators require greater powers to address unfair contract terms and lessen the burden on consumers and courts that comes from taking court action.

Recommendation 5:
That the Draft Bill retains the introduction of a rebuttable presumption for a term that has been declared by a court to be unfair.

Recommendation 6:
That the Draft Bill broadens the application of a rebuttable presumption to other identical terms regardless of if the contract is used in the same industry.

Recommendation 7:
That the explanatory memorandum provided to Parliament should clarify that the Draft Bill does not prevent non-party consumers from accessing external dispute resolution options where they exist.

Recommendation 8:

That the transition period for the Draft Bill to come into effect be reduced from 6 months to 1 month.

Prohibiting the use, application or reliance of an unfair contract term

CHOICE supports the policy aims of the Draft Bill. Expanding the prohibition on the use, application or reliance on an unfair contract is an important way of reducing the occurrence of unfair contract terms for consumers.

Existing prohibitions have not been sufficient to deter businesses from proposing and using UCTs

Unfair contract terms continue to be proposed and relied upon by businesses despite being banned under the Australian Consumer Law (ACL) and *Australian Securities and Investments Commission Act 2001* (ASIC Act) since 2011. People have sent CHOICE examples of contract terms that appear unfair across many industries from financial services, to household goods and dating services. Examples are provided in the appendix to this submission. Unfair terms appear right across consumer markets.

Businesses continue to flout the prohibition on unfair contract terms, highlighting the weakness of the current laws. The government needs to provide clearer guidance about when the unfair contract provisions of the ACL and ASIC Act apply and strong deterrence. This will help the government deliver its policy objective of getting rid of unfair contract terms. CHOICE believes that passing the Draft Bill will achieve this. If the Draft Bill isn't passed, we expect that businesses will continue to propose and rely on unfair contract terms to the detriment of consumers and small businesses, as they have for the decade since the introduction of the existing prohibitions.

The law should strengthen and clarify existing prohibitions

CHOICE supports the new prohibitions on proposing or relying on unfair contract terms contained in the Draft Bill. They will make it clearer to businesses that they cannot continue to use unfair contract terms. These new provisions will strengthen the current unfair contract terms provisions in the ACL and ASIC Act.

Case study: Companies proposing unfair contract terms. The importance of the new provision that prohibits companies from *proposing* unfair contract terms was made stark during the black summer fires in 2019/20 when CHOICE uncovered a number of unfair terms in fire insurance policies. This was before prohibitions against unfair contract terms were extended to cover insurance. Auto & General insurance policies at the time stated that people's homes would not be covered for "scorching, melting or smouldering unless there are flames." This term could cause detriment to people who thought they were covered for fire damage, but the insurer had an unusual definition of fire that was different to a common definition. Yet Auto & General states they approved peoples' claims even when their policy excluded such cover. The Insurance Council of Australia defended its member's behaviour at the time as they were not *relying* on the term however consumers were left at risk as the insurer could have relied on the term at any time and excluded a number of claims. This is an example of the failure of the current prohibitions at stopping the proliferation of unfair contract terms. Auto & General have since removed the unfair term. Further information is available on the CHOICE website Fire definitions in home and contents insurance policies.

CHOICE supports the introduction of a new prohibition on relying on unfair contract terms as it will strengthen existing prohibitions. The new prohibition will include situations, for example, where a company that has a contract with an unfair term outsources debt collection to an external company and that company also relies on the unfair contract term. The expansion of this power adds a further layer of deterrence to businesses as they will expose their business partners to action under these new powers if they use unfair contract terms in their consumer contracts.

Recommendation 1: That the Draft Bill retains the provisions that make unfair contract terms illegal.

Penalties are the deterrence that will reduce unfair contract terms

This Draft Bill introduces pecuniary penalties at the same level as the penalties for other breaches of the ACL, such as when courts have found businesses to have undertaken unconscionable conduct or misled customers. To set them below the standard already established in the ACL would send businesses the wrong message and would likely see them continue to rely on unfair contract terms.

The Draft Bill also makes each proposal, use or reliance on an unfair contract term a separate offence. This is warranted to address the size of the impact that unfair contract terms have on consumers relative to the size of that businesses' market share.

Recommendation 2: That the Draft Bill retain penalties in line with those for other offences in the ACL.

Remedies available under the scheme

New remedies give courts flexibility they require to ensure good outcomes for consumers

CHOICE supports the new law giving courts the power to hand down more flexible remedies and no longer limiting them to the automatic voiding of unfair terms. These new powers will give courts the flexibility to provide remedies that are more nuanced to the specific case before them. Consumers have been sometimes left worse off when a key contract term was voided by a court,[1] as it could leave a person without a good or service. The new powers allow a court to avoid this situation and take action that will not cause further harm to a consumer.

Extending remedies to non-party consumers is a good step in strengthening the unfair contract terms provisions. The ability of individual consumers to take court action against a business is limited by barriers such as the cost of legal representation. Yet a business may have the same consumer contract with thousands of individual consumers. Extending a court's remedy to non-party consumers ensures that remedies apply to everyone who is subject to that term without the need for thousands of court cases. It will ensure that the policy objectives of the Draft Bill can be achieved more quickly and efficiently than relying on individual court cases.

The remedies applied to non-party consumers should not prevent a person who has suffered additional harm from seeking a resolution to their individual situation through other means, such as external dispute resolution through a body like the Australian Financial Complaints Authority (AFCA). This should be reflected in the explanatory memorandum that is produced to accompany the Draft Bill when it is introduced to the Australian Parliament.

Recommendation 3: That the explanatory memorandum produced for the Draft Bill is updated to explain that the application of remedies to non-party consumers does not limit non-party consumers from taking up external dispute resolution

[1] Consumer Action Legal Centre, Financial Rights Legal Centre and WEstjustice, 2020, *Treasury consultation: Enhancements to Unfair Contract Term Protections,* https://treasury.gov.au/consultation/enhancements-unfair-contract-term-protections p.12 (accessed 13/09/21)

Regulators should be given more powers to address unfair contract terms

By maintaining the courts as the only body that can deem contract terms to be unfair, the Draft Bill missed an opportunity to give consumers easier options to address unfair contract terms.

CHOICE's preferred outcome is that the Draft Bill is amended to provide additional powers to consumers and regulators to address unfair contract terms. However, if Treasury chooses not to make these amendments, a future review of unfair contract terms should be undertaken to assess the impact the Draft Bill has on consumers once it becomes law and also explore options that give regulators powers that can complement the powers this Draft Bill gives the courts.

Recommendation 4: That the ACCC and ASIC be given powers to void terms that are the same or similar as terms that have been deemed unfair by the courts. If this change is not incorporated into the Draft Bill, then a review of the operation of the changes contained in the Draft Bill should be undertaken and that review considers providing regulators greater powers to address unfair contract terms and lessen the burden on consumers and courts that comes from taking court action.

Rebuttable presumption for a term that has been declared by a court to be unfair

Once a court has declared a contract term to be unfair, that same (or a very similar) term should also be presumed to be unfair. The introduction of a rebuttable presumption that this is the case is a fair and reasonable response. This is especially the case when the same (or very similar) contract terms can be found across businesses in the same industry. Identical or very similar terms can also be found across industries, such as on common platforms such as app stores.

A contract term found to be unfair by a court should be presumed to be unfair in other contracts until proven otherwise

CHOICE strongly supports the introduction of a rebuttable presumption for a term that has been declared unfair by a court is integral to the package of changes contained in this Draft Bill. The proposal correctly reverses the onus of proof onto businesses that propose or rely on unfair contract terms only when that term has already been deemed unfair by a court. This is an important part of delivering on the main policy aims of these reforms, to reduce unfair contract terms and to boost consumer confidence. It would take far too long to reduce unfair contract terms if each individual use of a term had to be taken to court. It would also tie up valuable resources of individual consumers, regulators and courts.

Court action is out of reach for many consumers and the introduction of a rebuttable presumption that a term declared by courts to be unfair is unfair in other contracts is a strong way to ensure that businesses can't delay removing unfair terms from their contracts. The proposal in the Draft Bill maintains the role for courts in assessing if a term is unfair but stops other businesses from using terms that have already been found to be unfair.

Requiring a new case across industries to establish that contract terms that include unilateral variation, forced arbitration or similar clauses would be a waste of time. The rebuttable presumption introduced in the Draft Bill is a sensible solution to the limited resources of individual consumers, regulators and courts.

Recommendation 5: That the Draft Bill retains the introduction of a rebuttable presumption for a term that has been declared by a court to be unfair.

The definition of industry needs to be expanded or replaced

If the term is found to be unfair by a court, that determination should extend to all other uses of the term that would have a similar impact on a consumer. The current Draft Bill, in s.37(5)(d)(i) and s.38(5)(d)(i), applies the rebuttable presumption only to terms that have been deemed unfair in the same industry. The Draft Bill should be amended to expand the rebuttable presumption to other identical terms and not be limited only to the use of the term in the same industry. Our concern is that if, for example, a term used in a finance industry contract is deemed to be unfair but an app from a retailer could continue to use the same term in its contract until it is challenged in court.

An example of a common clause that appears across industries is a forced arbitration clause. Forced, and especially overseas arbitration terms are seen as containing an imbalance in the rights and obligations of the parties. If a forced arbitration clause was found to be unfair in one industry, that same or substantially similar term should be recognised as unfair no matter which industry it applies. Specific examples of these types of terms are provided at the end of this submission in case studies 2 and 4.

Recommendation 6: That the Draft Bill broadens the application of a rebuttable presumption to other identical terms regardless of if the contract is used in the same industry.

Provisions referring to non-party consumers

Extending the court's power to make orders that relate to non-party consumers is a vital step in limiting the use of unfair contract terms. Requiring every individual consumer who has the same or similar contract to commence court proceedings would be a waste of the resources of individual consumers, regulators and the court system.

However, non-party consumers could face additional detriment if their situation is materially different to the individuals who are parties, or who have authorised the regulator to take action on their behalf. This could happen with the complimentary travel insurance that comes with high end credit cards. If the term that a company relied on to deny coverage was found to be unfair, two people could have had vastly different expenses as a result. Options need to be available to allow for additional remedies for affected consumers based on their specific circumstances.

This should be addressed by including clarifying information in the explanatory memorandum that accompanies the Draft Bill when it is introduced to the Parliament that clarifies that people can still access external dispute resolution services where they exist.

Recommendation 7: That the explanatory memorandum provided to Parliament should clarify that the Draft Bill does not prevent non-party consumers from accessing external dispute resolution options where they exist.

Application and transitional provisions

The prohibition of unfair contract terms has been in place for over ten years for consumer contracts and since the start of 2021 for insurance. The introduction of both of these prohibitions was given a long lead-in time and negates the need for a long lead-in time to the changes contained in the Draft Bill. The transition period in the Draft Bill should be shortened to 1 month after the bill receives royal assent, rather than the proposed 6 months.

Recommendation 8: That the transition period for the Draft Bill to come into effect be reduced from 6 months to 1 month.

Case studies: potentially unfair contract terms

The examples provided below have been provided by consumers to CHOICE. They have not been tested in court and therefore have not been deemed unfair. Instead they are terms that consumers and experts at CHOICE think could be deemed unfair if they were to be tested by regulators or in courts.

Case study 1: Bedshed Comfort Guarantee

A consumer highlighted to CHOICE the potentially unfair contract terms associated with a comfort guarantee offered by Bedshed, a bedding and mattress retailer. This is an example of a contract term where we are concerned that it is imbalanced towards Bedshed and may not be necessary to protect the legitimate interest of the parties.

The first term requires a customer to purchase another product, in this case a waterproof mattress protector that is approved by the company at the same time as purchasing the mattress, if they want to return the mattress under the comfort guarantee. Forcing the consumer to buy a waterproof mattress protector from Bedshed at the same time as the purchase of the mattress goes too far, and beyond the requirement to use a mattress protector that would likely protect the legitimate interests of the parties. The contract states:

> *"A Bedshed approved waterproof mattress protector must be purchased for your mattress at the same time as your mattress and appear on the same invoice. This mattress protector must be used on your mattress at all times from the very first night until the last night."*

The same contract also has a term that is most likely imbalanced. When a customer returns a mattress under the comfort guarantee, the term requires the customer to pay the difference between the mattress they originally purchased and a more expensive replacement. Yet the contract allows the company to keep the difference between the original price of the mattress and the replacement mattress if that mattress is cheaper than the original price under the comfort guarantee. The contract states:

> *"If the replacement mattress selected has a higher RRP than the original mattress, the customer must pay the difference (plus applicable delivery charges) prior to the exchange*

taking place. If the replacement mattress selected is priced at a lower RRP than the original mattress, no refund for the difference in price will be given."

Full terms and conditions for the comfort guarantee are available on their website: https://www.bedshed.com.au/customer-service/60-night-comfort-guarantee

Case study 2: Grindr

The mobile dating app Grindr contains two types of potentially unfair contract terms. The first term is imbalanced - it gives the company all the power to terminate a person's account without any reason and without any explanation. The contract states:

> *"WE MAY DELETE YOUR SUBMISSIONS AND WE MAY BAN YOUR ACCOUNT. Grindr may require that You delete, or Grindr may delete, any User Content (as defined below) at any time for any reason, or no reason whatsoever. Any violation of the Guidelines or this Agreement by Your User Content, as determined by Grindr, may result in Your User Account being banned and may lead to the termination of Your access to the Grindr Services."*

The second is a term is also imbalanced as it would be extremely difficult or impossible for a consumer who is offered these services in Australia to meet. This clause requires that any issues will be addressed through arbitration and be undertaken in the state of California in the US. If the term could be met, it would cause detriment to the consumer as the cost to travel to California would be excessive. The contract states:

> *"Applicable Law. You and We agree that United States federal law including the Federal Arbitration Act, and (to the extent not inconsistent with or pre-empted by federal law) the laws of the State of California, USA, without regard to conflict of laws principles, will govern all Covered Dispute Matters, except as may be expressly provided in the Special Terms."*

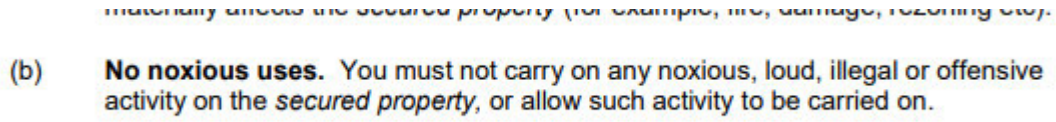
The 'Special Terms' for Australia do not mention any change to arbitration, though the 'Special Terms' for the UK and EU do apply local laws to arbitration for residents of those countries.

Full terms of service are available on Grindr's website: https://www.grindr.com/terms-of-service/

Case study 3: ING Mortgage Common Provisions

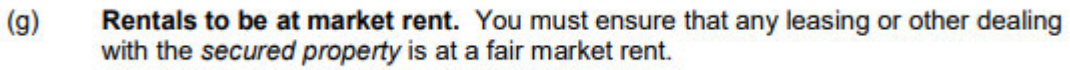
ING's "Mortgage Common Provisions" includes a number of contract terms that are unfair in our view.

The ‘no noxious uses’ clause demands that a home buyer must “not carry on any noxious, loud, illegal or offensive activity” on the property.” This term is not likely to constitute reasonable protection of the legitimate interest of the bank - being loud would not change the value of the property. The person who was provided with this document sought clarification on what might constitute ‘noxious’, ‘loud’ or ‘offensive’. No explanation was given, just an assurance that this was a common term in mortgage contracts.



(b) **No noxious uses.** You must not carry on any noxious, loud, illegal or offensive activity on the *secured property*, or allow such activity to be carried on.

The same document demanded that if the property is made available for lease, that the property be leased at ‘fair market rent’. Again, this term is not likely to constitute a term that is reasonable to protect the legitimate interest of the bank. If a loan is being paid off and the property is not being damaged, it should not matter to the bank whether the property is being leased above or below fair market rent.



(g) **Rentals to be at market rent.** You must ensure that any leasing or other dealing with the *secured property* is at a fair market rent.

The contract goes on to stake out the lender’s interest and control over insurance. 3.2(c) of the contract means that ING can take over the repair or rebuild of a property after it is damaged. While the requirement to have insurance is reasonable to protect the legitimate interest of the bank,, the term allows the bank to have total control over the repair, rebuild or payout of the insurance. The term could be considered imbalanced, as well as going beyond what is reasonable to protect their legitimate interest in the property.

3.2 You must keep the *secured property* insured

(a) You must keep the *secured property* insured for not less than its full replacement value on terms approved by us against loss or damage by fire, storm, tempest and any other risks specified by us. You must also maintain public liability insurance in respect of the *secured property* and any other insurance we reasonably require.

(b) All insurances must be with an insurer approved by us. Our interest as mortgagee must be noted on all policies until the *debt* is repaid.

(c) If loss or damage to the *secured property* occurs, we may enforce any rights under the insurance policy and settle any claim against the insurer. Any money paid by the insurer must be paid directly to us. We may apply that money as we see fit, including to repair or rebuild the *secured property*, apply it in repayment of the *debt*, or hold it as additional security for the *debt*.

Case study 4: Tinder

Tinder, another dating app, contains potentially unfair contract terms. The terms that are imbalanced are those that force Australian users to undertake arbitration in Texas and require a user to agree to give up other legal rights. The contract states:

> *15. Arbitration, Class-Action Waiver, and Jury Waiver.*
> *Except for members residing within the EU or European Economic Area and elsewhere where prohibited by applicable law:*
>
> *The exclusive means of resolving any dispute or claim arising out of or relating to this Agreement (including any alleged breach thereof) or the Service shall be BINDING ARBITRATION administered by JAMS under the JAMS Streamlined Arbitration Rules & Procedures, except as modified by our Arbitration Procedures. The one exception to the exclusivity of arbitration is that either party has the right to bring an individual claim against the other in a small claims court of competent jurisdiction, or, if filed in arbitration, the responding party may request that the dispute proceed in small claims court instead if the claim is within the jurisdiction of the small claims court. If the request to proceed in small claims court is made before an arbitrator has been appointed, the arbitration shall be administratively closed. If the request to proceed in small claims court is made after an arbitrator has been appointed, the arbitrator shall determine whether the dispute should remain in arbitration or instead be decided in small claims court. Such arbitration shall be conducted by written submissions only, unless either you or Tinder elect to invoke the right to an oral hearing before the Arbitrator. But whether you choose arbitration or small claims court, you agree that you will not under any circumstances commence, or maintain, or participate in against the Company any class action, class arbitration, or other representative action or proceeding against Tinder.*
>
> *By using the Service in any manner, you agree to the above arbitration agreement. In doing so, YOU GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend any claims between you and the Company (except for matters that may be taken to small-claims court). YOU ALSO GIVE UP YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER CLASS PROCEEDING. If you assert a claim against Tinder outside of small claims court (and Tinder does not request that the claim be moved to small claims court), your rights will be determined by a NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY, and the arbitrator shall determine all claims and all issues regarding the arbitrability of the dispute.*

You are entitled to a fair hearing before the arbitrator. The arbitrator can generally grant any relief that a court can, including the ability to hear a dispositive motion (which may include a dispositive motion based upon the parties' pleadings, as well as a dispositive motion based upon the parties' pleadings along with the evidence submitted), but you should note that arbitration proceedings are usually simpler and more streamlined than trials and other judicial proceedings. Decisions by the arbitrator are enforceable in court and may be overturned by a court only for very limited reasons. For details on the arbitration process, see our Arbitration Procedures.

Any proceeding to enforce this arbitration agreement, including any proceeding to confirm, modify, or vacate an arbitration award, may be commenced in any court of competent jurisdiction. In the event that this arbitration agreement is for any reason held to be unenforceable, any litigation against the Company (except for small-claims court actions) may be commenced only in the federal or state courts located in Dallas County, Texas. You hereby irrevocably consent to the jurisdiction of those courts for such purposes.

The online dispute settlement platform of the European Commission is available under http://ec.europa.eu/odr. Tinder does not take part in dispute settlement procedures in front of a consumer arbitration entity for members residing in the EU or European Economic Area.

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17. Venue.

Except for members residing in the EU or European Economic Area who may bring claims in their country of residence in accordance with applicable law and except for claims that may be properly brought in a small claims court of competent jurisdiction, all claims arising out of or relating to this Agreement, to the Service, or to your relationship with Tinder that for whatever reason are not submitted to arbitration will be litigated exclusively in the federal or state courts of Dallas County, Texas, U.S.A. You and Tinder consent to the exercise of personal jurisdiction of courts in the State of Texas and waive any claim that such courts constitute an inconvenient forum.

Full terms and conditions are available on the Tinder website:
https://policies.tinder.com/terms/intl/en