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By email: UCTprotections@treasury.gov.au

Director
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Dear Director

Comments on Treasury exposure draft legislation: strengthening protections against unfair contract terms

Thank you for the opportunity to provide feedback on Treasury's proposed reforms to unfair contract term (**UCT**) protections for consumers and small businesses. This is a joint submission by Consumer Action Law Centre, Financial Rights Legal Centre, Victorian Aboriginal Legal Service, Residents of Retirement Villages Victoria and WEstjustice.

Our organisations have all long advocated for UCTs to be made illegal, to provide greater incentive for businesses to stop using them, and to provide real avenues for consumers to seek redress if they are used. UCTs are, by definition, unreasonable and unnecessary. There is no justification for businesses to be using them in their standard form contracts, to the detriment of consumers. Using and relying on UCTs should carry a substantial penalty. We accordingly welcomed the November 2020 commitment by Commonwealth, State and Territory ministers to deliver on the recommendations from Treasury's final Regulation Impact Statement for the enhancements to unfair contract term protections (**RIS**).

We strongly support the content of the Exposure Draft *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms)* (**the Draft Bill**), and the Explanatory Memorandum (**Draft EM**). The proposed legislation would give the UCT regime teeth and go a long way towards completing the UCT reform process that has taken well over 10 years.

That said, there are still some ways the Draft Bill could be improved, particularly with regard to access to justice for consumers and small businesses. The regime changes proposed by the Draft Bill would still rely heavily on judgments of the court for just outcomes to be delivered to all consumers impacted by UCTs. Our recommendations are primarily aimed at ensuring that the Draft Bill makes relief for losses caused by UCTs to be more accessible, and ensuring that the regime does not unintentionally have any adverse impact upon consumers or small businesses who have suffered loss as a result of UCTs.

Overall, we encourage the Government to introduce the Bill to Parliament as soon as possible and pass the legislation.

A summary of recommendations is available at **Appendix A**.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Finally we operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies.

About Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as an Aboriginal Community Controlled Co-operative Society in 1973. VALS is the only dedicated, multidisciplinary legal and support service for Aboriginal and Torres Strait Islander peoples in the State of Victoria. VALS plays a vital role in supporting Aboriginal people in custody and providing referrals, advice/information, duty work and case work assistance across criminal, family, civil and strategic litigation matters.

About Residents of Retirement Villages Victoria

Residents of Retirement Villages Victoria Inc (RRVV) is a member-funded volunteer organisation representing third age people considering, living in and exiting retirement villages. We help members in conflict with their village operator and advocate for changes in industry practices and relevant laws to enhance the well-being of all village residents

About WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.

Part 1 of the Draft Bill

Attaching pecuniary penalties to using or relying on UCTs

We strongly support introducing civil penalties to the UCT regime under both the *Australian Consumer Law* (**ACL**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**). The current UCT regime has not been a sufficient deterrent for all businesses to remove UCTs. As set out in the RIS, some businesses are still exploiting the power imbalance between the parties to a contract by using UCTs, because the risk of court action is low and even if a court does identify an unfair term, the consequences are minimal. At present, the consequences of including or relying on UCTs are limited to providing redress to an individual consumer. There are no penalties or requirements to remove the term from other standard form contracts. Unilaterally inserting unnecessary terms to contracts that cause detriment to consumers or small businesses must carry a greater consequence.

Unfair contract terms examples

The standard terms and conditions of online dating service eHarmony contain terms[1] to the following effect that we consider to be unfair:

- A power to unilaterally suspend or terminate a user's access to the service, without notice, for any reason or no reason; and
- A term stating that if a subscriber cancels their subscription, they will not receive any refund for unused days of the subscription, and that cancelling will not impact any obligation to pay all outstanding amounts under the contract.

We accordingly strongly support the introduction of pecuniary penalties and support the amounts that may be imposed being set at the same level as other provisions which allow for pecuniary penalties to be applied in the ACL and ASIC Acts. Potential penalties of this size will provide a more substantial deterrent to businesses. UCTs cause detriment to consumers, and businesses need to be held accountable for unreasonably causing such detriment.

Two separate civil penalty provisions

We support the approach taken in the Draft Bill to treat proposing a UCT in a standard form contract, and then relying on a UCT, as separate prohibitions.[2] Attaching independent penalties to the two acts is essential to capture all relevant situations where UCTs may cause detriment to consumers, and the impact of each action should be assessed separately by the courts.

In some cases, the presence of a UCT alone in a contract can cause detriment to a consumer, who may alter their behaviour and refrain from acting in their own best interests to avoid breaching the term. For example, one common UCT is a fee imposed for early contract termination, where the fee amount is substantially more than the actual cost of termination to the business. These are still common in many contracts, such as for gym memberships and telecommunications services. These clauses often deter the consumer from ending the contract early.

We also support the approach in the Draft Bill that a person can breach this prohibition multiple times in a single contract as each individual unfair term contained in a contract proposed by the person is considered a separate contravention.[3]

[1] https://www.eharmony.com.au/termsandconditions/
[2] Schedule 1, items 1 and 2, section 23(2A) of the ACL and section 12BF(2A) of the ASIC Act
[3] Schedule 1, items 1 and 2, section 23(2B) of the ACL and section 12BF(2B) of the ASIC Act

An unfair contract term that can cause harm by inclusion alone

The standard enrolment terms of private education provider the Australian College of Weight Management & Allied Health contain the following term:

"In cases where students are suffering from medical ailment and are able to provide adequate documentation of such, upon application in writing, the student's enrolment may be suspended for a period of no more than 6 months. No refund of course fees apply and the student will still be liable for all payments due under the agreed payment plan (if applicable)."[4]

We consider this term to be unfair because there is no explanation of why the six-month restriction on deferrals is necessary, or why a refund would not be considered. The existence of term alone may push a student into undertaking their studies when they are not well enough, out of fear of losing their entire enrolment fee.

It is also important that relying, or purporting to apply or rely, on a UCT is treated as a separate breach. Crucially, we understand this provision would also capture the attempted reliance on the provision by third parties who did not issue the contract. An example of a situation where this may arise is where the rights of the contract issuer under the contract are assigned to a third party, such as a debt collector. Our read of the proposed subsections 23(2C) of the ACL and 12BF(2C) of the ASIC Act in the Draft Bill is that the debt collector would also be prevented from relying on the UCT. We strongly support this position. As above, we support the approach in the Draft Bill that a person can breach this prohibition multiple times if they apply or rely on that term on multiple occasions.[5]

In circumstances where the contract issuer is different to the party relying on the contract, having two separate prohibitions means the court would have the power to determine pecuniary penalties for both parties. If a court was considering the actions of both parties, penalties could be determined relative to their fault in the case. The existence of two separate prohibitions would also give the court more leeway to set clear benchmarks for industry and regulators. For example, if a term was found to be unfair, but only caused harm when relied upon, a more significant penalty could be imposed for the reliance on the term, rather than the act of including it in a contract.

Part 2 of the Draft Bill - remedies

Scope of remedies

The expanded scope of remedies contemplated under Part 2 of the Draft Bill generally represent a significant improvement on the existing law and we strongly support the flexibility provided to the courts in determining the appropriate remedies for reliance on UCTs. We also support the expanded powers of the ACCC and ASIC to bring matters before the courts. However, clarifying or expanding the powers of the courts in particular ways would help the Draft Bill have a greater impact in terms of access to justice for those who suffer detriment from a UCT.

UCTs automatically void

The Draft Bill provides that any UCT identified would be automatically void,[6] as under the current law. We had raised concerns in our submission to Treasury's previous consultation on enhancements to the UCT regime about this approach,[7] as we were concerned that in some situations automatically voiding a term might leave consumers worse off, particularly if it means the contract cannot function at all without the term. However, it appears that

[4] https://www.collegeofweightmanagement.com.au/terms-of-enrolment/
[5] Schedule 1, items 1 and 2, section 23(2C) of the ACL and section 12BF(2C) of the ASIC Act
[6] As per section 23 of the ACL and section 12BF(1) of the ASIC Act
[7] Consumer Action, Financial Rights and WEstjustice joint submission, available at https://consumeraction.org.au/treasury-consultation-enhancements-to-unfair-contract-term-protections/.

the broad powers provided to the court by the Draft Bill would allow the court to prevent unjust outcomes like this occurring.

Between the power of the court to award damages for loss caused by a party's use of a UCT,[8] and the broad powers that would be introduced by the Draft Bill's proposed section 243A and 243B of the ACL, and sections 12GNE and 12GNF of the ASIC Act, it appears the court would have sufficient power to make alternative arrangements to address this issue. For example, while an essential term of a contract deemed unfair by the court would be rendered automatically void, the court could replace this term with another term (or terms) that would perform the essential functions necessary for the contract to proceed, but also reduce any harm caused by the unfair term, and deliver a fairer outcome. Assuming our understanding of the additional powers of the court in these situations is correct, we see no issue with retaining the automatic voiding provisions. However, it is essential that the courts have broad powers to sufficiently vary all contracts to which the automatic voiding provision applies.

Powers of the court regarding the specific contract before it

We support the broad powers the Draft Bill confers upon the court to remedy the specific contract that comes before the court. In the ACL, the broad powers to award damages or make a compensation order under sections 236-238 ensure that the courts can make all orders necessary to provide an appropriate financial remedy to the party impacted by the UCT. The new powers in section 243A of the ACL provide sufficiently broad powers for the court to effectively void or vary the contract in any way necessary to ensure that breaches of the UCT provisions can be remedied.

The same can generally be said for the amendments to the ASIC Act – the amendment to section 12GF would allow the court to award damages for loss caused by a UCT, and section 12GNE would mirror the impact of s 243A in the ACL. However, there are no equivalent provisions in the ASIC Act to ss 237 and 238 in the ACL, which allow for compensation orders to be made. If this means that there may be types of financial losses resulting from a UCT that consumers cannot be compensated for under the ASIC Act then this should be remedied.

RECOMMENDATION 1. Ensure that the court can award damages or compensation for losses suffered by a consumer (whether direct or indirect) caused by a UCT in a contract before the court, regardless of whether it is governed by the ACL or the ASIC Act.

Powers of the court regarding other contracts of the respondent containing the same or similar UCT

We also generally support the court being able to provide a remedy to people affected by the same conduct, which is the subject of court proceedings, but who are not directly involved in the court proceedings. The law allows for the court to make orders on the basis of a person belonging to a class of people, that is, people affected or likely to be affected by the unfair term. This is an essential requirement to ensure that court judgments improve access to justice for people harmed by UCTs more broadly. Many standard form contracts will be issued thousands or even millions of times, and if they contain an unfair term they can cause detriment to just as many consumers.

The draft section 243B of the ACL and section 12GNF of the ASIC Act contain the relevant powers of the court in this regard, as well as the existing sections 239 of the ACL and 12GNB of the ASIC Act (the latter the Draft Bill expands to apply to breaches of the UCT laws). Based on past orders made under section 239 of the ACL in particular, we understand that these sections of the Draft Bill would allow for orders to be made requiring the party benefited by a UCT to provide redress for quantifiable loss to other parties that suffer detriment from the same UCT.[9] While the provisions exclude orders of damages, orders under this section could still require refunds or compensation be paid, and remediation schemes established to deliver on this. We strongly support this position.

[8] Which already exists under section 236 of the ACL, and would be introduced by the Draft Bill's amendment to section 12GF of the ASIC Act

[9] Such as in *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62, at [251-255].

Dealing with refunds or compensation where non-parties cannot be reached

A major ongoing issue with the impact of remediations schemes is that there are often a significant portion of people who are entitled to refunds or compensation that never receive it because the remediating company cannot contact them. Remediation schemes under the UCT regime should be run with the goal of identifying eligible non-parties as quickly as possible, and confirming how to deliver any refunds or compensation, to avoid this outcome. Where possible, remediation should also be automatic. However, where the regulator and party responsible for, or beneficiary of, the UCT are unable to reach or properly remediate all contracting parties harmed by the UCT, any additional amounts that should have been remediated by the responsible party should be distributed in accordance with the doctrine of *cy près* (as it is used in class actions).[10]

RECOMMENDATION 2. Any compensation owing to non-parties who cannot be contacted under a court order remedying a UCT should be dealt with in line with the doctrine of cy près.

No loss of legal rights

While remediation can be an effective means of delivering justice more widely, it is essential that orders for refunds or compensation made do not extinguish the legal rights of those non-parties to seek damages themselves.

In some situations, an individual might suffer a far greater loss because of a UCT, due to their particular circumstances. For example, a UCT that has financial consequences might put a person into financial hardship, that could result in them obtaining high-cost credit, or could even lead to bankruptcy. For this reason, even if a non-party receives remediation or a refund as a result of a Court order, this should not in any way limit their legal right to seek additional damages via the courts or an external dispute resolution (**EDR**) scheme, where there is one relevant to the industry. Even with a very well designed and detailed remediation scheme, it could be difficult to truly identify all the flow on effects of a UCT. There might also be significant non-financial loss, such as emotional distress and other significant difficulties associated with financial hardship. Once a judgment has been made, EDR schemes applying this precedent in particular could help improve access to justice for people in this position.

To ensure that any orders made under sections 243B of the ACL or 12GNF of the ASIC Act do not leave individuals worse off, the Government needs to make certain that these orders do not restrict the legal rights of non-parties to otherwise seek redress. We urge the Government to consider the impact of subsection (4) of both these sections in particular, which we are concerned could be construed to limit the rights of individuals in this regard.

RECOMMENDATION 3. Orders made against respondents under sections 243B of the ACL or 12GNF of the ASIC Act should not restrict the legal rights of any non-party individuals to seek redress for additional losses resulting from a UCT.

Powers to issue warnings about UCTs

One final observation on remedies relates to item 30 of the Draft Bill and paragraph 1.38 of the Draft EM. Paragraph 1.38 of the Draft EM sets out that the Draft Bill will extend the court's power to issue publish warning notices for breaches of the UCT law. However, item 30 of the Draft Bill will actually extend the power of ASIC (rather than the court) to issue a written warning notice, when ASIC has reasonable grounds to suspect that a person has contravened the UCT laws. The ACCC's similar existing power under section 223 of the ACL will also allow it to issue warning notices for suspected breaches of the Draft Bill's prohibitions on using or relying on a UCT.

We strongly support this position, but raise this issue as we urge the Government to clarify in the Draft EM that ASIC and the ACCC could exercise this power prior to a finding of the court being handed down – that is, that the regulators need not rely on a court order that a term is a UCT, in order to meet the 'reasonable grounds'

[10] Our view on the value of the doctrine of cy près in this situation was provided in the joint submission by Consumer Action, Financial Rights and WEstjustice to Treasury's prior UCT consultation, available here: https://consumeraction.org.au/treasury-consultation-enhancements-to-unfair-contract-term-protections/

requirement in section 12GLC(1)(a) of the ASIC Act and section 223(1)(a) of the ACL. In particular, the regulators should be able to use this power in circumstances where the rebuttable presumption in Part 3 of the Draft Bill would apply to other contracts in an industry.

RECOMMENDATION 4. Amend the Draft EM to clarify that there may be reasonable grounds for ASIC or the ACCC to issue a warning notice under section 12GLC of the ASIC Act or section 223 of the ACL about a person who has issued a contract containing a term the regulator suspects to be a UCT, without the court having made a declaration that the term is unfair.

Part 3 of the Draft Bill – The rebuttable presumption

We strongly support the inclusion of the rebuttable presumption that a term is unfair if it is substantially similar in effect to a term that was previously found to be unfair. This presumption only 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 industry as the contract that contained the original unfair term.[11]

This presumption makes sense. If a term is unfair in one company's contract, it is highly likely that it will also be unfair for another company in that industry to use it, too. This presumption will hopefully assist the expedition of matters it applies to and help improve access to justice.

The presumption would also create greater impetus for companies to review their terms after a judgment is handed down in their industry, helping to increase the pace at which unfair terms are stamped out once they are determined to be unfair. It would also help streamline negotiations between industry and regulators, as well as consumers (or advocates on their behalf).

A presumption in a civil case can be rebutted. The contract issuer can rebut the presumption by proving that it is not unfair in the particular circumstances of the case.[12] This is not markedly different from the persuasive power of a prior precedent anyway. If the new contract issuer could show relevant additional considerations or different circumstances that exist for their contract, the presumption would not prevent them from raising these.

Role of the presumption in EDR

The presumption's impact on access to justice could be even more significant through its application in EDR. A shortcoming of the framework the Draft Bill would establish on UCTs is that for an individual to receive compensation for losses specific to their case that were caused by a UCT, they would still need to a court to consider their personal circumstances and seek an award of damages. The application of the rebuttable presumption in matters that come before EDR schemes would significantly improve access to justice for consumers.

EDR schemes such as the Australian Financial Complaints Authority (**AFCA**) and the Telecommunications Industry Ombudsman (**TIO**) generally handle complaints with regard to the law and principles of fairness. If a court has identified a UCT in the same industry, consumers should be able to make claims in EDR schemes to seek damages for loss caused by a substantially similar or identical contract term in the same industry. The rebuttable presumption would help inform the scheme in making its recommendation or determination in the dispute.

It should be made clearer in the draft materials that EDR schemes should be guided by the rebuttable presumption, as well as court decisions. Recommendation 5 below proposes two methods by which this could be achieved.

[11] Schedule 1, items 37 and 38, section 24(5) of the ACL and section 12BG(5) of the ASIC Act
[12] Schedule 1, items 37 and 38, section 24(5) of the ACL and section 12BG(5)of the ASIC Act

RECOMMENDATION 5. Provide greater clarity that the rebuttable presumption in Part 3 of the Draft Bill should be applied by EDR schemes. This could be achieved by either:

- amending the proposed subsections 24(5)(b) of the ACL and 12BG(5)(b) of the ASIC Act in the Draft Bill to specifically also clarify that they capture recognised external dispute resolution schemes; or
- adding a sentence in the Draft EM clarifying that external dispute resolution schemes should also consider the rebuttable presumptions contained in Part 3 of the Draft Bill.

Part 4 of the Draft Bill – identifying standard term contracts

We generally support the proposed amendments aimed at better guiding the court in determining whether a contract is a standard form contract. The matters that a court must not take into account in particular are logical and entirely appropriate.

However, we recommend clarifying proposed subsections 27(2)(ba) of the ACL and 12BK(2)(ba) of the ASIC Act. We agree that the repeat use of a contract is clearly relevant to a determining whether it is a standard form contract. However, we encourage the Government to ensure these provisions do not unreasonably exclude contracts.

Firstly, the provisions need to allow consideration of contracts entered into by the respondent after the one before the court, as well as previous contracts – just because a consumer was one of the first customers that entered a contract on these terms should not weigh against how the court views the contract. Our view of the provisions as they appear in the Draft Bill is that it likely would allow the court to consider subsequent contracts entered into after the one before the court, but we encourage the Government to make certain this is the case.

Secondly, the Government should ensure that very low uptake of a particular contract does not preclude it from being treated as a standard form contract. For example, if a business only manages to sell a couple of products under the same terms, but would have approached all their sales in the same rigid way with the same contract, the low uptake of their offer should not prevent the court from finding that the contract is standard form.

Conclusion

We strongly support the strengthen of the UCT regime by making the use of UCTs illegal. This reform will help make marketplaces fairer for everyone, and we urge the Government to pass this legislation.

Yours Sincerely,

Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE

Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE

George Selvanera | Acting CEO
VICTORIAN ABORIGINAL LEGAL SERVICE

Lawrie Robertson | President
RESIDENTS OF RETIREMENT VILLAGES VICTORIA

An Huynh | Acting CEO
WESTJUSTICE

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Ensure that the court can award damages or compensation for losses suffered by a consumer (whether direct or indirect) caused by a UCT in a contract before the court, regardless of whether it is governed by the ACL or the ASIC Act.

RECOMMENDATION 2. Any compensation owing to non-parties who cannot be contacted under a court order remedying a UCT should be dealt with in line with the doctrine of cy près.

RECOMMENDATION 3. Orders made against respondents under sections 243B of the ACL or 12GNF of the ASIC Act should not restrict the legal rights of any non-party individuals to seek redress for additional losses resulting from a UCT.

RECOMMENDATION 4. Amend the Draft EM to clarify that there may be reasonable grounds for ASIC or the ACCC to issue a warning notice under section 12GLC of the ASIC Act or section 223 of the ACL about a person who has issued a contract containing a term the regulator suspects to be a UCT, without the court having made a declaration that the term is unfair.

RECOMMENDATION 5. Provide greater clarity that the rebuttable presumption in Part 3 of the Draft Bill should be applied by EDR schemes. This could be achieved by either:

- amending the proposed subsections 24(5)(b) of the ACL and 12BG(5)(b) of the ASIC Act in the Draft Bill to specifically also clarify that they capture recognised external dispute resolution schemes; or
- adding a sentence in the Draft EM clarifying that external dispute resolution schemes should also consider the rebuttable presumptions contained in Part 3 of the Draft Bill.