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Treasury Laws Amendment Bill 2021: unfair contract terms reforms

Thank you for the opportunity to comment on the draft Bill. My comments are set out below.

It is an area in which I have an academic and teaching interest, having written guides on legal writing and drafting for law students.

Part 2 remedies- add a Court Approved Enforceable Undertaking (CAEU)

I would like to suggest an additional remedy for breaches about unfair contract terms. Both the ACCC and ASIC can enter into Enforceable Undertakings under their respective legislation, in specified circumstances.

Where a wider abuse involving unfair terms is apparent, the ACCC or ASIC should be able to seek an additional remedy from the Court; a Court Approved Enforceable Undertaking or CAEU. The Court should be empowered to grant such a remedy, even if it is not sought by the ACCC or ASIC, but the Court believes it would be appropriate in a given case.

If such an order is made by the Court, the parties have 14 days to submit a draft CAEU for the Court's approval. If the parties cannot agree, each party will submit a draft CAEU and the Court will determine the final terms. This way the Court can order the offending party to enter a CAEU and be under ACCC or ASIC supervision while the ongoing breaches are remedied.

Companies with market power abuse it

Many large companies actively instruct their lawyers to draft one-sided contracts because they have market power and they abuse it. This has become a major problem in the technology industry over the last twenty years. Software "Terms of Use" updates for phones, tablets, operating systems, etc. are an example. Terms can be materially changed and you have no say, such changes can include the company using your data as they please.

Other abuses occur when a few companies have enormous market power; Facebook (WhatsApp, Instagram, etc.), Twitter and Google (Ads, Search, YouTube) readily come to mind.

These companies' standard terms allow them to use data across all their divisions even if you only use one service. The terms allow them to use your personal information for almost any purpose. The legislation should be amended to deem such unilateral use of data across the whole group as an "unfair term".

The legal profession is a major source of unfair contract terms

All practicing lawyers need to know how to draft, whether that is a confidentiality agreement, lease, pleading or standard terms. But drafting is not a compulsory subject at any Australian law school and few schools (or Colleges of Law) offer such a course. Drafting should be a core subject in all law degrees and address matters like unfair contract terms.

Often young lawyers are thrown in the deep end and must learn to draft with little or no guidance. They are given poor precedents riddled with unfair terms. They think (incorrectly) the more one sided an agreement, the better it is for their client. These poor practices then replicate throughout the legal profession like a virus.

If the legislation passes, it would be a sensible idea to write to State Law Societies stressing what a significant change the new law makes (or rather builds on). Or have the ACCC and ASIC do that. The message needs to get through to the profession that things have materially changed.

Regards

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