



15 September 2021

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury
By email to: uctprotections@treasury.gov.au

**MASTER
PLUMBERS**
AUSTRALIA AND
NEW ZEALAND

Dear Director,

Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021 (Treasury Laws Bill).

Thank you for the opportunity to comment on the exposure draft of the Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021 (**Treasury Laws Bill**).

On 23 August 2021, Michael Sukkar, the Assistant Treasurer, Minister for Housing, and Minister for Homelessness, Social and Community Housing announced the release of an exposure draft of the Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021 (**Treasury Laws Bill**).

It is our understanding that the Treasury Laws Bill seeks to amend the *Competition and Consumer Act 2010 (CC Act)* and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* to “strengthen and clarify the existing unfair contract term provisions in order to reduce the prevalence of unfair contract terms in consumer and small business standard form contracts”.

The Commonwealth Government is now seeking stakeholder views on the amendments proposed to the CC Act and the ASIC Act. Additionally, the Commonwealth Government is looking for stakeholder views on the accompanying explanatory materials.

In November 2018, the Treasury published the Review of Unfair Contract Term Protections for Small Business Discussion Paper (**Unfair Contract Discussion Paper**).

The Unfair Contract Discussion Paper asked for interested parties to make submissions on the “effectiveness of the extension of unfair contract protections to small business”.

Master Plumbers Australia and New Zealand made a submission to this (**MPANZ Submission**).

The MPANZ Submission identified a number of unfair contract terms that could be considered “regular offenders”. The “regular offenders” included (but were not limited) to the following types of clauses viz:

- extension of time;
- obligation to accelerate without compensation;
- variation claims;
- delay claims; and
- no collusion.





In November 2020, at a Meeting of Ministers for Consumer Affairs, it was agreed that the CC Act and the ASIC Act should be amended to provide even greater protection from unfair contract terms to small business.

The changes proposed to be made to the CC Act and the ASIC Act include: -

- making unfair contract terms unlawful;
- giving courts the power to impose a civil penalty;
- providing more flexible remedies to a court when it declares a contract term unfair by giving courts the power to determine an appropriate remedy, rather than the term being automatically void;
- increasing the eligibility threshold for the protections from less than twenty (20) employees to less than one hundred (100) employees, and introducing an annual turnover threshold of less than \$10M as an alternative threshold for determining eligibility;
- removing the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the unfair contract terms protections;
- improving clarity around the definition of standard-form contract, by providing further certainty on factors such as repeat usage of a contract template, and whether the small business had an effective opportunity to negotiate the contract; and
- enabling certain clauses that include 'minimum standards' or other industry - specific requirements contained in relevant Commonwealth, state or territory legislation to be exempt from the protections.

Unlike the “regular offenders” referenced in the MPANZ Submission, the proposed changes to the CC Act and the ASIC Act do not contain specific references or examples, rather they provide the courts with the opportunity to determine whether the term of the contract is in fact an unfair contract term. If the court finds that the term is in fact an unfair contract term, then the changes to the CC Act and the ASIC Act allow the court to impose pecuniary penalties and declare the term “unfair”.

For example, the proposed changes to the ASIC Act and the CC Act should continue with and expand on examples of terms that may be unfair, including: -

- terms that enable one party (but not another) to avoid or limit their obligations under the contract; and
- terms that enable one party (but not another) to terminate the contract; and
- terms that penalise one party (but not another) for breaching or terminating the contract; and
- terms that enable one party (but not another) to vary the terms of the contract.

In our view, most issues (such as extension of time or variation claims) would need to be covered by a clause that gave both parties the right to seek or make changes depending on the circumstances and blanket standard form clauses are not acceptable.

Whilst the MPANZ Submission provided particular and specific examples, our view is that the proposed changes to the CC Act and the ASIC Act are beneficial because the court will have the jurisdiction to determine the question of whether a term is, or isn't, an unfair contract term. Having particular and specific examples would allow those more unscrupulous participants in the industry to circumvent those particular and specific with differently worded



clauses. By giving the courts the authority to make a determination, the entity or person alleging that the clause is unfair is in a far better place.

Accordingly, while the proposed changes, do not follow exactly the suggested solutions in the MPANZ Submission, we support the proposed changes to the ASIC Act and the CC Act and the Treasury Law Bills as drafted.

Thank you again for providing MPANZ with the opportunity to contribute to the work of the ABCB.

Yours faithfully

Tom Martin
Chairman

