SUBMISSION

Treasury Consultation

Regulation Impact Statement

Enhancements to Unfair Contract Term Protections

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To the attention of:

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Introduction

Dr Justin Malbon is an Adjunct Professor, Law School, Griffith University. He is a former Professor, Law Faculty, Monash University and former Dean, Griffith Law School.

He makes the following submissions on his own behalf.

Key Points

The Treasury Consultation Paper on Enhancements to Unfair Contract Term Protections noted that 'while the UCT regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using UCTs in their standard form contracts' (para 1.3).

The Consultation Paper outlines various reasons for this, including that UCTs are:

- not illegal and do not attract a penalty,
- do not provide adequate incentive for businesses to ensure their standard form contracts are free from UCTs,
- are not prohibited terms.

In addition, a term can be included in a contract even if a business is aware it is likely a UCT (see para 4.1)

Problems with lack of incentive for businesses to avoid the use of UCTs are not unique to Australia. Similar concerns arise in the EU and UK. This submission seeks to draw Treasury's attention to some of ways those jurisdictions seek to deal with the issue, which might reinforce the need for reform in Australia and suggest options for those reforms. The submission also makes a number of other suggestions, some of which are based on the UK *Consumer Rights Act 2015*.

Issues and how they may be addressed

This submission proposes consideration be given to:

- Legislating a 'black list' of prohibited UCTs, which must not be included in standard form contracts. A legislative provision under the ACL might provide that if a business seeks to rely on the term or leads a consumer to believe it is binding on the consumer, the business may be engaging in misleading or deceptive conduct for which a penalty may be imposed.
- Black list and grey list terms should automatically be non-binding on a consumer, without preventing a consumer from relying on the term if he or she chooses to do so. That is, the term would be non-binding without a court first ruling it to be a UCT.
- Black-listed terms would include:
    - a term that is highly unbalanced (offering no benefit to consumers and small businesses); and
    - a term where the interest of the business in using the term is manifestly and significantly lower than the interests of the consumer or small business in it not being used.
- Legislating 'grey list' terms that are presumed to be unfair and are deemed non-binding on a consumer unless the business can establish before a court the term is not a UCT.
- Abolishing the 'loser pays' principle for consumers, consumer organisations and public authorities.
- Enabling approved ombudsman and tribunals to determine a term is unfair and unreasonable and therefore a UCT under the ACL. This will render the term void unless a business gains a contrary court ruling.
- Imposing penalties that are effective, proportionate and dissuasive to incentivise compliance with the UCT provisions of the ACL.

On 11April 2018, the European Commission published a proposal for a directive on better enforcement and modernisation of EU consumer protection rules (the Modernisation Directive).[1] The Directive proposes amendments to the unfair contract terms directive (Directive 93/13/EEC) requiring Member States to provide for effective, proportionate and dissuasive penalties for traders not respecting the provisions of the relevant directives. This submission refers to the Modernisation Directive below.

For the ease of expression, in this submission a 'consumer' includes a small business, and a 'business' means the party authoring a standard form contract.

The EU is also concerned about the lack of compliance with UCT laws

Problems arising from the lack of effectiveness of UCT provisions in curbing business use of the terms are not unique to Australia. The EU commissioned research and evaluations of the effectiveness of UCT legislation in the EU. The evaluations included a study commissioned by the EU, entitled a 'Study for the Fitness Check of EU Consumer and Marketing Law' (the

[1] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019

Fitness Check).[2] It assessed whether the objectives of the covered directives, which included the UCT directive, 'have been efficiently achieved and fully delivered, and whether the directives have efficiently achieved consumer protection and market integration objectives.'[3]

In referring to the commissioned research, the Executive Summary of an EU Commission Staff Working Document on a New Deal for Consumers states:

> Results show that, while the substantive rules are overall fit for purpose, their effectiveness is hindered by lack of awareness and by insufficient enforcement and consumer redress opportunities. In 2016, 20.1% of EU consumers reported consumer rights-related problems and 24% of traders thought compliance with consumer law was not good enough. This leads to consumer detriment and disruption of fair competition for traders. Furthermore, these evaluations showed the need for modernising the rules and removing disproportionate burdens in specific areas. Therefore, this Impact Assessment first addresses current ineffective mechanisms to (1) stop and deter infringements and (2) ensure that consumers get redress for harm suffered, especially in mass harm situations.[4]

Legislating a black-list and a grey-list

Consideration should be given to legislating a 'black list' of prohibited UCTs, which must not be included in standard form contracts, or if they appear in the contracts are automatically non-binding on consumers. Black-listed terms would include:

- a term that is highly unbalanced (offering no benefit to consumers and small businesses); and
- a term where the interest of the business in using the term is manifestly and significantly lower than the interests of the consumer or small business in it not being used.

In giving legislative effect to black listed terms, consideration might be given to:

- Listing as black listed terms some or all of the terms described in Schedule 2 of the UK *Consumer Rights Act*.
- Rendering a black listed term automatically non-binding on a consumer, without preventing a consumer from relying on the term if he or she chooses to do so (see section 62 UK *Consumer Rights Act*).
- Legislatively providing that a business that purports to rely on or give effect to a black listed term be liable for engaging in deceptive or misleading conduct, for which a penalty is liable to be imposed. See for example section 29(n) ACL. See also the discussion on penalties below.
- Allowing a business to challenge before a court a term that is automatically voided as a black listed term, enabling the business to seek a declaration the term is not a UCT, or as a defence to a regulatory action seeking to have a court impose a penalty.

Regarding the rationale for legislating for black listed terms, the Fitness Check stated:

> In legal scholarship, the black list is generally considered to generate practical and significant benefits. For practices on the list there is no need to apply the transactional decision test in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. This assessment is confirmed through our country research. Stakeholders often assess the idea of a black list as positive, as

[2] Civic Consulting, 'Study for the Fitness Check of EU consumer and marketing law' May 2017.
[3] Above, at page 10.
[4] COM(2018) 184 final) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0098&from=EN page 2.

> it provides certainty and offers some clarity, predictability and – simply put – examples and illustrations for what is prohibited behaviour of traders. Country reports frequently emphasise that the black list has important practical benefits for authorities, as well as for consumers and traders:
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> …Reasons provided include that they can easily control those commercial practices that are blacklisted, that the black list alleviates burden of proof, leads to avoiding arguments over whether a particular practice should be considered unfair or not, and simply provides a welcome addition to the toolbox for enforcement purposes. Regarding consumers, country reports indicate benefits such as the possibility to check the list and find out whether certain behaviour of a trader may be suspected as unfair, thereby increasing predictability and clarity of consumer protection rules. For traders, the black list is considered to facilitate identification of unfair commercial practices and thereby increases legal certainty, awareness and compliance.[5]

The Fitness Test recommended replacing the indicative list of unfair terms with a blacklist and/or grey list of terms that are deemed or presumed to be unfair.[6] The Fitness Check stated that:

> It is therefore recommended to provide at the EU level for a either a grey list, whereby the listed terms are presumed to be unfair, or preferably a black list of terms that are considered to be unfair under all circumstances, or for a combination of a black list and a grey list. Both lists obviously increasing the degree of certainty compared to the current situation where the terms are merely 'indicative' of unfairness. The country research provided numerous examples of terms that are blacklisted at the country level with a view to providing a high degree of certainty and effectiveness (see examples below from the Netherlands, Poland, Slovakia and the UK). It is recommended to have a limited list at EU level, to be complemented by national lists. Such a limited (black) list at EU level would both contribute to a high level of consumer protection across Member States, and increase predictability for traders. Some terms could be blacklisted on the basis of CJEU case law.[7]

In determining whether terms should be blacklisted, the Fitness Check recommended that consideration be given to factors including whether:

- the term is highly unbalanced (offering no benefit to consumers); and
- the interest of the trader in using the term is manifestly and significantly lower than the interests of the consumer in it not being used.[8]

Abolition of the 'loser pays' principle

A significant reason for the lack of incentive for businesses to ensure their standard form contracts do not contain UCTs is the high cost and risk to consumers seeking to void a UCT. The Executive Summary of an EU Commission Staff Working Document on a New Deal for Consumers notes:

> The preferred package of options will make consumer redress easier and more effective, and thus reduce consumer detriment which will be beneficial particularly for vulnerable consumers. It will also improve compliance through increased deterrence.[9]

So as to reduce barriers to consumer redress, consideration might be given to the removal of the power of a court to make costs against a party making an application to a court regarding a UCT, other than a business, unless the application is vexatious or lacking merit. The Fitness Test, relevantly recommended:

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[5] Above, footnote 2, page 34.
[6] Above, paragraph 8.2.2.5.
[7] Above.
[8] Above.
[9] Above page 3.

- the abolition of the 'loser pays' principle for consumer organisations and public authorities.[10] However, the Modernisation Directive did not follow this recommendation.
- That consumer organisations be explicitly empowered to seek an injunction against standard contract terms.[11]

Consideration might also be given to extending the number of 'regulators', or 'enforcers' that can bring an action on behalf of consumers regarding unfair contract terms. In the UK for instance, Schedule 3 of the Consumer Rights Act 2015 empowers a relatively broad range of entities to have the regulator's powers for unfair contract terms, including the Competition and Markets Authority, the Financial Conduct Authority, the Office of Communications, the Information Commissioner, and the Consumers' Association.

Enabling approved ombudsman and tribunals to determine whether terms are unfair and unreasonable and therefore a UCT under the ACL

Consideration should be given to enabling approved ombudsman schemes to determine a term is unfair and unreasonable and consequently a UCT under the ACL. Such a determination would render the term void unless and until a business obtains a contrary court ruling.

There are numerous and well-established consumer ombudsman services in Australia, including the Small Business and Family Enterprise Ombudsman, the Australian Financial Complaints Authority, the Telecommunications Industry Ombudsman and the various state-based energy ombudsman. These services enable consumers to make complaints to the relevant service without the imposition of costs, regardless of whether their compliant is successful or otherwise. The ombudsman services are also well versed in determining whether the relevant conduct of a service provider is fair and reasonable in all the circumstances.

Generally, however, the service provider has very limited grounds on which to successfully appeal an ombudsman's decision before a court. Generally, an appeal must establish the ombudsman made an error in law, or that its decision was so aberrant as to be irrational (*Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* [1999] VSC 275 [31]). This review or appeal standard may be unduly restrictive in the case of UCTs. Consideration may be given, if ombudsman gain the power to determine the existence of a UCT in a standard form contract thereby rendering the term void, to allowing an as of right entitlement of a business to challenge the ombudsman's determination before a court. This may allow for a fairer balancing of the rights and interests of consumers, small businesses and the large business parties.

The Terms of Reference of an ombudsman service may need to be amended by the service to enable it to determine, under its own rules, whether a term is an UCT, assuming it gains statutory powers to make UCL determinations. A determination regarding an UCT should be made either on the application of a complainant, or a consumer or other representative on behalf of consumers, or on the ombudsman's own motion in the course of dealing with a complaint. Section 71 UK *Consumer Rights Act* is informative in this regard:

> Duty of court to consider fairness of term

[10] Ibid p.285.
[11] Ibid p.276-77.

(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.

(2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.

(3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

In addition to ombudsman services having the capacity to determine UCL matters, consideration should be given to empowering relevant tribunals, including the Administrative Appeals Tribunal across a wide range of its jurisdictions, and the underlying bodies such as the Veterans' Review Board.

Care would need to be taken to ensure such empowerment of ombudsman and other relevant tribunals do not breach the Commonwealth Constitution. In some instances, it might be necessary to grant the power under each state and territory's ACL rather than under the Federal ACL, if necessary.

Penalties

The Treasury Consultation Paper invites submissions on whether penalties should be imposed for breaches of UCT requirements. Australia is not unique regarding this proposal. Consideration might be given to adopting or modifying the approach regarding penalties that is being directed in the EU.

The Modernisation Directive sets non-exhaustive and indicative criteria to be taken into account for the imposition of penalties, which could be adopted or modified for Australian purposes. The Directive relevantly provides as follows:

Article 1: Amendment to Directive 93/13/EEC In Directive 93/13/EEC, the following article is inserted: 'Article 8b

1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive…

3. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

   (a) the nature, gravity, scale and duration of the infringement;

   (b) any action taken by the seller or supplier to mitigate or remedy the damage suffered by consumers;

   (c) any previous infringements by the seller or supplier;

   (d) the financial benefits gained or losses avoided by the seller or supplier due to the infringement, if the relevant data are available;

   (e) penalties imposed on the seller or supplier for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;

   (f) any other aggravating or mitigating factors applicable to the circumstances of the case.

4. Without prejudice to paragraph 2 of this Article, Member States shall ensure that, when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the seller's or supplier's annual turnover in the Member State or Member States concerned.

5. For cases where a fine is to be imposed in accordance with paragraph 4, but information on the seller's or supplier's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.