NATROAD

NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the Treasury

Enhancements to Unfair Contract Term Protections

16 March 2020

INTRODUCTION

1. The National Road Transport Association (NatRoad) is pleased to provide a submission on the Consultation Regulation Impact Statement entitled *Enhancement to Unfair Contract Term Protections*[1] (CRIS).

2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from subcontractors to large fleet operators, general freight, road trains, livestock, tippers, express, car carriers, as well as tankers and refrigerated freight operators.

3. NatRoad has a strong commitment to improving the law as it relates to unfair contract terms. This submission is accordingly structured so as to address the issues raised in a number of the questions posed in the CRIS with an emphasis on supporting enhancements of unfair contract term protections.

4. We also indicate our preference that any change proposed be considered separately from matters that would not permit a provision expressing a limitation on the amount of a carrier's liability for damage to goods in transit. In this regard, we have discussed with Ms Gillian Bristow, Legal Practitioner Director of Bristow Legal, a submission on the CRIS dealing with this issue. We support the submission and commend the approach set out in the New Zealand *Contract and Commercial Law Act 2017* summarised at pages 11-12 of that submission. We return to that issue below.

USE, PREVALENCE AND IMPACTS

5. The CRIS seeks stakeholders to provide information on the use, prevalence and impacts of unfair contract terms in small business contracts in a particular firm or industry. These matters are covered in questions 1-4 in the CRIS.

6. The road transport industry is diverse with a large number of small business operators. The industry covers those who only operate trucks and those who provide transport across modes. The industry also covers those who may not own or operate their own equipment but focus on coordination (e.g. freight forwarders).

7. In the current context, an important characteristic of the hire and reward sector is that subcontracting plays an important role. Many of these subcontractors are owner-operators with no employees. Less than 0.5% of all operators own a fleet of more than 100 trucks, and 70% have just one truck in their fleet.[2]

8. The industry is highly competitive noting that in "2016-17, businesses in the broader Road Transport industry had a profit margin of 9.7%."[3] This margin is surprisingly high when compared with the lived experience of NatRoad members being that 2-3% profit margin is common, albeit not a sustainable level. This has translated to lower rates of capital expenditure than counterpart sectors overseas with the ANZ Bank noting in respect of 2017 that "capex/sales is remarkably correlated however consistently 2 per cent less than larger global peers. This helps explain why Australia's average fleet age is more than twice as old as USA (14 years v 6.5 years)."[4]

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[1] https://consult.treasury.gov.au/consumer-and-corporations-policy-division/enhancements-to-unfair-contract-term-protections/

[2] http://www.truck.net.au/sites/default/files/submissions/DAE%20Economic%20benefits%20of%20improved%20regulation%20in%20the%20Australian%20trucking%20industry%20March%202019%20Final.pdf
At p 13

[3] Ibid

[4] https://infogram.com/road-transport-1hxr4z91p93y6yo

9. As acknowledged at page 8 of the CRIS, NatRoad provided examples of how extended payment time provisions in the road transport industry were unfair in the December 2018 submission to Treasury in its then review of the unfair contract terms law. Obviously in an industry that is highly competitive with tight margins, cash flow is vital to sustainability. NatRoad set out that one means of righting the imbalance in payment structures in the industry is to deem payment terms that require payment beyond a minimum of 30 days unfair and proscribed. NatRoad maintains that position and indicates that this would be a credible means to assist small businesses.

10. The payment of monies owing beyond 30 days from the date a service is provided should be deemed to be unfair and substituted by the 30-day minimum payment period or even a lesser period. This is not an approach embraced in the CRIS. The CRIS concentrates on extending the way in which the current law is structured with courts being given the power to determine whether in the circumstances of the case in a particular contract a term is or is not unfair i.e. there are no generalised objective criteria by which unfairness may be measured and each contract must be looked at in context.

11. However, in NatRoad's submission, it makes sense to label some provisions as per se unfair given the underlying problem with the unfair contract terms law described by one commentator[5] thus:

    Whether a term is "unfair" depends on the other terms in the particular contract. For this reason, a finding by a court that a term is unfair in one particular contract only provides limited guidance on whether that term may be unfair in another contract.

12. Bearing that last comment in mind, the issue of the prevalence of unfair contract terms in the transport industry more generally was explored in a NatRoad submission[6] to the National Transport Commission (NTC) concerning the current Heavy Vehicle National Law (HVNL) review. The submission responded to the NTC's Issues Paper on safe people and practices.[7]

13. Unfair contract terms and their effect on the industry was, indeed, a common theme in the NatRoad submissions to the HVNL review where we emphasised that this was a much higher priority for members than reflected in the NTC Issues Papers published to inform the review. This priority is accorded because members are increasingly concerned that contract conditions in the industry are creating unfairness and are adding to commercial pressures. These practices add to a culture that does not give safety the primary focus. Members are clear that safety is advanced only when customers view the freight task as integrally involving the operator rather than simply getting the lowest possible cost outcome.

14. The cornerstone of the neoclassical conception of contract is the idea that contractual obligations are voluntarily undertaken by contracting parties.[8] But in the road transport industry ease of entry is allowing an oversupply of unskilled operators who are not adept at proper costing. This factor is lowering revenue levels to below sustainability for many skilled and compliant operators, particularly those who baulk at accepting unfair contract terms. It is in part engendering the low profit margins discussed earlier. The situation is that those with the

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[5] Sise, Peter *Potato case highlights one of the problems with the unfair contract term provisions* Clayton Utz newsletter 22 August 2019

[6] https://www.ntc.gov.au/submission_data/561

[7] https://www.ntc.gov.au/sites/default/files/assets/files/NTC_Issues_Paper_-_Safe_people_and_practices.pdf

[8] Discussed in detail by Robertson, Andrew "The Limits of Voluntariness in Contract" [2005] MelbULawRw 5

analytical ability to detect and reject unfair contract terms are losing ongoing work to those who sign up to contract conditions where they fail to understand their full import.

15. This factor is affecting a number of practices in the industry. The first NatRoad submission[9] to the HVNL Review outlined the problem and sought a recommendation that there should be a step up in enforcement along the chain of responsibility (COR) which currently comprehends the ability of contract conditions to affect safety.[10] Customers who create, for example, unrealistic time slot requirements should be prosecuted, especially where the contract says that missing a time slot means the operator doesn't get paid but still must deliver the goods at another proximate time free of charge, a provision NatRoad has seen in contracts referred to us by members for assessment.

16. For example, in one particular contract we assessed, the member would be liable for undefined "missed, delayed or futile" services, inclusive of missing a narrowly defined time slot period. The member would be liable for the principal's costs for these services, would not be entitled to be paid for them and would be required to perform the services in any event at a later date and at a time set by the principal.

17. Another common unacceptable practice is the insertion of wide-ranging hold harmless clauses in transport contracts which can be manifestly unfair.[11] These are sometimes complex indemnity provisions requiring members to make good any relevant loss that arises under the contract, even where the loss was not caused by the member's actions. The events here include a breach of the contract, but the indemnity also extends to other events, including events over which the member has no control.

18. Operators are often unaware that giving a voluntarily assumed indemnity can mean that insurance cover otherwise available is excluded. This phenomenon has been described as follows:

    The reality is that the scope of cover under the particular insurance policies may not align with what is covered under the indemnity. This can create gaps which leave the contracting parties with uninsured exposures. For example, liability policies often exclude cover for contractually assumed liability. If a party assumes a liability under a contractual indemnity in circumstances where liability would not otherwise exist at common law or under statute, such an exclusion would leave that liability uninsured.[12]

19. A lawyer working in the transport industry has provided an example of an unfair indemnity provision which is likely to be encountered by transport operators thus:

    To the extent permitted by law, the Carrier agrees to indemnify, defend and hold harmless the Customer, its related entities and their directors, officers, employees, agents, and all other persons acting for or on behalf of the Customer against all claims, demands, suits, causes of action, debts, liabilities, losses, judgments, damages, costs (including legal costs on an indemnity basis), expenses and penalties (Claim) arising out of or in any way connected, either directly or indirectly, with:

    (a) the Services provided under this agreement;

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[9] https://www.ntc.gov.au/media/2060/ntc-issues-paper-risk-based-approach-to-regulating-heavy-vehicles-warren-clark-national-road-transport-association-natroad-may-2019.pdf

[10] Section 26E HVNL

[11] Discussed here https://www.fullyloaded.com.au/industry-news/1909/natroad-throws-its-weight-behind-senate-probe?utm_source=Sailthru&utm_medium=email&utm_campaign=ATN%20eDM%2019%2009%202019&utm_term=list_fullyloaded_newsletter

[12] Gerber, David and Hine Craig " Contractual Indemnities – Drafting Effective Clauses" (2103) https://www.claytonutz.com/knowledge/2013/may/contractual-indemnities-drafting-effective-clauses

(b) the operations of the Carrier;
(c) the use of any vehicles or plant and equipment in connection with the Services; and
(d) any breach by the Carrier of any of the representations, warranties, or obligations set out in this agreement.

This indemnity is unconditional and applies regardless of issues of fault or cause and regardless of whether any Claim arises in tort, contract, bailment, breach of duty, breach of statute or otherwise.

20. In responding to questions 1-4 we return to the issue of COR. The HVNL recognises that the responsibility for ensuring safety on the road is shared between various parties in the supply chain, including consignors, schedulers, operators and loading managers. Amendments to the HVNL that took effect from 1 October 2018, are aligning chain of responsibility provisions more closely with WHS laws to include outcomes-based primary duties and duties for executive officers. The HVNL clarifies that if it is possible to comply with both the HVNL and WHS law then both must be complied with. But where there is any inconsistency between the WHS laws and the HVNL, the WHS law prevails.[13]

21. The HVNL changes involve a new chapter of regulation directed at chain of responsibility parties and the principle of shared responsibility. They include a proactive primary duty on chain of responsibility parties to ensure the safety of transport activities. [14] This primary duty supplements provisions where parties are only liable once breaches are detected. The new provisions also include a 'due diligence' obligation on executive officers of entities with a primary duty and, relevantly for feedback in the current context, prohibit requests and contracts that would cause a driver or chain of responsibility party to breach fatigue requirements or speed limits.[15] The sort of contract condition mentioned at paragraph 16 could cause such a breach.

22. Rather than limiting unfair contract provisions though, members have alerted us to concerns about customers up the supply chain using COR laws as a means of getting information and applying excessive audit requirements. This issue was given coverage in the media[16] in April 2019 where the National Heavy Vehicle Regulator (NHVR) said that it had received "several reports of unnecessary pressure to disclose additional information from larger customers beyond that required under the current provisions."[17]

23. Clearly, the COR law does not mean that a customer can require an operator to provide personal details of drivers' characteristics, details of safety systems or work diaries, although that has been occurring. But secondly, some contracts that NatRoad has assessed and advised members not to sign do explicitly give customers that right, even though that engenders a number of obligations and potential liability on those customers under the *Privacy Act, 1988 (Cth)*. In the road transport industry, there is an additional issue. In many instances a principal is also a competitor to the contractor and therefore the information received by the principal has the capacity to be used for anti-competitive purposes.

24. Members indicate that they accept these obligations of disclosure because they would not get the work if they do not make the relevant disclosures and because these sorts of problematic disclosures have become commonplace. The answer to Treasury's question about why small

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[13] S18(1) and 18(1A) HVNL
[14] A detailed explanation of the laws appears here: https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/about-the-chain-of-responsibility
[15] See s26E HVNL, as per note 6 above
[16] https://www.fullyloaded.com.au/industry-news/1904/nhvr-moves-against-customer-cor-overreaction?utm_source=Sailthru&utm_medium=email&utm_campaign=ATN%20eDM%2001%2004%202018&utm_term=list_fullyloaded_newsletter
[17] Ibid

businesses accept these unfair contract terms is because it seems that COR provisions are manifestly misunderstood and there is therefore a requirement, separate to the current inquiry, for new assurance laws to be put in place. In addition, the competitive pressures referred to earlier mean that customers are increasingly squeezing transport operators, including through an annual mandated "cost reduction" provision where after one year of the contract operating, the transport operator must reduce its rates by a defined percentage, purportedly finding these savings from undefined " efficiencies."

25. To illustrate the point in relation to the influence of COR further, in the face of increasing customer and principal audits despite membership of one or even more certification schemes, members are indicating that they are suffering under an administrative tidal wave. Customers/principals do not appear to have sufficient confidence in current assurance schemes so as to have the confidence to rely on them to satisfy their COR obligations.

26. Members are reporting that not only are they subject to frequent and intrusive audits but that they are required to adhere to sometimes unreasonable operational directives (see box below) linked to compliance with the private assurance regimes being imposed. There is an absurd level of duplication where the member has its own audit system, is then audited by its major customer and then, for example, in seeking to meet a tender, must meet other intrusive requirements, many of which operate unfairly. The major customer or principal (where the member is a subcontractor) then places other contractual obligations on the member (see box below) in the name of assurance.

Large clients are imposing their systems on contractors regardless of the contactors already having their own systems satisfying their legal obligations, contractor size, the cost impact, or privacy concerns:

- A large road transport business (the principal) has advised its contractors that it is introducing a new app based system that will not only allocate delivery jobs but be used to monitor the location of the contractor's trucks even when they are not performing work for the principal.

- The app must be loaded onto a smartphone used by the professional drivers of the trucks performing the work.

- The contractors do not provide smart phones to their employees. Where a phone is not provided, drivers use their own phone – sometimes a smart phone, sometimes not.

- The contractors already have systems to ensure they comply with their safety obligations, including GPS monitoring devices in their trucks to keep track of their location and cross check that their drivers comply with the fatigue management requirements. This GPS data is not automatically available to the principal.

- The concerns include the requirement for a driver to have a smart phone, to use that smart phone for purposes prescribed by their employer's client (the principal) without the principal seeking consent or offering to cover purchase or operating costs, and the smart phone will be trackable not just when they are performing deliveries for their employer's client but when they are undertaking other driving work and possibly not even during work time.

27. As can be seen from the foregoing, unfair contract practices are rife in the transport sector and the current legislation is just one of the changes to the legal landscape that is required. Reinforcing the responsibility of those up the chain of responsibility would be brought about if the regulator could declare a number of the provisions which we have discussed unfair per se.

This would also assist in preventing their manifestation before a potential prosecution by the heavy vehicle regulator or State-based road authority was contemplated.

Education and Awareness

28. Question 5 asks about whether "regulatory guidance and education campaigns could help reduce the use of UCTs?"

29. The short answer is no. The use of unfair contract terms in the road transport industry has become systemic and needs laws with cut-through. The utility of guidance/publicity will be in the publication of material about the new laws. The guidance should also as much as possible set out factors where a provision is not unfair because it is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.

30. In this context, the guidance should, as much as possible be tailored to individual industry sectors; for example, following the TPG litigation[18] a small "prepayment" in a contract for the supply of telephone/internet services may not be unlawful but would be likely to be in other sectors.

Option 3

31. NatRoad supports Option 3 where a civil penalty would be imposed by a court where a contract term was found to be unfair. The conduct would be unlawful.

32. In support of this option, NatRoad turns to a speech[19] made by the Chair of the Australian Competition and Consumer Commission (ACCC), Mr Rod Simms, where he outlines two fundamental problems with the current law with which we agree. He states:

    There are two fundamental problems.

    The biggest limitation that the ACCC has identified is this: unfair contract terms are not illegal.

    They should be!

    Currently, the Australian Consumer Law, or ACL, allows a potentially unfair contract term to be challenged in a court so it can be declared void but it does not prohibit such a term being included in a contract.

    The second biggest limitation to the current regime is that the ACCC cannot seek civil pecuniary penalties when a term in a contract is declared unfair and void by the court. Nor can we issue infringement notices for contract terms that are likely to be unfair. By making unfair contract terms illegal, the ACCC would be able to seek pecuniary penalties and issue infringement notices.[20]

33. Mr Sims then isolates that under the current law, companies can simply amend their unfair contract terms when the ACCC raises an issue with them, and there is nothing that the ACCC is then empowered to do to hold those companies to account for prior conduct. There is in practice nothing that the ACCC could do to then stop other industry operators not the subject of litigation using similar provisions. That is unacceptable.

34. Penalties and infringement notices should apply if unfair contract terms are included in standard form contracts. In the words again of Mr Sims, "Otherwise, no real incentive exists for businesses to ensure their standard contracts do not contain such terms."[21]

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[18] Discussed here https://www.accc.gov.au/media-release/court-dismisses-accc%E2%80%99s-case-against-tpg-over-prepayments

[19] https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms

[20] Ibid

[21] Ibid

Option 4b

35. The CRIS indicates that regulators could be given the power to determine whether a contractual term is unfair and request the contract-issuing party to vary the term. This enforcement mechanism is supported. Currently, the ACCC is unable to use its mandatory information gathering powers under s155 *Competition and Consumer Act, 2010* to investigate whether a term is unfair and, instead, the ACCC must rely on evidence being provided voluntarily. That is difficult to obtain because members who are small businesses are loathe to complain where they might be identified and lose work or they are not aware of the unfair provisions because they only become aware where an event triggers the unfair provision against them e.g. missing a time slot, referred to earlier.

36. Mr Sims sums up the position just described as follows:

    In circumstances where small businesses might be unwilling to cooperate with the ACCC for fear of commercial retribution, it is difficult for us to collect the necessary evidence to enforce the unfair contract term regime.[22]

37. For the reasons set out above we support Options 3 and 4b.

Definition of a small business

38. NatRoad's position is that because so many of the businesses that operate in the road transport industry are price-takers, given the level of competition referred to earlier, the widest possible ambit should be given to the unfair contract laws.

39. Accordingly, we support Option 3 whereby a contract would be considered a small business contract where at least one party is a business that employs fewer than 100 employees or has an annual turnover of less than $10 million.

Value Threshold

40. NatRoad's perspective is the same in regard to the application of the current upfront price threshold. We submit that the value threshold should be removed. Many of NatRoad's members are not normally in a position to negotiate standard form contracts presented to them on the basis that the conditions must be adhered to if they want the work. This often occurs regardless of contractual value. Hence, NatRoad's support for this option, again Option 3.

Clarity on what is a standard form contract

41. NatRoad supports a strengthening of the current law: Option 3. The criteria set out currently in the law to determine whether or not a contract is a standard form contract and therefore capable of being covered by the protections of the unfair contracts law include whether one of the parties has all or most of the bargaining power relating to the transaction. This is a highly relevant criterion for the road transport industry. The road freight industry has a low market share concentration. The four largest companies accounted for over 15% of industry revenue in 2015-2016.[23] But the low market concentration figure belies the market power of the major companies in the road freight industry.

42. This market power is reinforced by the subcontract system within the industry, mentioned earlier. Larger companies often subcontract work to smaller owner-operators. Those owner operators have little power to influence prices. The characteristics which most distinguish the owner operator area of the market are fragmentation and intense competition.[24] A significant

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[22] Ibid

[23] IBISWORLD Report 14610 *Road Freight Transport in Australia* April 2016 at 18

[24] Ibid

number face business viability issues associated with their lack of power in the market. Further, these small businesses lack economies of scale and suffer increased safety and operating costs.

43. Accordingly, the proposal in Option 3 to clarify the meaning of what constitutes an effective opportunity to negotiate (and therefore where the unfair contract terms protections don't apply) is welcomed. The onus should remain with the contract provider to prove that the contract is not a standard form contract.

44. The critical point mentioned in the CRIS is that an opportunity to actually negotiate the substance of a term must be present for the criterion of having an effective opportunity to negotiate to apply. It is rare for the transport industry contracts that we have assessed for members to have been able to satisfy this criterion. Members are also concerned that if they seek to negotiate contracts that are established (say in respect of a new term) the customer will invoke a clause which permits termination of the contract for convenience or on a short notice period. That problem is made worse when a transport operator is required to invest in major new capital equipment to fulfill the terms of the contract yet the contract has an insecure tenure.

45. There is also a further concern in this context: the absence of written contracts. A large number of small business engagements in the road transport industry are undertaken through oral contracts. A mechanism in the law for a contract to be required to be in writing if requested by a small business should be contemplated as part of the revised unfair contract terms legislation.[25]

46. To illustrate the issue with no written contracts being often potentially unfair we provide the following case study:

    Unfair Contracts: Refusal to put contract in writing

    A small road transport operator has been working for its only client for approximately 15 years. The operator has been encouraged by the client to grow its fleet over the years.

    Throughout this time there has never been a written contract between the operator and client. The operator has asked for one several times but without success.

    The operator has had small rate increases over the last five years and now needs to increase its rates for some of the work it performs to remain viable. However, the client wants to significantly reduce the rate for the majority of the operator's work – which will not be offset by other small rate increases.

    Despite the lengthy relationship, the operator feels its work is at risk and may be given to another road transport business willing to undercut its rates.

    The operator is not covered by state regulation of independent road transport contractors. The absence of a written contract leaves the operator without clear rights as to varying or terminating the contract, or how rates are to be adjusted.

Application of any enhanced protections to consumers and insurance contracts

47. We reiterate the remark made in the introductory section of this submission that we endorse the submissions of Bristow Legal in this context.

48. In particular we endorse the point made that the law has always recognised the economic imperative for carriers and warehouse operators to be able to exclude or limit liability for damage to goods in transit, including due to carrier negligence.

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[25] Cf s20 *Owner Drivers and Forestry Contractors Act, 2005 (Vic);* note under amending legislation with effect from 1 May 2020 penalties will be applied inter alia for failure to provide a written contract where required by the legislation

49. In New Zealand, the *Contract and Commercial Law Act 2017* provides for a limitation on the amount of a carrier's liability for damage to goods in transit. The Act provides for four categories of contract, for determining upon whom liability for the loss of or damage to any goods is to fall. These legislative provisions were previously included in the *Carriage of Goods Act 1979.* These categories of contract are set out in the Bristow Legal submission. For the reasons provided in the relevant submission, we believe that Treasury should consider a similar regime for Australia.

Conclusion

50. As is evident from the content of this submission, NatRoad supports the strengthening of the unfair contract term law.

51. The law should not, however, be extended to contracts which seek to exclude or limit the liability for damage to goods in transit. Instead the extant New Zealand regime should be considered for introduction in Australia.

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Enhancements to Unfair Contract Term Protections

Bristow Legal appreciates the opportunity to comment on the Enhancements to Unfair Contract Term Protections Consultation Regulation Impact Statement (**RIS**).

1. ABOUT BRISTOW LEGAL

Bristow Legal is a boutique law practice that represents transport and warehousing businesses and their advisors across Australia. Our legal practitioner director, Gillian Bristow, has worked with clients in the transport and logistics industry, and their insurers and professional advisors, for more than 25 years. Our practice assists transport and warehouse operators with preparing and reviewing contracts in relation to transport and storage.

2. KEY POINTS

Bristow Legal has considered the RIS and its proposed options to improve the unfair contract terms (**UCT**) regime.

Bristow Legal supports both the protection of small businesses and the UCT regime.

This submission deals with only one aspect of the regime, namely its application to exclusions of liability and limitations on liability for loss of or damage to goods in transport and storage. Because of the broad nature of the legislation and its application across almost all Australian industries, the effects on particular areas of the economy (such as transport) have not been considered in any detail in the RIS.

We are concerned the amendments to the current UCT regime may harm the road transport industry and by extension consumers, who will ultimately bear additional cost burdens associated with an increase in rates charged for transport and storage services in Australia.

This likely effect is due to unique issues faced by transport and warehouse operators:

- The amount charged by a transport/warehouse operator for carriage or storage of goods is almost always significantly lower than the value of the goods. Thus, if goods are lost or damaged, the quantum of any damages to which the operator is exposed is disproportionately high in comparison to the revenue generated from the carriage/storage.

- A transport/warehouse operator has no way of establishing with certainty the value of the goods it is transporting or storing. It also does not know what potential financial losses/consequential losses might be suffered by the consignor as the result of any loss of

or damage to the goods.

- It is commercially expedient for a customer (rather than the operator) to take out insurance cover, because the customer is in a better position to know the value of the goods.

- A scenario where both the customer and the operator insure the goods results in a duplication of both the administrative burden and expense which is passed on to the ultimate consumers of the goods.

- It is therefore reasonable for the customer to accept all, or a significant proportion of the risk of loss of or damage to the goods being stored or transported, as they are in a better position to insure against that risk. This outcome is usually achieved by standard form contract terms that exclude or limit the liability of the transport/warehouse operator for loss of or damage to goods in transit/storage, including for negligence.

- It can be argued that such exclusion/limitation clauses are unfair contract terms. If, under the reforms, such terms are not only void but potentially attract significant penalties, operators will no longer be prepared to 'risk' including such terms in their standard form contracts. As a result, operators will be forced to take out additional insurance cover, the cost of which will ultimately be borne by consumers.

Bristow Legal therefore submits that exclusion or limitation clauses in contracts for the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on by the consignor, should be exempt from the UCT regime in circumstances in which those terms have been clearly disclosed 'up front' to that consignor.

3. BACKGROUND: THE TRANSPORT INDUSTRY

3.1. The Australian Transport Industry

The transport and logistics industry is vital to Australia's economy, contributing significantly in terms of employment and services provided. It has an estimated annual revenue of $96.65 billion and added $39.95 billion to the Australian economy in 2017.[1] The sector employs almost half a million people across road transport, logistics, warehousing and stevedoring.[2] Every day, more than 4,000 heavy vehicles travel between Sydney and Melbourne, and another 3,600 travel between Sydney and Brisbane.[3]

In 2013-2014 the domestic freight task totalled 726 billion tonne-kilometres, of which rail accounted for half and road accounted for one-third.[4] Rail freight is dominated by the transportation of bulk commodities such as iron ore, coal, grains, and fertiliser, whereas, road freight specialises in delivering time-sensitive perishable commodities, whitegoods, electronics, construction materials and many more.[5] Nearly all household consumers rely heavily on the road freight industry.

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[1] Australian Industry Standards, *Transport and Logistics Industry* (Key Findings Discussion Paper, February 2018) 3.
[2] Australian Industry and Skills Committee, *Transport and Logistics* (Web Page, 3 January 2019) <https://nationalindustryinsights.aisc.net.au/industries/transport/transport-and-logistics>.
[3] Geoff Hiscock, 'Road Freight Transport: The Economy's Enablers' *The Australian* (Online, 18 April 2018) <https://www.theaustralian.com.au/business/road-freight-transport-the-economys-enablers/news-story/786241b00f580a300e90d98ab927fd21>.
[4] National Transport Commission, 'Who Moves What Where: Freight and Passenger Transport in Australia' *The Australian* (Online, August 2016) < https://www.ntc.gov.au/sites/default/files/assets/files/Whomoveswhatwhererepor t.pdf>.
[5] National Transport Commission, 'Who Moves What Where: Freight and Passenger Transport in Australia' *The Australian* (Online, August 2016) < https://www.ntc.gov.au/sites/default/files/assets/files/Whomoveswhatwhererepor t.pdf>.

Any changes to the UCT regime which increase the insurance (and therefore cost) burden for transport and storage operators may result in operators increasing fees charged to customers. These charges will ultimately be passed on to consumers.

3.2. The future of the industry

The scale and importance of the transport industry is only set to increase as Australia's population increases to a predicted 30 million by 2030 – increasing demand for food, construction, materials, and retail supplies.[6] Australia's freight requirements are projected to increase by 80% in the lead up to 2030, and to triple by 2050.[7]

Road transport is likely to continue to dominate the Australian market for non-bulk freight, with industry analysts predicting 75% growth in road transport over the next 20 years.[8]

3.3. Rates of return

The road transport industry is not an industry that can easily absorb additional cost burdens; the industry is characterised by low margins and high rates of insolvency.

In the 2018 – 2019 financial year, transport, postal and warehousing industries had the fifth highest rates of insolvency across Australia, totalling 4.9% of all cases of insolvency across 24 industries.[9] The top cause of failure was inadequate cash flow or high cash use.

4. THE CURRENT POSITION FACED BY TRANSPORT OPERATORS/WAREHOUSE OPERATORS

4.1. How does the current UCT regime apply to transport operators?

The flowchart on page 5 demonstrates the complexity of the current legal position for transport/warehouse operators seeking to exclude or limit their liability for loss of or damage to goods.

Section 63 of the ACL exempts certain transport and storage contracts from the various guarantees set out in the ACL. The justification for this exemption is discussed in Section 6. Section 63 is in these terms:

> **Services to which this Subdivision does not apply**
>
> (1) This Subdivision does not apply to services that are, or are to be, supplied under:
>
> (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or
>
> (b) a contract of insurance.
>
> (2) To avoid doubt, subsection (1)(a) does not apply if the consignee of the goods is not carrying on or engaged in a business, trade, profession or occupation in relation to the goods.

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[6] Geoff Hiscock, 'Road Freight Transport: The Economy's Enablers' *The Australian* (Online, 18 April 2018) <https://www.theaustralian.com.au/business/road-freight-transport-the-economys-enablers/news-story/786241b00f580a300e90d98ab927fd21>.

[7] Ferrier Hodgson, *Look Out! Here Comes the Future: Transport 2050* (2017) 10.

[8] Ferrier Hodgson, *Look Out! Here Comes the Future: Transport 2050* (2017) 8.

[9] ASIC, 'Insolvency Statistics: External administrators' reports (July 2018 to June 2019)' (Online, December 2019) 17 <https://download.asic.gov.au/media/5416956/rep645-published-18-december-2019.pdf>

However, as illustrated in the flow chart, under the current UCT regime, if an operator transports or stores goods 'for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored', it is not sufficient for the operator to enter into a written contract excluding or limiting their liability. The operator must also ensure that any such exclusion or limitation is not 'unfair', or it will be void.

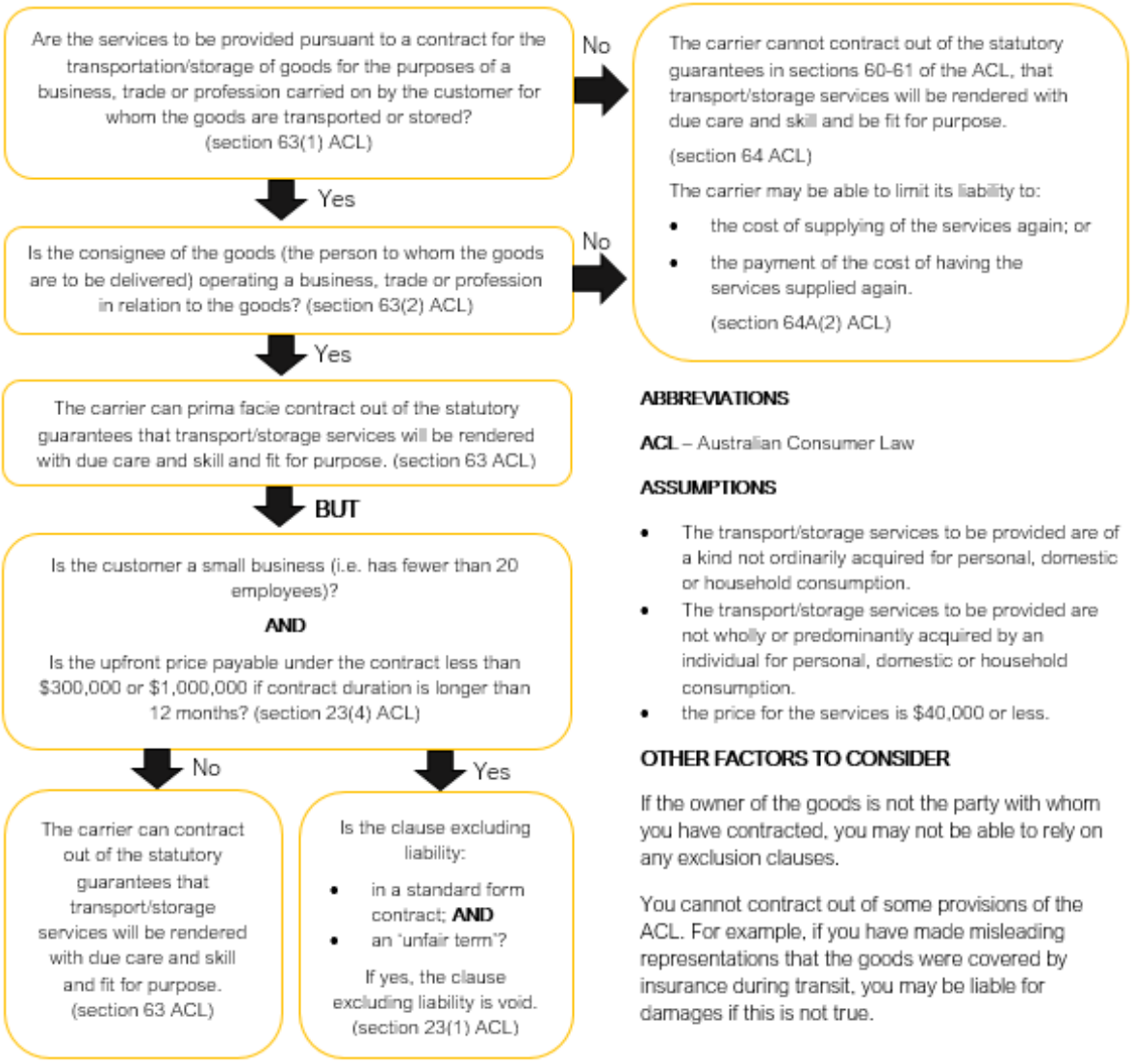
The current UCT regime creates considerable uncertainty. It is far from clear whether exclusions of liability or limitations on liability for loss of or damage to goods in transit or storage may be considered 'unfair terms' and therefore void.

Based on the guidance material issued by the ACCC, there are good reasons for transport/warehouse operators to be concerned that any contractual exclusions of liability or limitations on liability are 'unfair terms'. In this regard, we note that the ACCC guidance material on unfair contracts gives the following example of an unfair term[10]:

> *Example five: limited liability*
>
> A small business enters a contract with a removal company for an office relocation. A term of the agreement states that the removal company accepts no liability for any loss arising in the move, including loss arising as a result of the removal company's negligence. This term is likely to raise concerns as it seeks to limit rights the small business would otherwise have against the removal company.

[10] https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair

Flow chart summarising the circumstances in which a carrier may be able exclude liability for loss of or damage to goods in transit



Various publications have suggested that transport/warehouse operators could avoid all issues associated with the current UCT regime by having two sets of terms and conditions – one for small business customers and one for other customers.[11]

The transport industry is characterised by low value, repeat transactions and therefore, in our view, it is impractical for a transport/warehouse operator to:

(a) determine, in advance, whether or not its customer qualifies as a small business; and

(b) operate with different conditions/contractual terms based on whether or not it considers that its customer meets the definition of a 'small business'.

[11] See, eg, McKenzie Ross, 'Unfair Contract Terms: Changes for Logistics Operators' (Online, 14 July 2016) <https://mckenzieross.com.au/unfair-contract-terms-changes-for-logistics-operators/>; Andrew Probert, 'Unfair contract terms: repercussions for the transport sector' *Collin Biggers & Paisley Lawyers* (Online, 22 January 2016) <https://www.cbp.com.au/insights/insights/2016/january/unfair-contract-terms-repercussions-for-the-trans>

4.2. How can transport and warehouse operators manage risk?

Presently, transport and storage operators manage risk by a combination of contractual terms and insurance cover.

Transport and storage operators are able to purchase a variety of insurance covers, but the applicable premiums and the products available depend upon their standard contract terms.

Legal liability cover

Transport operators can purchase, relatively cheaply, insurance cover termed 'carrier's legal liability' insurance. This cover is offered on the basis that the transport operator uses its best efforts to have customers sign standard terms that exclude the operator's liability for loss of or damage to goods in transit. If the customer's goods are lost or damaged, the insurer (on behalf of the operator) will then defend any legal proceedings that ensue, relying on the exclusions of liability in the transport operator's standard terms.

These policies are often limited in their cover to $1,000,000 per incident and include within the sum insured any claim made for consequential financial loss by the owner of the goods.

Even though these policies are relatively inexpensive, they may provide much broader cover for the transport operator because the insurer has some comfort that the operator is protected by its standard terms of carriage, thereby managing contractual risk.

Goods in transit cover/goodwill cover

More expensive cover is available to allow a transport operator to insure goods in transit up to a nominated value. This sort of cover can be either:

(a) narrow and restricted to particular events (such as collision or overturning); or

(b) broad, covering most forms of accidental loss of or damage to goods.

This form of cover does not rely upon the transport operator's standard terms – it will simply pay the value of the lost/damaged goods if an insured event occurs and is not otherwise excluded in the policy – hence the higher premium.

It can be difficult for a transport operator or warehouse operator to arrange cover with appropriate limits. This is because the operator will rarely be given information by its customer as to:

(a) the market value of the goods being transported; or

(b) any potential consequential losses (e.g. loss of profit or downtime) that might result if the goods are lost or damaged.

A transport operator may therefore end up transporting (and damaging) goods worth $2 million in circumstances where it has a limit of $1 million per load under its insurance policy.

Also, under this form of cover, the consequential loss limit is often sub-limited to Nil (excluded) or to $50,000 or $100,000. Therefore this form of cover will often not protect the transport operator fully from consequential loss exposures.

Because of the difference in price between legal liability cover and goods in transit cover, an operator which excludes or limits its liability (and holds only legal liability cover) can offer its services at a lower rate.

Liability cover

See comments under 'storage cover'. While these policies offer more extensive cover, they are not generally available to small transport operators.

Storage cover

It is difficult for warehouse operators to source cover for goods in storage (see further discussion in example two in section 6.3). Insurance for goods in storage can sometimes be arranged via a broad form liability policy that extends to cover all of the operator's liability associated with transport and storage activities. However, these sorts of policies are usually specialised and designed for large operators.

Otherwise, the operator may be able to obtain cover under an industrial special risk policy. This cover is usually very expensive, particularly having regard to the low fees that are charged for the storage of goods.

4.3. How can small business customers manage risk?

A small business customer engaging the services of a transport/warehouse operator is able to:

(a) choose to engage an operator with cheaper rates;

(b) accept the operator's standard conditions including any exclusion or limitation of liability; and

(c) insure the goods in transit/storage itself (and pay the premium). The customer will also be in a better position than the operator to inform any insurer of the value of the goods.

4.4. Problems with the current position

Although:

(a) there are sound reasons for transport/warehouse operators to seek to exclude or limit their liability for damage to goods (even where negligence is involved); and

(b) the logic for this position is recognised in section 63 of the ACL;

it is far from clear whether an exclusion or limitation of liability will be an 'unfair contract term' under the legislation, as demonstrated by the ACCC's own guidance material (see paragraph 4.1).

This uncertainty is unhelpful for transport/warehouse operators and their advisors and makes it difficult for insurers in the industry to properly assess or price the risk that they are underwriting.

This uncertainty also means that goods are potentially 'double insured' in the sense that both the owner of the goods, and the transport/warehouse operator take out insurance. This cost duplication increases the price that ultimate consumer pays for goods.

5. HOW WILL THE PROPOSED REFORMS AFFECT THE POSITION?

The position will worsen under the proposed reforms. Not only will the legal position continue to be unclear, but transport/warehouse operators may face a situation where a regulator or court can issue/impose infringement notices/penalties for including exclusions or limitations of liability in standard terms.

The additional risk of being penalised is likely to result in transport/warehouse operators:

(a) varying conditions of carriage and storage to remove any exclusions or limitations of liability;

(b) taking out goods in transit insurance cover, in circumstances where:

a. they risk taking out a policy with too low a limit of cover (because they do not know the value of the goods they are carrying), and therefore having uninsured losses;

b. their customer already has insurance cover over the goods (with the consequence that the goods have been insured twice); and

(c) increasing their prices to reflect the additional expenses and risks undertaken as a result.

6. WHY SHOULD TRANSPORT AND WAREHOUSE OPERATORS BE ABLE TO EXCLUDE OR LIMIT LIABILITY?

6.1. Recognition by the law of the unique position of carriers

The law has always recognised the economic imperative for transport/warehouse operators to be able to exclude or limit liability for damage to goods in transit, including due to carrier negligence.

The practical and commercial basis for carriers seeking to exclude or limit liability for loss of or damage to goods was explained by the High Court in *Penn Elastic Co Pty Ltd v Sadleirs Transport Co (Vic) Pty Ltd (formerly Flight Express Pty Ltd)*[12]:

> One starts with the notion of a need for limiting liability; one party to the carriage, the carrier, may otherwise, when it is too late and loss has been sustained, discover that, all unknowing, he has been carrying "articles of great value in small compass" and is liable for amounts quite out of proportion to the charges made for their carriage ... To alleviate the position of the carrier, while preventing him from imposing upon unsuspecting consignors unduly restrictive limits of liability, legislatures have in many jurisdictions intervened in the bargain between the parties… Arbitrary limits of liability have been imposed, the consignor of goods of special value being obliged to declare their value and pay increased rates if the carrier is to be liable for their special value over and above that limit.

The argument is also sometimes expressed as the following economically rational proposition:

(a) transport of goods by road carries inherent risk;

(b) because of the risky nature of the transport of goods, it is usual for the goods to be insured;

(c) it makes no economic sense for both the carrier and the customer to insure the same goods. This is simply a duplication of expense and administrative effort;

[12] (1976) 136 CLR 28 at 31 per Stephen J. Note that this decision relates to *Carriage of Goods by Land (Carriers' Liabilities) Act 1967* (Qld) that was subsequently repealed

(d) if insurance cover is to be taken out, it is less expensive for the customer to obtain such cover, simply because the customer is in a position to know the value of the goods. The carrier has no way of establishing with certainty the value of the goods. For this reason, the premium charged to the customer may be less than the premium charged to the carrier in the same transaction; and

(e) the carrier's price for carriage is provided on the basis of its conditions, including exclusions. If required to accept liability and to insure the goods, the carrier would need to charge a higher price for its services.

6.2. Legislative recognition of this position

The Commonwealth Parliament has previously recognised this position, which forms the rationale for section 63 of the ACL. The predecessor to section 63 (section 74 of the *Trade Practices Act*) was inserted in 1986. The Explanatory Memorandum for the amending legislation explained the amendment in these terms:

> A new sub-s 74 will provide that the section does not apply to contracts for the storage or transportation of goods for a commercial purpose… In the area of transportation and storage of goods for the purpose of a business, business parties have well-established insurance arrangements which sometimes involve the limitation of liability in a way contrary to section 74. No useful purpose would be served in upsetting these arrangements, and for this reason contracts for the storage and transport of goods for a commercial purpose have been exempted from the application of the section.

6.3. Practical examples illustrating these concerns

Example one: transport

A small medical practice engages a transport operator to transport an MRI machine from Sydney to Brisbane. Unknown to the transport operator, the machine is worth $2 million and is one of only four units of its kind in Australia, having been imported from Germany. In addition, the machine is essential to the practice's operation – without it the medical practice is unable to assist many of its patients, some of whom require MRI scans urgently. The medical practice signs the transport operator's standard conditions of carriage. Those conditions contain a limitation of liability clause to the effect that the transport operator's liability for consequential losses is excluded, and its liability for loss of or damage to goods in transit is capped at $5,000 per incident.

The transport operator has load insurance, but that insurance covers only $500,000 per load and does not cover any consequential losses. The medical practice has also insured the machine itself.

The transport operator's driver has an accident where one of the restraints breaks and the machine is extensively damaged. The machine is destroyed, and the medical practice is unable to treat patients for three weeks with a claim for financial losses as a result of $200,000.

Unless it can rely on its standard terms, the operator will probably be liable for the value of the machine (and consequential losses) because of the laws of bailment. The onus will be on the operator to prove that the accident occurred without fault on its part.

What is likely to happen under the current regime?

The medical practice makes a claim on its insurance cover after the accident and receives the value of the machine, but not the consequential losses, as these are not covered by the policy.

The insurer of the medical practice is now subrogated to the rights of the medical practice. To attempt to recover the amount paid out, it commences legal proceedings seeking to argue that:

(a) the transport operator was negligent in the transport of the unit; and

(b) to the extent that the transport operator has purported to limit its liability for loss of or damage to the unit, that term is an unfair contract term, and therefore void as it unfairly limits the transport operator's liability for negligence.

The medical practice also includes its claim for consequential loss as part of the proceedings, agreeing to pay a share of the insurer's legal costs.

The transport operator's legal position is unclear (because of the UCT provisions) and it does not have sufficient insurance cover to allow the litigation to be settled on terms satisfactory to the insurer of the medical practice/the practice itself. Litigation proceeds with the transport operator hoping that a court will uphold its contractual terms that purport to limit its liability to $5,000.

Even if the transport operator is able to resolve the litigation by its insurer making a significant payment, the premium it pays for its insurance cover in the next policy year will increase significantly because of its claims history.

What would happen under the proposed new regime?

The transport operator must reconsider its decision to include limitations of liability in its standard terms. If it continues to include such terms it will run the risk that:

(a) any limitation clause is held to be unfair (and void); and

(b) it may be subject to statutory penalties for including the limitation clause in its standard terms.

If the operator does not include the limitation clause, the operator will need to have goods in transit insurance for the full value of every load that it carries. This will involve administrative overhead in attempting to ascertain the likely value of loads, together with significantly increased premiums that will need to be factored into its pricing.

The medical practice will be likely to continue to insure its units, as it will not want to run the risk that the transport operator is not adequately insured.

Example two: warehousing

A warehouse operator operates a large warehouse in New South Wales. It stores agricultural products like fertiliser and pesticide for several small business. These products are classified as 'dangerous goods' under the Australian Dangerous Goods Code. The total value of goods in the warehouse is $6 million. The warehouse operator charges $4.50 per pallet per week to store the goods.

The operator will find it almost impossible to take out insurance cover for the value of the goods stored. This is because an insurer will recognise the potential for a major catastrophic loss in the event of a fire, a cyclone or even a break-in. In addition, even if insurance were available, the warehouse operator has no knowledge of, or means of ascertaining, the value of goods held in the premises at any one point in time. This is because the goods do not belong to the operator and the stock levels vary markedly over time, depending on seasonal stock levels.

As a bailee of goods, unless its contract provides otherwise, the warehouse operator is liable for loss of or damage to the goods unless the operator can prove any loss or damage was not due to its negligence.

What happens under the current regime?

The warehouse operator requires all customers to take out their own insurance and the operator contractually excludes liability in its standard terms. Again, this does not cause financial detriment to the small businesses storing goods at the warehouse, provided that each small business is aware of the exclusion and takes out its own insurance cover.

What would happen under the proposed new regime?

As with example one, the warehouse operator is likely to reconsider both the exclusion of liability in its standard terms, and the rates it charges. It may even elect to only store goods for large businesses that do not qualify for UCT protection or to charge a much higher rate to small business customers because of the need to take out insurance cover over their goods.

7. PROPOSALS TO REDUCE IMPACT OF LEGISLATION ON TRANSPORT AND WAREHOUSE OPERATOR CONTRACTS

The proposed legislation could militate the effect of the regime on transport and warehousing contracts in a number of ways including:

(a) The UCT regime could exclude certain clauses in contracts for transport and storage, provided those clauses have been disclosed to the small business. A suggested section/amendment is set out below.

> This Part does not apply to a term of a written contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession, or occupation carried on or engaged in by the person for whom the goods are transported or stored that:
>
> (a) is disclosed at or before the time the contract is entered into; and
> (b) excludes liability for loss of or damage to those goods or sets a monetary limitation of liability for loss of or damage to those goods.

(b) Other protections (such as a requirement for the term to be 'transparent', or for any contract including exclusions or limitations to be signed) could also be included. In this regard, New Zealand legislation, referred to in section 8 of this submission, imposes certain requirements for contracts 'at owner's risk' – perhaps similar requirements could be imposed in Australia's UCT provisions.

(c) The criteria for 'unfairness' in section 24 could refer to the availability of insurance when a clause includes a limitation or restriction on liability. The availability of insurance is one of the criteria considered when evaluating 'reasonableness' in the UK legislation dealing with unfair contract terms, as set out below.[13]

> (2) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular …to—
>
> (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
> (b) how far it was open to him to cover himself by insurance.

(d) Although this issue is beyond the scope of the current RIS, we also submit that Australia should consider introducing limits of liability for loss of or damage to goods during road transport or storage. Legislation along these lines that applies in other jurisdictions is discussed in the next section.

[13] *Unfair Contract Terms Act 1977*, section 24

8. OTHER JURISDICTIONS' APPROACH TO LIMITING LIABILITY FOR TRANSPORT OPERATORS

The options proposed by the Treasury should be informed by the experience of internationally comparable jurisdictions. New Zealand and most of Europe have statutorily imposed limits of liability for road transport operators. No such legislation exists in Australia and therefore, in order to manage risk, transport operators are required use contractual terms to manage their potential risks/liability.

8.1. New Zealand

In New Zealand, the *Contract and Commercial Law Act 2017* provides for a limitation on the amount of a carrier's liability for damage to goods in transit. The Act provides for four categories of contract, for determining upon whom liability for the loss of or damage to any goods is to fall. These legislative provisions were previously included in the *Carriage of Goods Act 1979.*

Type of contract for carriage	Allocation of risk
At owner's risk	The carrier is not liable for the loss of or damage to any goods, except where the loss or damage is intentionally caused by the carrier. A contract will only be 'at owner's risk' where it is in writing and includes a statement that the carrier is not liable for loss of or damage to the goods, unless the goods are lost or damaged intentionally.
At limited carrier's risk	The carrier is liable for the loss of or damage to any goods in accordance with sections 256 to 260 (and liability is limited, as discussed below).
At declared value risk	The carrier is liable for the loss of or damage to any goods up to an amount specified in the contract and otherwise in accordance with sections 256 to 260.
On declared terms	The carrier is liable for the loss of or damage to any goods in accordance with the specific terms of the contract. Such a contract must be in writing, freely negotiated and signed.

Under the legislation, the type of contract of carriage is determined based on certain specified criteria. If the contract of carriage does not purport to be of a particular type, the contract will be treated as a contract for carriage at limited carrier's risk.

For contracts at limited carrier's risk and declared value risk, section 259 of the Act limits the carrier's liability (subject to certain constraints) to:

(a) $2,000 for each unit of goods lost or damaged in the case of limited carrier's risk; and

(b) the amount specified in the contract, in the case of a contract at declared value risk.

8.2. Europe

More than 50 European countries, including the UK, Austria, Finland, France, Germany, Italy, Spain and Sweden, are contracting parties to the Convention on the Contract for the International Carriage of Goods by Road, which provides for a limitation on liability for road transport carriers when engaging in international road transport of goods.

8.3. Approach to limiting liability for shipping

The current unfair contracts regime does not apply to contracts for the carriage of goods by ship.[14]

In Australia, the approach to limiting liability for maritime transport operators is governed by:

(a) the Hague-Visby Rules, which are given force, in an amended form, in Australia by the *Carriage of Goods by Sea Act 1991* (Cth) – which limits damage to goods claims for individual contractual claims; and

(b) the Convention on Limitation of Liability for Maritime Claims, 1976, given force in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (Cth) which provides a 'global' limit in disasters where the owner faces multiple claims from different sources.

9. CONCLUSION

We would welcome the opportunity to further discuss any aspect of this submission.

Yours faithfully
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[14] *Competition and Consumer Act 2010* (Cth) sch 2 ('ACL') s 28.