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REVIEW OF THE AUSTRALIAN CONSUMER LAW BY CONSUMER AFFAIRS AUSTRALIA AND NEW ZEALAND
SUBMISSION IN RESPONSE TO THE INTERIM REPORT*

Dear sir/madam

Introduction and summary

1. This submission addresses certain aspects of the Interim Report concerning the "unfair contract term" provisions (**UCT provisions**) in Part 2-3 of the *Australian Consumer Law (ACL)*. For convenience, summaries of each submission are provided.

"Overarching questions": *Definition of a "standard form contract"*

Summary of submission

- The requirement that a contract be a "standard form contract" should be removed from the ACL.
- Instead, the test for whether a term is "unfair" should be expanded so that a term must also lack transparency in order to be "unfair". The onus should be on the applicant to prove that a term lacks transparency.

2. Page 117 of the Interim Report asks whether there are any issues that require legislative intervention. One issue is the definition of a standard form contract and whether the UCT provisions should be limited to standard form contracts.

Problems with the current definition of a "standard form contract"

3. The common understanding of a standard form contract is a "contract that is not individually negotiated by the parties but contains the same terms for all transactions of that type."¹ With effect from 12 November 2016, a definition of standard form contract was inserted into the ACL by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth)*. That definition is really no definition at all as it simply refers to the factors in s 27 of the ACL which a court must consider when determining whether a contract is a standard form contract.

* This submission contains the views of the author and does not contain the views of any organisation associated with the author.

¹ Finkelstein, Ray & Hamer, David (ed), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) at 592 and LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (at January 2011). See also Garner, Bryan (ed), *Black's Law Dictionary* (Thomson Reuters, 10th ed, 2014) at 397.

4. Section 27 of the ACL provides as follows.
- (1) *If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.*
 - (2) *In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:*
 - (a) *whether one of the parties has all or most of the bargaining power relating to the transaction;*
 - (b) *whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;*
 - (c) *whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;*
 - (d) *whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);*
 - (e) *whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;*
 - (f) *any other matter prescribed by the regulations.*
5. There are currently no matters prescribed under s 27(2)(f).
6. The absence of a definition for a standard form contract creates uncertainty in two ways. First, it is unclear what level of negotiation is required to convert a standard form contract to a negotiated contract. Is it enough for the respondent in a court proceeding to have negotiated one term in the contract? Would it matter what that particular term was? The answers to these questions are unknown.
7. Second, it is unclear whether the dealings of a respondent with parties other than the applicant (**Third Parties**) should be considered when determining whether a contract is a standard form contract. To illustrate the point, consider this example. Business A enters into a contract with Mr Jones. Business A presents Mr Jones with a pre-prepared contract and gives him no opportunity to negotiate the terms of the contract. Business A has previously presented the same pre-prepared contract to five other customers but gave them an opportunity to negotiate. Does the fact that Business A allowed these five customers an opportunity to negotiate affect whether Business A and Mr Jones entered into a standard form contract? Does it matter which terms Business A was willing to negotiate with the five other customers? There is no clear answer to these questions. A court may certainly consider the dealings with the five other customers since s 27(2) specifically says that it may consider “such matters as it thinks relevant”, but this does not mean they are necessarily relevant and hence should be considered. In my opinion, under the current state of the law, the respondent’s dealings with Third

Parties are relevant to determining whether a contract is a standard form contract and hence should be considered. This is for four reasons.

8. First, the common understanding of a standard form contract above, indicates that dealings with Third Parties are relevant. In the absence of a definition in the ACL, the common understanding of what is a standard form contract should apply. As noted above, the common understanding of a standard form contract is a contract that "contains the same terms for all transactions of that type". Since the same transaction was entered into with Third Parties, we need to consider whether the same terms were used for the transactions with the Third Parties. If we do not consider dealings with Third Parties, the court will simply focus on the dealings between the applicant and the respondent. This could lead to a counterintuitive result, namely, a court could conclude that a particular set of terms is a standard form contract even if those terms were only used in relation to the applicant.
9. Secondly, s 27 of the ACL suggests that the respondent's dealings with Third Parties are relevant. Section 27(1) creates a presumption that a set of terms is a standard form contract unless the respondent establishes otherwise. Section 27(1) refers to a "party to a *proceeding*". Section 27(2), which lists the factors a court must consider when determining whether a set of terms is in standard form, does not refer to a "party to a *proceeding*" but instead simply refers to parties. The fact that s 27(2) does not refer to a "party to a *proceeding*" suggests that a court may consider contracts and transactions that were not entered into by both the applicant and the respondent (i.e. transactions with Third Parties). Since a court *must* consider the factors in s 27(2), it appears that it *must* consider transactions with Third Parties.
10. Thirdly, the explanatory memorandum that introduced the UCT provisions (**Explanatory Memorandum**) suggests that the respondent's dealings with Third Parties are relevant. The Explanatory Memorandum says that the provisions place the onus on the respondent to establish that a set of terms is not a standard form contract because the applicant "will usually only have evidence of the existence of one contract—their own" and "the respondent is best placed to bring evidence regarding the nature of the contracts it uses and the way in which it deals with *other parties* to such contracts".² These two quotes, particularly the reference to "other parties", suggest that Parliament intended a court to consider dealings with Third Parties.
11. Fourthly, the limited case law on this issue suggests that the respondent's dealings with Third Parties are relevant. The only case which has considered the meaning of "standard form contract" in detail for the purposes of the UCT provisions is *Ferme v Kimberley Discovery Cruises Pty Ltd*.³ Jarrett J of the Federal Circuit Court considered whether a contract concerning a holiday cruise was a standard form contract.⁴ His Honour did not specifically address the question of whether the respondent's dealings with Third Parties were relevant but appears to have proceeded on the assumption that they were since his Honour received evidence about the respondent's dealings with "potential travellers", "would-

² Explanatory Memorandum [5.73] (emphasis added).

³ [2015] FCCA 2384. This case was addressed in detail in "A holiday cruise, a cyclone and an unfair contract term: *Ferme v Kimberley Discovery Cruises Pty Ltd*" (2016) 32(2) *Competition and Consumer Law News* 167.

⁴ [2015] FCCA 2384, [33]-[51].

be travellers”, “clients” and “passengers” who appear not to have been the applicants in the immediate case.⁵

12. If dealings with Third Parties are relevant, which appears to be the case, there may be some troublesome consequences.
13. First, it may create a large evidentiary exercise for the respondent if they wish to displace the presumption that a contract is a standard form contract. A respondent may have to present evidence of all its dealings with Third Parties or run the risk of not displacing the presumption. Hence, the respondent may need to produce copies of all contracts entered into with Third Parties as well as obtain oral evidence from Third Parties about the opportunity they were given to negotiate these contracts. This will result in the applicant, respondent and court considering a significant volume of evidence simply to determine whether the UCT provisions apply.
14. Second, it may be difficult for an applicant to know whether it has entered into a standard form contract, because it is unlikely to know about the respondent’s dealings with Third Parties. Hence, an applicant may commence proceedings without much certainty of whether it will establish one of the threshold requirements for invoking the UCT provisions.
15. Third, an applicant may be unable to avail itself of the UCT provisions even though an unclear, pre-prepared contract was offered to it on a take-it-or-leave basis by a respondent that had far greater bargaining power. This situation could arise if the respondent did not deal with Third Parties, or perhaps a certain number of Third Parties, in this way. This outcome would be justified if the UCT provisions were only intended to address wide-spread and systematic unfair practices, but if they are intended to protect individual consumers and small businesses from unfair practices, it is an undesirable outcome.

Solutions to the problem

16. There are three potential solutions to the problems created by the requirement of a standard form contract.

First solution: Keep the requirement of a standard form contract but clarify the scope of the inquiry

17. The first solution would keep the requirement that a contract be a standard form contract but exclude the respondent's dealings with Third Parties from the scope of inquiry. In other words, a court would only consider the dealings between the applicant and the respondent. This would avoid the problems referred to in paragraphs 13 to 15 above. This could be achieved by adding a new sub-section (3) into s 27 as follows.

(3) In determining whether a contract is a standard form contract, a court may only consider the dealings between the parties to the proceeding.

⁵ Ibid [38] and [45]-[50].

18. This solution does not address the problem referred to in paragraph 6 above, being what level of negotiation will convert a contract from a standard form contract to a negotiated contract.

Second solution: Limit the UCT provisions to terms that have not been individually negotiated

19. The second solution would be to:
- (a) remove the concept of a standard form contract by deleting the definition and s 27 from the ACL; and
 - (b) limiting the UCT provisions to terms that have not been individually negotiated between the applicant and the respondent.
20. The onus would be on the applicant to show that the impugned term was not individually negotiated. This is unlikely to be a heavy onus because the applicant will have first-hand knowledge of whether they negotiated the term.
21. Removing the requirement of a standard form contract is not without precedent. The unfair contract term provisions in the *Consumer Rights Act 2015* (UK) do not require an unfair term to be in a standard form contract nor did the provisions that existed in the now-repealed *Fair Trading Act 1999* (Vic) from 9 October 2003 to 1 July 2010.
22. The now-repealed *Unfair Terms in Consumer Contracts Regulations 1999* (UK) did not require an unfair term to be in a standard form contract. Instead, those Regulations only applied to terms that had not been negotiated.⁶
23. Like the first solution, this second solution would limit the court's inquiry to the dealings between the applicant and the respondent and hence avoid the problems referred to in paragraphs 13 to 15 above. It would also avoid having to consider what number of terms must be negotiated in a contract and the nature of those terms in order to convert the contract from a standard form contract to a negotiated contract. This was a problem with the first solution. This problem would be avoided because the court and parties would only need to consider the impugned term.
24. However, there are two problems with this second solution.
- (a) First, there would be uncertainty about what level of dialogue between the parties and amendments to a term would be necessary to amount to "negotiation".
 - (b) Second, an applicant may challenge a term which was not forced on them and which they were well aware of, but which they simply chose not to negotiate. A party could strategically choose not to negotiate terms, which they know that the other party will be unlikely to negotiate, and then challenge them for being unfair.

⁶⁶ *Unfair Terms in Consumer Contracts Regulations 1999* (UK), reg 5(1).

Third solution: Alter the test for unfair so that a term must lack transparency to be unfair

25. The third solution would be to:
- (a) remove the concept of a standard form contract by deleting the definition and s 27 from the ACL; and
 - (b) alter the test for unfair so that a term is only unfair if it has not been brought to the attention of the applicant before they entered into the contract.
26. It is submitted that this approach is preferably to the second solution because it removes the uncertainty surrounding what constitutes "negotiation" and removes the problem of an applicant challenging a term which they deliberately chose not to negotiate (see paragraph 24 above).
27. This third solution proposes a different concept of what is unfair. It treats a term as being "fair" if a party was made aware of it and understood it yet still proceeded to enter into the contract. It is submitted that this concept of "fair" and "unfair" is appropriate since it gives primacy to the free and informed decisions of contracting parties.
28. This third solution would require the test for unfairness contained in s 24(1) of the ACL to be modified. It is submitted that it should be amended as follows.
- (1) *A term of a consumer contract is **unfair** if:*
 - (a) *it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
 - (b) *it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;*
 - (c) it is not transparent; and**
 - ~~(c)~~ **(d) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.**
29. This definition of "transparent" found in s 24(3) should also be amended to ensure that a term has been clearly presented to an applicant prior to entering into the contract. It is submitted that it should be amended as follows:
- (3) *A term is **transparent** if the term is:*
 - (a) *expressed in reasonably plain language; and*
 - (b) *legible; and*
 - (c) *presented clearly **and prominently prior to entering into the contract;** and*

(d) readily available to any party affected by the term **prior to entering into the contract**.

30. The addition of the words "and prominently" are not strictly necessary because "transparent" has been interpreted as allowing a court to consider whether the term is prominent and has been drawn to the applicant's attention.⁷ However, amending the definition of "transparent" will make the requirement of prominence clearer. The concept of prominence is not without precedent. The unfair contract term provisions in the *Consumer Rights Act 2015* (UK) say that a term is "prominent ... if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term."⁸ An "average consumer" is "a consumer who is reasonably well-informed, observant and circumspect."⁹
31. If the concept of "transparent" was incorporated into the definition of unfair, there would be no need for it to continue as a mandatory consideration for a court when it determines whether a term is unfair. As stated in my earlier submission, the concept of "transparent" has little logical relevance to the current test for unfairness and hence should not continue as a mandatory consideration when determining whether a term is unfair.¹⁰
32. In my earlier submission, I warned against adding "transparency" to the test for unfairness because it could result in consumers and small businesses being subject to terms that create substantive unfairness provided those terms were transparent.¹¹ It is submitted that this should not create a problem provided the applicant was clearly aware of the term before entering into the contract and understood its effect. If this is so, the applicant made an informed choice to accept any disadvantage caused by the term. To ensure that the applicant made an informed choice prior to entering the contract, the definition of transparent should be amended as suggested in paragraph 29 above.
33. The onus should be on the applicant to prove that a term is not transparent. This is because the applicant will have first-hand knowledge of the matters necessary to establish that the term was not transparent, such as whether the term was presented clearly and prominently to them prior to entering into the contract. Currently, the onus is on the respondent to prove that a contract is not a standard form contract, but that is because only the respondent will know how they dealt with Third Parties. Hence, the applicant will not have the information necessary to know whether the contract is a standard form contract.

Recommended solution

34. The definition of standard form contract and s 27 should be removed from the ACL because there is no logical reason to only protect consumers and small businesses from unfair terms in standard form contracts. If a term causes unjustifiable hardship and has been inadequately disclosed, it should not matter whether it is in a negotiated contract or a standard form contract. Also, the concept of a

⁷ *ACCC v Chrisco Hampers Australia Limited* [2015] FCA 1204, [75]-[78] and [89]-[90].

⁸ *Consumer Rights Act 2015* (UK), s 64(4).

⁹ *Consumer Rights Act 2015* (UK), s 64(5).

¹⁰ See paragraph 43 of my submission dated 30 April 2016.

¹¹ See paragraph 43 of my submission dated 30 April 2016.

standard form contract creates uncertainty and may lead to large evidentiary investigations by courts and tribunals.

35. For the reasons stated above, it is submitted that the third solution should be adopted.

Question 44: *Should the use of terms previously declared unfair by a court be prohibited?*

Summary of submission

- A term that has previously been declared unfair by a court should not be prohibited.
- A court may make an order restraining a respondent, who has previously entered into a contract containing an unfair term, from enforcing that term. A breach of the order may be punished as a contempt of court. This is an appropriate form of prohibition. Hence, no legislative change is required.

Should the use of terms previously declared "unfair" by a court be prohibited?

36. The ACL should not prohibit a term that has previously been declared "unfair" by a court from being used in the future. If such a prohibition were introduced, it could work in two ways. It is submitted that neither way should be adopted for the reasons set out below.

First way: The prohibition only applies to the respondent in the particular court proceeding

37. The prohibition could be limited to the person who was the respondent in the particular court proceeding where the term was declared "unfair" (**Respondent**). It is submitted that this is undesirable because the Respondent could use the very same term in a different context where the term would not be "unfair". Whether a term is "unfair" depends on the following matters which are specific to the context in which the term is used.

- (a) Whether a term is unfair depends on whether it causes a significant imbalance in the parties' rights and obligations arising under the contract. When determining this, a court must consider "the contract as a whole".¹² It is quite possible that a term, which was unfair in the context of a particular contract used by the Respondent, may be fair in a different contract because the other contracting party has been granted a countervailing right or the Respondent has assumed an additional obligation.
- (b) Whether a term is unfair depends on "the extent to which the term is transparent".¹³ Transparency is a factor which a court *must* consider in all cases. Whether a term is transparent depends on the language of the term, how clearly the term is presented and whether the term was "readily available to any party affected by the term".¹⁴ It is quite possible that a term, which was unfair because it was concealed from a contracting party, may be fair if it was clearly brought to their attention before they entered into the contract.

¹² Section 24(2)(b) of the ACL.

¹³ Section 24(2)(a) of the ACL.

¹⁴ Section 2 of the ACL, definition of "transparent".

- (c) Whether a term is unfair depends on whether it is “reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term”.¹⁵ The circumstances of the Respondent may change after the court’s decision so that a term may become “reasonably necessary” when it previously was not.
- (d) A term may not be declared void for being “unfair” under s 23 of the ACL if it is “required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.”¹⁶ A change to legislation after the court’s decision may move the term beyond the reach of s 23.

38. There have been a small number of decisions in the Federal Court where a term has been declared unfair. These decisions have declared a term to be unfair when used in a particular contract in the past.¹⁷ There have been no decisions which say that a term is unfair in all contexts. It is submitted that this is appropriate since whether a term is unfair depends on its context.

Second way: The prohibition applies to all persons, and not just the Respondent

- 39. Prohibiting the use by any person (i.e. not just the Respondent) of a term that has previously been declared unfair is inappropriate for the reasons referred to in paragraph 37 above. The reason referred to in 37(c) above is of greater significance to a person other than the Respondent because that person is likely to operate in a different environment and due to that different environment, the term may be “reasonably necessary” to protect their legitimate interests.
- 40. If any person is prohibited from using a term that has previously been declared unfair, the courts will have the power to “legislate”. A court will effectively be empowered to ban a term from being used by everyone in Australia. This is inappropriate because a court makes a decision based on the evidence immediately before it and the rights and obligations of the parties immediately before it. It does not consider the broader effects on the economy and business because it does not have the material to do so and that is not its role. Previous and current legislation concerning unfair contract terms support the view that a court should not “legislate” in respect of the use of terms. There are two examples of such previous legislation.
 - (a) First, s 32Z of the now-repealed *Fair Trading Act 1999* (Vic) imposed a penalty if a supplier used a “prescribed unfair term” in relation to a consumer in a standard form contract. Section 32U defined a “prescribed unfair term” as a “term that is prescribed by the regulations to be an unfair term or a term to the like effect”. Hence, the power to generally prohibit a term was not given to the courts but to those who created the regulations. No “prescribed unfair terms” were created by regulations.

¹⁵ Section 24(1)(b) of the ACL.

¹⁶ Section 26(1)(c) of the ACL.

¹⁷ See paragraph 2 of the orders made in *ACCC v Chrisco Hampers Australia Limited (No 3)* [2016] FCA 206; paragraph 1 of the orders made in *ACCC v CLA Trading Pty Ltd* [2016] FCA 377; paragraph 6 of the orders made in *ACCC v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368; and orders made in *ACCC v Bytecard Pty Limited* (Federal Court proceeding number VID301/2013).

(b) Second, the Trade Practices Amendment (Australian Consumer Law) Bill 2009 originally contained provisions that forbid a person from including a "prohibited term" in a consumer contract that was a standard form contract.¹⁸ The use of a "prohibited term" would be punishable by a pecuniary penalty. A "prohibited term" would be prescribed by regulations. These provisions were not ultimately included in the ACL. Once again, the power to generally prohibit a term was not given to the courts but to those who created the regulations.

41. As for current legislation, s 25(1)(n) of the ACL allows the "grey list" of potentially unfair terms to be supplemented by regulations. Section 25(2) provides that before the Governor-General makes a regulation that adds a term to the "grey list", the Minister must consider the broader consequences of doing this, including "the impact on business generally of prescribing that kind of term" and the public interest.¹⁹ It is telling that these matters must be considered for a term that *may* be unfair and not necessarily is "unfair". If these matters must be considered for a term that *may* be unfair, they must surely be considered for a term that *will be* treated as unfair. A court is not well-placed to consider these matters while a Minister, who has the assistance of a government department which can carry out inquiries, is.

42. If the ACL is amended so that all persons are prohibited from using a term that has previously been declared unfair, it is submitted that the ACL should include a provision that allows the Governor-General to make a regulation that overrides the prohibition or overrides it in certain circumstances. Similar to s 25(2), before the Governor-General makes such a regulation, the Minister must consider the broader consequences of the regulation, as set out in s 25(2).

What prohibitions should we have on terms previously declared unfair by a court?

43. If a court declares a term to be unfair where that term occurred in a particular contract or group of identical contracts entered into by the Respondent, the Respondent should be prohibited from attempting to enforce the term in *those particular contracts*. The Respondent should not be prohibited from enforcing the same term (or a similar term) in different contracts. If the prohibition is limited in this way, the Respondent will only be prohibited from attempting to enforce terms that are known to be unfair. A court already has the power to make this sort of prohibition by granting an injunction under s 232 of the ACL. Hence, no amendment to the ACL is required.

44. It is unnecessary for the ACL to set a penalty for breach of an injunction granted under s 232 since this may already be punished as a contempt of court. Depending on the circumstances, a contempt of court may be punished by a fine, sequestration of property or imprisonment.²⁰ In *ACCC v Advanced Medical Institute Pty Limited & Ors* (Federal Court proceeding number VID1113/2010), the ACCC successfully brought a proceeding for contempt of court.²¹ Although the case involved unfair contract terms, the proceeding for contempt did not relate to entering into a contract containing a term that had

¹⁸ See clause 6 of schedule 2 of the Bill.

¹⁹ Section 25(2) of the ACL.

²⁰ *ACCC v Contact Plus Group Pty Ltd (in liq) (No 2)* [2006] FCA 695, [55].

²¹ See orders made on 24 November 2015.

previously been declared unfair; rather, it concerned the making of representations to customers. However, there is no reason why a proceeding for contempt of court cannot be brought for breach of an order restraining a person from enforcing an unfair term.

Question 45: *Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be an appropriate enforcement tool? If so, what should be the scope of this power?*

Question 46: *Are there any unintended consequences, challenges or risks that need to be considered?*

Summary of submission

- ACL regulators should be given *limited* compulsory information-gathering powers to enforce the UCT provisions.
- The powers should be limited to investigating the second element of the test for unfairness, being that the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- If ACL regulators are given compulsory information-gathering powers to investigate the second element, the onus for proving the second element should be on the regulator and not the respondent.
- Even if ACL regulators are not given compulsory information-gathering powers for investigating the second element, they should bear the onus for proving the second element.

45. Compulsory information-gathering powers assist ACL regulators in enforcing the ACL. Against this benefit, we must consider the cost and inconvenience to business of investigations and whether ACL regulators need these powers to enforce all parts of the ACL. It is submitted that ACL regulators only need these powers to investigate the second element of the test for unfairness in the UCT provisions. Since these powers are unnecessary to obtain evidence to prove the other elements of the test for unfairness, they would be an unwarranted cost and inconvenience to business.
46. A term is unfair if:
- (a) the term would cause a significant imbalance in the parties' rights and obligations arising under the contract;
 - (b) the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) they would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
47. To establish the first element of unfairness, an ACL regulator simply needs a copy of the contract. To establish the third element, it simply needs evidence from a victim of the impugned term. An ACL regulator does not need anything from a prospective respondent to establish either of these elements.
48. Information, which is necessary to prove the second element, will not be readily available to an ACL regulator. This is because the information will largely be in the possession of a prospective respondent. For this reason, compulsory information-gathering powers should be granted to ACL regulators in relation to the UCT provisions but:

- (a) the powers should be restricted to investigating whether a term is reasonably necessary to protect the legitimate interests of a prospective respondent; and
 - (b) the regulator (not the respondent) should bear the onus of establishing that the term is not reasonably necessary to protect the legitimate interests of the respondent.
49. Currently, the onus is on the respondent to prove that a term is reasonably necessary to protect a legitimate business interest. There are two justifications for this.
- (a) First, consumers and small businesses are unlikely to know the legitimate interests of a prospective respondent.
 - (b) Second, consumers and small businesses are unlikely to have the resources and expertise to use preliminary discovery procedures, which are available from the courts, to obtain information from a prospective respondent about their legitimate interests.
50. Neither of these justifications applies to an ACL regulator, particularly a regulator that has compulsory information-gathering powers. For this reason, the onus should definitely be placed on the ACL regulator to prove that a term is not reasonably necessary to protect a legitimate interest of the respondent.
51. Even if an ACL regulator is not given the compulsory information-gathering powers described above, they should still bear the onus of establishing a term is not reasonably necessary to protect a legitimate interest of the respondent. Neither of the justifications for placing the onus on the respondent, which are referred to in paragraph 49 above, applies to an ACL regulator. In this regard, it is worth noting the following.
- (a) ACL regulators often carry out inquiries into industries. For example, the ACCC is currently carrying out an inquiry into the Australian dairy industry, a market study of the cattle and beef sector, a market study of the communications sector and a market study of the new car retailing industry. Due to these inquiries, ACL regulators are likely to know about the legitimate interests of businesses and how they are protected. This is not the case for a consumer or small business.
 - (b) An ACL regulator is a sophisticated organisation. It is capable of using the preliminary discovery processes contained in rule 7.23 of the *Federal Court Rules 2011*. This is unlikely to be the case for a consumer or small business. Rule 7.23 allows a prospective applicant to apply to the Federal Court for an order that a prospective respondent produce documents which would assist the prospective applicant to decide whether it has a claim.
 - (c) An ACL regulator is able to obtain information on a voluntary basis due to the gravitas it has. For example, the ACCC carried out an industry review in 2013 concerning unfair

terms in consumer contracts and a further review in 2016 for terms in small business contracts.²² This is not the case for a consumer or small business.

52. Earlier in this submission, I suggested that the test for unfairness be expanded to include a requirement that the impugned term lack transparency. An ACL regulator does not need compulsory information-gathering powers to establish that element because the necessary information will be apparent from the face of the contract or readily available to the victim of the impugned term. For example, the victim will know whether the impugned term was readily available to them prior to entering into the contract.

Question 47: Should the “grey list” of examples of unfair contract terms be expanded?

Summary of submission

- The “grey list” should not be expanded. Instead, it should be removed.
- Instead of the “grey list”, ACL regulators should provide an online list of terms which are not unfair because they are required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

53. It is submitted that the “grey list” should not be expanded; rather, the list should be removed for the following reasons.
54. First, the list serves no practical use because there is no presumption that any term listed in s 25 of the ACL is unfair.²³ Each term must still pass the test for unfairness contained in s 24.
55. Second, having a list simply encourages someone to bring a claim without considering whether the impugned passes the test for unfairness in s 24, whether the term is contained in a standard form contract, whether the term is contained in a “small business contract” or “consumer contract”, whether any exclusions apply to the particular contract (e.g. it is a contract for the transport of goods by ship), and whether the particular term is exempt from the UCT provisions (e.g. the term sets the “upfront price”). As already mentioned, there is no presumption that a term listed in s 25 is unfair and further, the fact that a term is listed in s 25 provides no accurate indication of whether it may be unfair. For example, s 25 lists “a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract”. This term may be perfectly valid depending on what countervailing rights the party, who is not permitted to vary terms, is given and how “transparent” the term is. Also, a unilateral variation term may be specifically permitted under the *National Consumer Credit Code* in some cases. Since there is no presumption that a term in s 25 is unfair and the “grey list” is not an accurate indication of whether a term is unfair, its main purpose is to give parties an inaccurate indication of whether a term is fair or not.
56. Third, it is inconsistent with the ACL to give examples of conduct which may be prohibited. There are no examples of what may constitute a breach of the prohibition on misleading or deceptive conduct in

²² See 'Unfair terms in small business contracts: a review of selected industries' (released on 10 November 2016) and 'Unfair contract terms: industry review outcomes' (released on 14 March 2013).

²³ *ACCC v Chrisco Hampers Australia Limited* [2015] FCA 1204, [44].

s 18 and no list of conduct which may amount to unconscionable conduct. This is because giving examples of what may constitute a contravention is more likely to mislead than assist. The better approach is to list factors which a court is to consider when determining whether there is a contravention. This approach has been adopted for unconscionable conduct (see s 22) and for the UCT provisions (see s 24(2)). Section 24(2) of the UCT provisions currently says that a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole. Perhaps the list of factors in s 24(2) should be expanded if s 25 is removed. Section 32X of the now-repealed *Fair Trading Act 1999* (Vic) said a court may take into account whether the term had a certain object or effect, such as permitting the supplier but not the consumer to vary the terms of the contract. Section 32X of the *Fair Trading Act 1999* was very similar to s 25 of the ACL. Section 32X essentially took the terms that are now given as "examples" in s 25 and said the court may consider whether the impugned term had the object or effect of one of those "examples". The difference between s 32X and s 25 is slight and really one of emphasis. If s 25 were recast in the same format as s 32X, it is likely to create the same problem of giving parties an inaccurate indication of whether a term is unfair. For this reason, it is submitted that s 25 should simply be deleted with no further additions made to the ACL.

57. A preferable form of guidance would be for ACL regulators to provide a list of terms that are not unfair. Section 26(1)(c) of the ACL provides that a term may not be declared void under s 23 for being unfair if the term is "required, or expressly permitted, by a law of the Commonwealth, a State or a Territory." These terms are definitely not unfair, unlike the terms listed in s 25 which may or may not be. It is submitted that ACL regulators should maintain a list of terms that are required or expressly permitted by Commonwealth, State and Territory laws. This list should be publicly available online and in a form that can be readily understood. This will provide consumers and small business with a better understanding of what terms can and cannot be challenged than the list in s 25 of the ACL.

Yours sincerely

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