Law Council
OF AUSTRALIA

Strengthening protections against unfair contract terms

The Treasury

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Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Introductory Comments

1. The Law Council welcomes the opportunity to make a submission to the Treasury regarding the *Strengthening protections against unfair contract terms* consultation including the:

   - Exposure Draft *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms* (**Exposure Draft**); and
   - related Exposure Draft Explanatory Materials (**Exposure Draft Explanatory Materials**).

2. The Exposure Draft proposes amendments to the *Australian Consumer Law* (**ACL**) (schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to implement a set of reforms to the unfair contract terms (**UCT**) regime as agreed by Commonwealth, State and Territory Ministers (**the Consumer Affairs Ministers**) at the Meeting of Ministers for Consumer Affairs in November 2020 (**proposed reforms**).

3. The Law Council is grateful to its Business Law Section (**BLS**) and Legal Practice Section (**LPS**) for contributing to this submission, in particular, the following Committees:

   (a) the Competition and Consumer Committee of the BLS (**Competition and Consumer Committee**);

   (b) the Financial Services Committee of the BLS (**Financial Services Committee**);

   (c) the SME Business Law Committee of the BLS (**SME Committee**); and

   (d) the Australian Consumer Law Committee of the LPS (**ACL Committee**).

4. The Law Council has also received substantive input from several of its Constituent Bodies, namely the Queensland Law Society (**QLS**), the Law Society of South Australia (**LSSA**), and Law Institute of Victoria (**LIV**).

5. Among each of these stakeholders there is a diversity of views across several aspects of the proposed reforms. In the limited time available in which to respond, it has not been possible to reconcile all divergent views, and therefore the Law Council provides the perspectives of each of the contributing stakeholders separately for consideration by Treasury.

6. However, there is consensus on two key issues which both relate to practical implementation of, and transition to, the proposed reforms should they proceed in their current (or substantially similar) form:

   (a) the need for an increased transition and implementation period; and

   (b) the need for adequate regulatory guidance and education programs to promote awareness and certainty for all parties.

Increased transition period

7. A key element of the Decision Regulation Impact Statement (**DRIS**) considered by the Consumer Affairs Ministers was that the reforms should involve a transition

period during which regulators and other parties would provide appropriate guidance and education to assist contract-issuing parties, small businesses and consumers.[1]

8. As stated in the Exposure Draft Explanatory Materials:

> *The unfair contract terms amendments will apply to new or renewed standard form contracts from the date of commencement of Schedule 1 to the Bill. Schedule 1 to the Bill will commence on the day after the end of the period of 6 months beginning on the day the Bill receives Royal Assent. A term of a contract varied after the commencement of Schedule 1 to the Bill will also be covered by the unfair contract terms regime.*[2]

9. The Law Council considers this transition period to be insufficient and submits that a transition period of at least 12 months would be more appropriate.

10. The Law Council notes that as a result of the proposed changes to the small business definition thresholds and proposed removal of the contract value threshold, a number of small businesses will be subject to the UCT regime for the first time and, for businesses already subject to the regime, a larger number of contracts will fall within the scope of the regime for the first time and require review and potential amendment. In the Law Council's view, an increased transition period is particularly necessary to allow these businesses to, among other things, seek legal advice, engage with regulatory guidance or education materials and implement any necessary changes to contracting practices prior to the commencement of the proposed reforms.

11. Many Australian businesses, including many small-to-medium businesses, have been significantly affected by the COVID-19 pandemic and are grappling with a high degree of financial uncertainty in the current economic climate as well as logistical challenges presented by restrictions on movement and gathering. The Law Council notes that the beginning of the operation of the proposed reforms will coincide with key periods of the Australian economic recovery from the pandemic. In the interest of facilitating this recovery and supporting affected businesses, the Law Council submits that a transition period of at least 12 months is desirable.

12. The proposed reforms are substantial and include potentially significant pecuniary penalties for breaches. Should the proposed measures be implemented, in the Law Council's view, business should be given sufficient transition time to properly prepare for the commencement of the proposed reforms.

Education program and guidance material

13. In the Law Council's view, due to the potentially broad and costly consequences of the proposed changes to the regime, in particular the introduction of potentially significant pecuniary penalties for breaches, it is critical that regulators provide clear guidance to industries impacted by the proposed measures and implement substantive education programs. Such programs are critical to ensuring certainty of application of the provisions assisting business and their advisors in complying the proposed reforms.

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1 The Treasury (Cth), Enhancements to Unfair Contract Term Protections (Regulation Impact Statement for Decision, September 2020) 48, 78 ('*Decision Regulation Impact Statement*').

2 Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms, Exposure Draft Explanatory Materials, [1.83] ('*Exposure Draft Explanatory Materials*').

14. The Law Council does not consider the proposed transition period to be sufficient for the regulators to develop and properly consult on guidance materials. Final guidance material must also be delivered with sufficient notice to allow business to properly implement responses to the guidance material. Ideally, there should be at least three months (and preferably six months) between the date of release of new or updated regulatory guidance and the commencement date of new laws to which the guidance relates. In this regard, the Law Council reiterates its position that a transition period of at least 12 months is required.

15. The QLS, in its submission to the Treasury's previous consultation in relation to Enhancements to Unfair Contract Term Protections, provided several suggestions in relation to the implementation of an education program and development of guidance material. The QLS refers the Treasury to page 4 and 5 of its previous submission.

General concerns

16. There is also reasonably widespread concern among contributors to this submission that if penalties are to be imposed for reliance on unfair contract terms, there be steps taken to encourage:

    (a) certainty of conclusions drawn in respect of findings of unfair contract terms, including perhaps a warning system so that parties are not unfairly subjected to potential prosecution; and

    (b) that the provisions for the imposition and calculation of penalties not be applied so as to produce disproportionate penalties.

    More detail as to these concerns are set out later in this submission.

Competition and Consumer Law Committee (Business Law Section)

Introduction

17. The Competition and Consumer Committee is a committee of the BLS and provides a forum through which lawyers, economists, academics and other interested parties can discuss competition and consumer law issues. The Competition and Consumer Committee meets regularly to discuss legal developments, policy issues and potential areas of competition and consumer law reform. It also actively participates in law reform processes such as the current consultation. This section reflects the views of the Competition and Consumer Committee.

18. The UCT protections for consumers have been in operation for more than ten years, with protections being extended to small business and insurance contracts over time. In November 2020, the Consumer Affairs Ministers reached agreement to further reform the UCT regime following a consultation process.[3] Following this agreement, on 23 August 2021, the Treasury released Exposure Draft which proposes, *inter alia*, to:

[3] Legislative and Governance Forum on Consumer Affairs, Joint Communique, Minutes of Meeting of Ministers for Consumer Affairs (Meeting 12, 6 November 2020).

- make UCTs unlawful and give courts the power to impose a civil pecuniary penalty for contravention of the UCT regime;
- create a rebuttable presumption provision for UCTs used in similar circumstances; and
- award remedies in relation to loss that 'may' be caused by an unfair contract term.[4]

19. The Competition and Consumer Committee does not support the proposed mechanism for the introduction of pecuniary penalties or the rebuttable presumption in the Exposure Draft, which reverses the onus of proof in proceedings in certain circumstances where an impugned term in a standard form contract is the same or 'substantially similar' in effect as a term previously declared unfair. Nor does the Competition and Consumer Committee support the imposition of a new, lower threshold for the provision of remedies, which will cause additional confusion, delay, and expense for parties. The Competition and Consumer Committee's submission will develop each of these positions, first in relation to the proposal to introduce civil pecuniary penalties; secondly in relation to the proposed rebuttable presumption; and thirdly in relation to the imposition of a new remedies threshold.

Civil pecuniary penalties for contraventions of the UCT regime

Previous submissions of the Competition and Consumer Committee

20. During the previous consultation period, the Competition and Consumer Committee made submissions to the Treasury that the inclusion of unfair terms in standard form contracts should not be illegal and subject to penalties.[5] The reason for this view was due to the lack of practical guidance about what makes a term 'unfair' under the ACL and the ASIC Act,[6] and the significant degree of subjectivity that is inherent in the test for whether a particular term is, in the particular circumstances, unfair.

21. The Competition and Consumer Committee accepted that there may be concerns about the ongoing use of unfair terms in certain industries. However, the Competition and Consumer Committee considered that the introduction of financial penalties would represent regulatory overreach and was not the appropriate regulatory response to address this issue.[7] Further, the submission from the Australian Competition and Consumer Commission (**ACCC**) that companies were changing provisions before the ACCC had the chance to take them to court, suggested to the Competition and Consumer Committee that the current regime was working, and that further enforcement mechanisms were not required.[8] Regardless of the primary submission, the Competition and Consumer Committee submitted that if financial penalties were to be introduced, steps should be taken to ensure that they were only sought in exceptional circumstances. For instance, penalties should not be available unless the following steps have been taken:

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4 Treasury Laws Amendment (Measures 4 for a later sitting) Bill 2021: Unfair contract terms reforms, Exposure Draft ('*Exposure Draft*').

5 Law Council of Australia, Submission to the Treasury (Cth), *Enhancements to Unfair Contract Terms Protections* (6 April 2020) [12] ('*Previous Law Council Submission*').

6 Throughout this submission, for ease of expression the body of the submission will refer to the *Australian Consumer Law* ('*ACL*') (sch 2 to the *Competition and Consumer Act 2010* (Cth) ('*CCA*')) provision, and the corresponding *Australian Securities and Investments Commission Act* 2001 (Cth) ('*ASIC Act*') provision will be footnoted.

7 Previous Law Council Submission, [14].

8 Ibid [12].

- warnings have been provided to the relevant party beforehand by the relevant regulatory agency;
- the party has been given an appropriate and reasonable opportunity to consider their position and amend the relevant terms; and
- despite those warnings, the party has failed to make the necessary amendments to address the regulator's concerns within a reasonable time.[9]

22. The Competition and Consumer Committee is of the view that the current Exposure Draft does not include a framework that provides for any of these 'steps' to enliven the availability of penalties.

Introduction of civil penalties with the appropriate framework

23. The DRIS, issued following the consultation period by Treasury, recommended that pecuniary penalties be introduced to provide a strong deterrent against contract-issuing parties including UCTs in standard form contracts from the outset, and encourage parties to be proactive in amending any likely UCTs in existing standard form contracts, and cooperate with regulators to address any concerns raised.[10] The DRIS proposed that the reforms allow for courts to impose civil pecuniary penalties for contraventions and provide the courts with the power to determine the appropriate penalty amount, up to the maximum set under the law. In imposing a civil pecuniary penalty, the DRIS highlighted that courts would need to be satisfied that imposing a penalty is necessary and the amount appropriate, depending on the circumstances of the individual case.[11]

24. Importantly, however, the DRIS also highlighted that the introduction of civil pecuniary penalties would need to go hand in hand with the following:

- exercise of regulatory powers in a way that is proportionate to the harm from the conduct and in accordance with general principles of deterrence, meaning there will need to focus on industry engagement and compliance activities to provide businesses with an opportunity to take the necessary steps to amend their contracts to comply with the law;
- a transition period during which regulators and other parties would provide appropriate guidance and education to assist contract-issuing parties, small businesses and consumers in order to rectify the insufficiency of clear guidance on what constitutes a UCT; and
- guidance that would assist in distinguishing between terms that may be 'unfair' and terms which, because they are reasonably necessary to protect the legitimate interests of the contract-issuing party, would not be considered 'unfair', to resolve existing uncertainties in the regime.[12]

25. As discussed below, in the Competition and Consumer Committee's view, the Exposure Draft provides a framework that is inconsistent with the general principles of deterrence and the Exposure Draft Explanatory Materials do not provide the required guidance to ensure compliance can be achieved.

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9 Ibid [16].

10 Decision Regulation Impact Statement, 47.

11 Ibid 6.

12 Ibid 47-48.

The Exposure Draft

26. The Exposure Draft which includes the proposed UCT reforms, operates, *inter alia*, to:

    (a) provide courts with the power to impose a pecuniary penalty for a contravention of the prohibition on entering into or proposing a standard form contract containing an unfair term, or applying or relying on an unfair term in a standard form contract, in addition to the current ability to declare such a term 'unfair';

    (b) establish a power for the court to make orders that apply to any existing consumer or small business standard form contract (whether or not that contract is put before the court) that contains an unfair contract term that is the same or substantially similar to a term the court has declared to be an unfair contract term; and

    (c) create a new rebuttable presumption that terms whose effect is substantially similar to a term that has been found to be unfair that are subsequently included in relevant contracts in the same industry, are unfair.[13]

27. Each of the above proposed reforms combines to create significant uncertainties for businesses.

28. While the issue of the appropriate level for a proposed maximum civil pecuniary penalty was not addressed in the DRIS, it is now proposed that the maximum penalty available for each contravention is to be determined with reference to section 224 of the ACL and its ASIC Act equivalent (**ACL penalty regime**).[14] The ACL penalty regime provides the following maximum civil pecuniary penalty:

    - for businesses, the greater of A$10 million, three times the value of any benefit from the contravention and (if the value of the benefit cannot be determined) 10 per cent of Australian turnover in the 12 month period prior to the contravention; and
    - for individuals, $500,000.

29. Neither the Exposure Draft, nor the Exposure Draft Explanatory Materials, provides specific guidance on how the ACL penalty regime will be applied in respect of UCT contraventions.

30. Of the three key initiatives that the DRIS identified as being required alongside the introduction of penalties (outlined above at paragraphs 23-25), the only one that has been included in the Exposure Draft is the inclusion of a six-month transition period.[15] The transition framework also includes a carve-out that means that the new reforms only apply to new or renewed contracts, and variations that postdate the introduction of the legislation.[16]

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13 Exposure Draft Explanatory Materials, [1.12].

14 Exposure Draft, sch 1 items 9 and 25 (namely, proposed s 224(1)(a)(iia) of the ACL and s 12GBA(6)(aa) of the ASIC Act); Exposure Draft Explanatory Materials, [1.19].

15 Exposure Draft, sch 1 items 71 and 72 (namely, s 304 of the ACL and s 350 of the ASIC Act); Exposure Draft Explanatory Materials, [1.83].

16 Exposure Draft, sch 1 items 71 and 72 (namely, s 304 of the ACL and s 350 of the ASIC Act); Exposure Draft Explanatory Materials, [1.83].

Approach to the number of contraventions and quantum of penalties

31. The Exposure Draft, as indicated in the Exposure Draft Explanatory Materials, provides for two separate prohibitions, namely, that a person will be in breach of the law if they:

    (a) enter into a contract in which they propose an unfair term, where that contract is a standard form consumer or small business contract; and/or

    (b) apply or rely on (or purport to apply or rely on) an unfair term of a standard form consumer or small business contract.

32. The Exposure Draft Explanatory Materials note that:

    - in respect of (a) immediately above, a person can breach the prohibition multiple times in a single contract as each individual unfair term contained in a contract proposed by the person is considered a separate contravention of the prohibitions;[17] and
    - in respect of (b) immediately above, a person can breach the prohibition multiple times in relation to the same contract or even in relation to the same unfair term of the contract if they apply or rely on that term on multiple occasions,[18]

    (together, the **multiple contraventions model**).

33. When the above is considered in light of the ACL penalty regime, the proposed framework will likely, in the Competition and Consumer Committee's view, operate to expose businesses to a significant maximum civil pecuniary penalty, which might be excessive and create significant uncertainty for businesses for the reasons explained below.

Limitations of the Exposure Draft in relation to penalties

Key issues with draft legislation

34. The Competition and Consumer Committee considers that there are a multitude of issues with the civil pecuniary penalty framework as currently conceived. These are:

    (a) contrary to the observations in the DRIS[19], the explanatory framework does not provide appropriate guidance and further education to assist businesses to distinguish between terms that may be 'unfair' and terms which, because they are reasonably necessary to protect the legitimate interests of the contract-issuing party, would not be considered 'unfair';

    (b) for this and other reasons explained in Competition and Consumer Committee's submission, the proposed legislation, in respect of the civil pecuniary penalties, does not achieve its intended deterrent function due to an absence of certainty; and

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17 Exposure Draft, sch 1 items 1 and 2 (namely, proposed s 23(2B) of the ACL and s 12BF(2B) of the ASIC Act); Exposure Draft Explanatory Materials, [1.16].

18 Exposure Draft, sch 1 items 1 and 2 (namely, proposed s 23(2C) of the ACL and s 12BF(2C) of the ASIC Act); Exposure Draft Explanatory Materials, [1.18].

19 Decision Regulation Impact Statement, 48.

(c) there is a risk of excessive maximum penalties arising from the multiple contraventions model that are disproportionate to the conduct where UCTs result in many individual 'contraventions'.

In its present form, the Exposure Draft does not achieve its intended deterrent function

35. The Competition and Consumer Committee acknowledges that deterrence must play a primary role in the assessment of the appropriate penalty for contravening conduct.[20] The DRIS outlined that general deterrence needed to be a priority for any proposed UCT reform. The three principles of deterrence which impact the efficacy of a civil pecuniary penalty are that potential contraveners must:

    (a) have a high degree of certainty that the conduct will in fact be a contravention of the relevant legislative provision and attract a civil pecuniary penalty (**certainty**);

    (b) perceive the associated penalty for the contravention as more than a cost of doing business, while also being proportionate to the harm suffered (**severity**);[21] and

    (c) believe that they are at a real risk of being caught (**detection**).[22]

36. As identified in the DRIS, the existing UCT framework does contain a degree of uncertainty due to the subjective nature of the test for 'unfairness', which would need to be addressed (through guidance and education activities) alongside the introduction of penalties so that deterrence could be achieved. The subjectivity that creates the uncertainty is, to a degree, necessary to have a robust model that caters for the various differences in contracts, terms and parties that are intended to be covered and protected by the UCT regime.[23] However, the proposed legislation does not balance the need for a robust system with the need for certainty to achieve the intended deterrent effect of the penalties. The Exposure Draft does not propose changes that provide for greater guidance on terms that may be 'unfair' and terms which, because they are reasonably necessary to protect the legitimate interests of the contract-issuing party, would not be considered 'unfair'. For the reasons expressed in the Competition and Consumer Committee's previous submission,[24] this is a significant shortcoming in the current proposal.

37. Additionally, the proposed Exposure Draft, by virtue of the multiple contraventions model, does not appropriately balance the interest in penalties for contraventions being 'more than a cost of doing business', with the principle that the penalty ought to be proportionate to the harm suffered by the counterparty. See below for further details about the imbalance in the severity of the civil pecuniary penalty proposed by the Exposure Draft.

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20 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [65].

21 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, [62]-[63], [68]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [65]-[66].

22 Risk of detection is not a principle that can be impacted by the Exposure Draft. Rather, it relies on the investigative and enforcement powers of the ACCC and ASIC, and the regulator's utilisation of those powers. The Competition and Consumer Committee does not propose to deal with that issue.

23 There is a role for the ACCC and ASIC to provide education and guidance materials to alleviate a degree of uncertainty.

24 Previous Law Council Submission, [7]-[9], and response to question 5 (A3-A5).

The multiple contraventions model and risk of excessive and disproportionate maximum penalties

38. The Exposure Draft exposes the contravening party to a significant maximum penalty in circumstances where UCTs result in many individual 'contraventions' (based on the number of contracts with consumers or small businesses, which is likely to be significant considering the use of a standard form contract) as part of the multiple contraventions model.

39. The Competition and Consumer Committee notes that the phrase in the Exposure Draft, 'in respect of each term that is unfair and that the person proposed',[25] carries with it a considerable burden if the court interprets this, consistent with the guidance provided in the Exposure Draft Explanatory Materials, as allowing for multiple contraventions arising from one term in a standard form contract that has been entered into, or proposed in contracts, with a significant number of consumers or small businesses. Additionally, the prohibition at proposed subsection 23(2C) of the ACL[26] provides for multiple breaches in relation to the same contract or even in relation to the same unfair term of the contract, if the contravener applies or relies on that term on multiple occasions.[27]

40. Due to the propensity for the framework to give rise to multiple contraventions (and therefore multiple penalties), this framework will result in a maximum pecuniary penalty being available that is disproportionate to the relevant conduct or harm suffered. In circumstances where the court has already applied civil pecuniary penalties for contraventions calculated per person,[28] the multiple contraventions model might result in a single unfair term (contained in standard form contracts entered into, proposed, applied or relied upon on hundreds or thousands of occasions) giving rise to hundreds or thousands or contraventions, each subject to maximum penalties.

41. For example, taking the facts alleged in a current case where the ACCC alleges that there were nine types of standard form contracts containing 173 UCTs,[29] the multiple contraventions model might result in a penalty for each individual unfair term (that is, 173 contraventions), multiplied by the number of times each of the nine contracts was entered into, or each of the 173 terms were applied or relied upon, going back to 12 November 2016 (being the date on which the relevant statutory provisions commenced).[30]

42. Moreover, a relatively small number of unfair terms can affect a large number of contracts. For example, in *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224, eight impugned terms affected 26,000 contracts entered into or renewed since 12 November 2016.[31] The multiple

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25 Exposure Draft, sch 1 items 1 and 2 (namely, proposed s 23(2C) of the ACL and s 12BF(2C) of the ASIC Act); Exposure Draft Explanatory Materials, [1.17].

26 Exposure Draft, ASIC Act proposed s 12BF(2)(2C).

27 Exposure Draft, sch 1 items 1 and 2 (namely, proposed s 23(2C) of the ACL and s 12BF(2C) of the ASIC Act); Exposure Draft Explanatory Materials, at [1.18].

28 See, eg, per worker in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 11.

29 *Australian Competition and Consumer Commission v Fuji Xerox Australia Pty Ltd* (NSD1156/2020). See also Australian Competition and Consumer Commission, 'Fuji Xerox in court over alleged unfair contract terms' (Media Release, 22 October 2020) <https://www.accc.gov.au/media-release/fuji-xerox-in-court-over-alleged-unfair-contract-terms>.

30 *Australian Competition and Consumer Commission v Fuji Xerox Australia Pty Ltd* [2021] FCA 153, [7].

31 Ibid [43]-[44].

contraventions model might treat these as 208,000 contraventions, each subject to maximum pecuniary penalties, and reliant on the court's discretion (having regard to various penalty principles) to determine the appropriate penalty. This means:

(a) a maximum penalty would be the company's total annual turnover multiplied by 20,800; and

(b) if the company had turnover of $1 billion, the maximum penalty would be over 20 trillion dollars (i.e. 14 times Australia's entire annual gross domestic product).

43. However, the Competition and Consumer Committee notes that the Exposure Draft Explanatory Materials do not offer meaningful guidance as to how the court is to reach a civil pecuniary penalty proportionate to the conduct, in light of the multiple contraventions model and the fact that such guidance as is offered appears to encourage findings of multiple contraventions.[32] In assessing penalties a judge must have some regard to the maximum penalty even if the totality principle is also applied. But it is unclear how a company board assesses solvency risk if it is facing proceedings with these kinds of maximum penalties as a penalty of even a tiny fraction of the maximum would by definition bankrupt the company.

44. To alleviate the risk that the penalties for breaches of the UCT regime will be oppressive, the Competition and Consumer Committee submits the UCT regime should not be amended to include the multiple contraventions model. Rather, eschewing a multiple contraventions model in favour of the warnings-based approach will deter parties from engaging in conduct in breach of the UCT regime and signal to the court that it retains the discretion to determine the appropriate maximum penalty in the circumstances.

The proposed penalty regime does not have regard to the particular circumstances of each case

45. A key feature of the existing UCT regime is that it requires the court to have regard to the particular circumstances of the disadvantaged counterparty in forming a view as to whether a term is unfair. For example, paragraph 24(1)(a) of the ACL requires the court to have regard to whether the terms would cause a significant imbalance in the parties' rights and obligations arising under the contract, and paragraph 27(2)(e) of the ACL requires the court to consider the specific characteristics of another party, both of which are fact-specific considerations.

46. The proposed penalty regime, however, does not appear to have regard to the particular circumstances of the disadvantaged counterparty. This is because, on the drafting of proposed subsections 23(2A), (2B) and (2C) of the ACL,[33] once a 'term of the contract is unfair' or 'the term is unfair', then each contract entered into, and each instance of the term being applied or relied upon, is subject to civil pecuniary penalties without further regard to the factual circumstances of each contract or each instance. It is not apparent how a Court is to determine appropriate penalties in a particular case, having regard to penalty principles such as proportionality, if the seriousness of each individual contravention (having regard to the circumstances in which each contract was entered into or each term was applied or relied on) is not in evidence before the Court.

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[32] Exposure Draft, sch 1 items 1 and 2 (namely, proposed s 23(2B) and(2C) of the ACL, and s 12BF(2B) and (2C) of the ASIC Act); Exposure Draft Explanatory Materials, [1.17]-[1.18].

[33] Exposure Draft, ASIC Act proposed ss 12BF(2A), (2B) and (2C).

47. Further, it is unclear what 'purport to apply or rely on' a contractual right means and the phrase is without useful judicial or legislative guidance. It is also unclear whether a term must be shown to be a UCT at the time of purported application, or the time the contract was entered into. One solution may be to replace that phrase with '*purports to give effect to'*. This phrase has an established meaning and will achieve the same effect.

Resolving the uncertainty, without impeding the necessary subjectivity in the test

48. While retaining the robustness of the current framework, the Competition and Consumer Committee submits that, should a penalty regime be considered appropriate, the introduction of a warning-based penalty structure would aid in providing clarity as to what conduct is likely to contravene the provisions, and provide an opportunity for affected businesses to amend inadvertent breaches without severe penalties.

49. The warning-based penalty system protects the robustness of the system, while enabling greater efficacy in deterrence by engaging the appropriate enforcement structure. It promotes a measured approach that is suitable for allowing big and small businesses the opportunity to comply with the UCT regime, while not permitting businesses to avoid compliance or prevent the ACCC from seeking appropriate penalties for non-compliance. A warning structure is also consistent with observations in the DRIS that regulators would provide businesses with an opportunity to take the necessary steps to amend their contracts to comply with the law.[34] As previously submitted by the Competition and Consumer Committee, it is prudent that regard should be had to the prior conduct of the contravening party through the introduction of a warning-based system. The following proposal also takes account of the proposed operation of the 'same or substantially similar' provisions to deem certain terms unfair and subject to penalties, as outlined in the Exposure Draft and Exposure Draft Explanatory Materials.

50. Accordingly, the Competition and Consumer Committee submits that penalties should only be available in the following exceptional circumstances:

    (a) warnings have been provided beforehand (see further detail below);

    (b) the party has been given an appropriate and reasonable opportunity to consider their position and amend the relevant terms; and

    (c) despite those warnings, the party has failed to make the necessary amendments to address the regulator's concerns within a reasonable time.

51. As a result of the introduction of the 'same or substantially similar terms' provisions, there are a number of issues which arise in relation to the warnings-based system that was proposed by the Competition and Consumer Committee in the initial submissions.[35] To appropriately accommodate these issues, the Competition and Consumer Committee proposes the following '**proposed warning system**':

    (a) the following terms (**prescribed terms**) should be treated as though warnings have already been provided (effectively treated as terms that are deemed to be unfair and subject to civil pecuniary penalties if proposed in standard form contracts, or applied or relied on):

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[34] Decision Regulation Impact Statement, 48.

[35] Previous Law Council Submission, [16].

(i) the terms set out in section 25 of the ACL;

(ii) terms subject to declarations or other orders made pursuant to section 250 of the ACL,[36]or proposed sections 243A or 243B of the ACL;[37]

(b) any other terms (defined as any term that is not a 'prescribed term') should be subject to the warning system in relation to normative conduct; and

(c) warnings should be made public, with a reasoned statement as to what makes the term unfair (including the circumstances of the contract as a whole) and be effective against other parties in addition to the relevant party, in order to provide greater clarity on the operation of the regime.

52. In effect, the prescribed terms listed at paragraph (a) above would not be subject to any further warning. These terms represent the kinds of terms that may be unfair, as identified by Parliament and the courts. In relation to other types of terms (the 'other terms' mentioned at paragraph (b) above), once a warning has been provided in relation to other terms, contracting parties will be on notice that such a term may be unfair. Accordingly, by implementing the proposed warning system, the proposed framework can continue to be robust, while also providing certainty, so that imposition of penalties can achieve the desired deterrent effect. The proposed warning system, by the operation of the prescribed terms and the effectiveness of public warnings against other parties, operates to ensure that parties can no longer take a reactive approach to compliance with the UCT regime.

Rebuttable presumption that a term is unfair

Summary of the Competition and Consumer Committee's position

53. The Competition and Consumer Committee considers that there should not be a rebuttable presumption that a term is unfair. If there is to be any rebuttable presumption, its operation should be limited to where the same term (but not one 'substantially similar' in effect) has previously been declared to be unfair, in a contract involving the same party that proposed the original term or a related body corporate, and where the contract is for the provision of the same or a substantially similar product or services by that same party or a related body corporate.

The proposed presumption

54. Part 3 of Schedule 1 to the Exposure Draft proposes new subsection 24(5) of the ACL,[38] the effect of which is that a term in a standard form contract is presumed to be unfair under the ACL or ASIC Act if the following conditions are all satisfied:

(a) it is established in a proceeding in a court (**First Proceeding**) that a term of a contract is unfair (**Unfair Term**);

(b) a party to another proceeding in a court (**Second Proceeding**) alleges that a term of another contract is unfair;

(c) the term referred to in paragraph (b) is the same, or substantially similar, in effect to the term referred to in paragraph (a); and

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[36] ASIC Act s 12GND.

[37] Exposure Draft, ASIC Act proposed ss 12GNE or 12GNF.

[38] ASIC Act s 12BG(5).

(d) either:

(i) the person who proposed the term (**Provider**) referred to in paragraph (b) is the same person who proposed the term referred to in paragraph (a); or

(ii) the contract referred to in paragraph (b) was entered into in the same industry as the contract referred to in paragraph (a),

unless another party to the Second Proceeding proves that it is not unfair.

55. The legislative intent for the rebuttable presumption is described in the Exposure Draft Explanatory Materials as:

> *encourag[ing] those who have been found to have used unfair contract terms in some of their standard form contracts to review and amend the same or similar terms they have used in other standard form contracts they have issued. It also encourages parties within an industry, to review and amend terms in standard form contracts that are the same or have a substantially similar effect as terms that have been found by a court to be unfair, where necessary to do so.*[39]

Issues with the proposed rebuttable presumption

56. As a matter of both policy and practical operation, the Competition and Consumer Committee considers that there is no justification for a rebuttable presumption of the kind contemplated by the Exposure Draft.

57. It is a 'cardinal' principle of Australia's justice system that, in criminal matters, the Crown must prove the guilt of an accused person.[40] In civil matters, as is the case here, the burden of proof will generally lie on the plaintiff or applicant on all essential elements of the cause of action,[41] which in the present case necessarily includes whether the impugned term is unfair.

58. The Exposure Draft Explanatory Materials say the rebuttable presumption is intended to encourage companies found to have used UCTs, and those in the same industry, to review their standard form contracts for the same or similar terms. That purpose would be achieved by the specific and general deterrence inherent in punishing contraventions with appropriate pecuniary penalties,[42] noting the Competition and Consumer Committee's submission that the penalties mechanism in the Exposure Draft should eschew the multiple contraventions model and include a warning system, as noted at paragraphs 48-52 above.

59. However, as drafted it appears that the rebuttable presumption seeks to use prior judicial declarations of unfairness as normative standards which can be applied across and between industries.

60. This is firmly at odds with the UCT regime, where a finding of unfairness inherently turns on the unique facts and context of the relevant contract, parties and term. It is well-established that an assessment of whether a term is unfair under section 24 of

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39 Exposure Draft Explanatory Materials, [1.42]

40 *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

41 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

42 See, eg, *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49.

the ACL is an 'evaluative process'.[43] In particular, the Federal Court has observed that:

> *for a term to be 'unfair' requires consideration of the circumstances of the counterparties to each contract. Accordingly, while a particular form of words might be unfair in respect of one customer, it may not be in respect of another.*[44]

61. In so saying, the Court recognised that the same term may or may not be unfair for different customers of the *same company*, let alone a term in an entirely unrelated contract with entirely unrelated counterparties that is merely in the same industry as the contract containing the impugned term.

62. This concern is compounded when one considers the rebuttable presumption is also envisaged to apply between entirely distinct 'industries', linked only by the identity of a party to the contract. The rebuttable presumption would apply to the same term used by a company operating in two distinct sectors (for instance, the homewares and fertiliser 'industries'), notwithstanding the clear factual and relational differences that may exist between distinct business sectors.

63. Moreover, a Court must assess whether a term is unfair taking into account the extent to which the term is transparent and the contract as a whole. In construing the whole contract, 'not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question'.[45]

64. Each of these enquiries are highly fact-specific. It is reasonable to expect that, where the same term appears in two contracts offered by two different Providers, one Provider may have 'legitimate interests' justifying the term; one contract, interpreted as a whole, may mitigate the effect of the term such that it is not 'unfair'; or that the terms, while 'substantially similar', differ in their transparency (for example, as to how readily available they are to customers.[46] Similarly, where the same term appears in two contracts offered by the same Provider but in different industries, the Provider's 'legitimate interests' may differ markedly between industries, as may the surrounding contractual terms. These risks are heightened by draft subparagraph 37(5)(d)(ii), which extends the deeming provision to contracts 'entered into in the same industry' as the relevant contract in the First Proceeding. For example, a particular provision of an agreement in a standard form contract in the telecommunications industry may not be necessary to protect the legitimate interests of a major provider, but may be necessary to protect the legitimate interests of smaller providers (or vice versa).

65. Moreover, the rebuttable presumption is characterised by a range of features which are apt to give rise to legal uncertainty and procedural delay.

66. In particular, the court would be required to determine the question of whether the contract is in the 'same industry', which is a new concept in the ACL and ASIC Act. While this may be easy to determine in some instances (i.e. industries already

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43 *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436, [181]; see also *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409, [430].

44 *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2020] FCA 1409, [342].

45 *Jetstar Airways Pty Ltd v Free* (2008) 30 VAR 295; [2008] VSC 539 at [128].

46 ACL s 24(3)(d)).

characterised by voluntary codes), it is likely to be difficult in others, and may involve extensive submissions and expert economic evidence.

67. The practical consequence of these new concepts is that parties to proceedings are likely to incur significant legal costs making submissions and adducing evidence about the factual similarities between two terms, in circumstances where the UCT regime already requires an assessment of the unfairness of the term in and of itself.

68. It must also be noted that an existing rebuttable presumption exists in subsection 24(4) ACL,[47] which places the onus on a respondent to prove that a term is reasonably necessary in order to protect its legitimate interests. Taken together, the cumulative effect of existing rebuttable presumption in subsection 24(4) ACL[48] and new proposed subsection 25(5) ACL[49] would be to grant applicants a clear procedural advantage, in circumstances where it is unclear whether the severity of the contravention would be sufficient in all cases to warrant this departure from a key normative standard and safeguard in the justice system.

Scope of the presumption is inconsistent with other provisions of the ACL and ASIC Act and principles of contractual construction

69. The scope of the proposed presumption in Part 3 of Schedule 1 to the Exposure Draft is distinguishable from the existing, narrower presumptions in the ACL (and equivalent provisions of the ASIC Act) and appears inconsistent with the well-established approach to contractual interpretation.

70. The Exposure Draft Explanatory Materials provide that: '[t]he rebuttable presumption…acts as a disincentive for companies to reuse terms they know are likely to be considered unfair'. However, absent the presumption, the doctrine of *stare decisis* already requires courts to consider and apply consistently previous decisions on similar issues and relevant matters. If a court determined that a particular term in a contract is unfair, a subsequent court considering a 'substantially similar' term is bound to consider and apply the relevant findings of the previous decision. Avoiding recurring litigation costs (and the potential for adverse costs orders) therefore provides a natural deterrent for businesses to continue to enter into, apply or rely on terms which have already been found to be unfair.

71. At common law, the principles of contractual construction are well-established, and relevantly include that:[50]

    (a) to determine the meaning or legal effect of a particular term, the whole contract must be construed, including any implied terms;

    (b) the role of context (surrounding circumstances) in determining meaning has been acknowledged; and

    (c) account is taken of the fact that contract law is often concerned more with the legal effect of a contract term rather than (linguistic) meaning.

72. The proposed presumption is inconsistent with the approach to construction at common law, which would otherwise apply to the interpretation of the same contract in a cause of action other than under the UCT provisions (including other provisions

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47 ASIC Act s 12BG(4).

48 ASIC Act s 12BG(4).

49 ASIC Act s 12BG(5).

50 LexisNexis, *Halsbury's Laws of Australia* [110-2240], and the authorities cited therein.

of the ACL or ASIC Act). In its terms, where a term of one contract is found to be unfair by a court (including by reference to its particular context, and the contract as a whole), the Exposure Draft requires that the court ignore the context and entirety of another contract where it contains a 'substantially similar' term - notwithstanding that, construed in context, the term as it appears in the second contract may not be 'unfair' within the meaning of the ACL or ASIC Act.

73. The existing rebuttable presumptions in the ACL are limited to the particular parties the subject of the proceeding, and the conduct in issue. They also do not relate to prior court decisions. There is no precedent in the ACL for a rebuttable presumption that applies findings made against one party to non-parties who have not engaged in the conduct to which the findings apply. These include:

- subsection 4(2), which provides that, in a proceeding concerning a representation made with respect to a future matter, the alleged representor is taken not to have had reasonable grounds for making the representation (which, by virtue of subsection 4(1), is deemed to be misleading for the purpose of other provisions of the ACL), unless evidence is adduced to the contrary;
- subsection 10(2), which provides that an invoice or other document purporting to have been sent by or on behalf of a person is taken to have been sent by that person unless the contrary is established, for the purpose of asserting a right to payment for unsolicited goods or services;
- subsection 24(4), which provides that a party purporting to rely on the legitimate interests exception in s 24(1)(b) bears the burden of establishing that the term is reasonably necessary in order to protect such legitimate interests; and
- subsection 29(2), which provides that representations concerning a testimonial (or representation that purports to be a testimonial) under paragraphs 29(1)(e) and (f) are deemed to be misleading, unless evidence is adduced to the contrary.

74. The scope of the presumption also gives rise to substantial class action risk to Providers. While class actions can be efficient vehicles for the determination of multiple claims with common issues of law or fact, they can also be more complex and lengthy than other forms of litigation, increasing costs. It is important that the time and expense of a class action is proportionate to the potential benefits to the parties and group members. The Parliamentary Joint Committee on Corporations and Financial Services recently recommended, in its report on litigation funding and the regulation of the class action industry, that legislation be considered to promote proportionality in class actions by balancing the potential costs and drawbacks against the potential benefits, not only for parties to litigation, but also the impact on court resources and the public interest.[51]

Normative principles do not appear to support the presumption

75. As a general rule, a presumption is a statement of facts that are taken to exist unless proven otherwise. A presumption that a matter exists unless the contrary is

[51] See Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (21 December 2020), Recommendation 6.80.

proved places a legal burden on the respondent (in civil matters) or the accused (in criminal cases).[52]

76. In a survey as at 2015 of laws that reverse the legal burden, the Australian Law Reform Commission (**ALRC**) identified three broad rationales which have been used to justify reversing the onus of proof and/or enacting rebuttable presumptions in both civil and criminal contexts:[53]

- where the severity of the offence or risk justifies it;
- where a particular matter is uniquely within the knowledge of the accused or respondent, and where it is in the interests of law enforcement that the burden shift to them;[54] and
- where the presumption would 'assist [applicants] and reduce costs in the litigation process'.[55]

77. The ALRC noted academic commentary that presumptions have been adopted by legislatures in order to:

- save time, money and effort in litigation;
- avoid a procedural impasse where the rights of litigants depend on facts incapable of proof;
- deal with situations where the only evidence available would not meet a requisite legal standard;
- deal with situations where evidence is peculiarly in the power of one party; and
- favour a socially desirable outcome.[56]

78. The ALRC also noted the observation that where the intent is to prevent time and delay caused by establishing issues that are more likely than not to exist (such as copyright subsisting in an alleged work), only a shift in the *evidential*, rather than legal, burden is justified.[57]

79. The Competition and Consumer Committee submits that the rebuttable presumption in the Exposure Draft does not meet any of the three limbs of the normative standards described by the ALRC.

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52 *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) 194 FCR 142, [122] (Perram J).

53 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report 127, 3 August 2015), ch 11 ('*ALRC Interim Report 127*').

54 See eg s 8Y of the *Tax Administration Act 1953* (Cth):

> (1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.
>
> (3) For the purposes of subsection (1), an officer of a corporation shall be presumed, unless the contrary is proved, to be concerned in, and to take part in, the management of the corporation.

55 See eg *Copyright Amendment Act 2006* (Cth), which enacted evidential presumption provisions in Australia's copyright laws, to provide that statements contained on labels, marks, certificates etc. are presumed to be correct unless the contrary is established rather than the previous 'admissible as prima facie evidence' standard. It also enacted new presumptions recognising the labelling practices of commercially released films and computer software that apply in both criminal and civil proceedings, and a presumption of originality for computer programs.

56 See Luke Pallaras, 'Falling between two stools: Presumptions under the *Copyright Act 1968* (Cth)' (2010) 21 *Australian Intellectual Property Journal* 100, 104.

57 Ibid; see also ALRC Interim Report 127, [11.64].

80. First, the determination as to whether a term is unfair within the meaning of the ACL and ASIC Act is primarily a legal, rather than evidentiary, matter to be determined by construing the legal effect of the term on the rights and obligations of the parties to the agreement. It is therefore difficult to see how there could be any matters 'uniquely within the knowledge' of the Provider so as to justify the shift in burden under the first limb, in circumstances where the question before the court (i.e., whether the term meets the statutory meaning of unfair) is to be determined objectively on the face of the relevant contract.

81. A distinction can be drawn with the existing presumption in section 24(4) of the ACL (and section 12, which provides that a party purporting to rely on the legitimate interests exception in paragraph 24(1)(b) bears the burden of establishing that the term is reasonably necessary in order to protect such legitimate interests). Here, it is plain that the Provider is uniquely placed to adduce evidence of its legitimate interests and the necessity of the relevant term to protect them. Practically, it also operates as a defence to the provision, and is therefore properly for the Provider to establish on the balance of probabilities.

82. Further, there is a real question as to whether 'the interests of law enforcement' justify the presumption. Put another way, is the entry into, application of or reliance on an unfair term in a standard form consumer or small business contract a sufficiently serious contravention to justify a reversal of the onus of proof in a civil proceeding? In the criminal context, the commission of a crime (outside of strict liability offences) necessarily involves intent. However, there may be circumstances where a Provider unknowingly includes in a relevant standard form contract a term that meets the unfair threshold for some Customers (but not necessarily others). It might also be said that, in at least some circumstances, the consequences of the inclusion of an unfair term in a relevant contract would be relatively minor, particularly where the term is entered into, but not applied or relied upon.

83. Secondly, the application of the presumption to terms 'substantially similar' to the Unfair Term, and to contracts 'in the same industry' are likely to give rise to not insignificant disputation which would likely equal, if not outweigh, any savings in litigation costs that the presumption might otherwise achieve. For example, while not analogous, the process of market definition in the context of the CCA is a purposive, highly fact-sensitive exercise involving complex legal and economic analysis. The task of defining an 'industry' for the purpose of the presumption is likely to involve similar complexity (noting that the term is foreign to the ACL and the CCA).

84. The proposed presumption can be contrasted with the existing deeming provision in subsection 10(2) of the ACL, which provides that an invoice or other document purporting to have been sent by or on behalf of a person is taken to have been sent by that person unless the contrary is established, for the purpose of asserting a right to payment for unsolicited goods or services. That presumption is appropriate to avoid putting applicants to formal proof of a matter that is more likely than not to be true (i.e., that a document purporting to be sent by a party was, in fact, sent by that party).

Competition and Consumer Committee's views and potential solutions

85. The Competition and Consumer Committee does not support the proposed presumption as it appears in the Exposure Draft.

86. In the alternative, if a presumption is to be included in the final form of the Exposure Draft, the Competition and Consumer Committee submits that the scope of the presumption should be limited to situations where:

(a) the second contract is with the same Provider and for the supply of the same goods or services (as contemplated in subparagraph 37(5)(d)(i) of the ACL); and

(b) the second contract in subject matter and in form, as well as the term, is 'substantially similar' to that the subject of the First Proceeding, including by reference to the factors in subsection 24(2).

87. If, contrary to that submission, the rebuttable presumption is to apply across industries, then the Competition and Consumer Committee submits that it should not apply to past conduct by a different Provider – i.e. the rebuttable presumption should not be capable of being pleaded in relation to a term in a standard form contract which a Provider entered into, proposed, applied or relied upon *prior* to a court declaring that a term in a *different* contract with the same or substantially similar effect was unfair. In the absence of this protection, the law would in effect apply a retroactive presumption of illegality, in circumstances where the Provider had no reasonable basis on which to believe the term was unfair.

88. Further, if the presumption is to be retained, the Competition and Consumer Committee submits that there should be a 'grace period' following a declaration of a term as unfair, during which time the rebuttable assumption cannot be pleaded or relied upon in proceedings in relation to a subsequent term. This is consistent with the legislative intent of the rebuttable presumption as expressed in the Exposure Draft Explanatory Materials, which is to encourage those who have been found to have used UCTs, and parties within an industry, to 'review and amend terms in their standard form contracts that are the same or have a substantially similar effect as terms that have been found by a court to be unfair, where necessary to do so'.

89. The grace period should be of sufficient length to enable Providers to digest the judgment declaring the terms unfair, review their own standard form contracts, obtain legal advice in relation to whether their terms may have the same or substantially similar effect as the declared term, and if necessary vary the terms in each individual contract.

The provision of remedies based on loss that may occur

Summary of the Competition and Consumer Committee's position

90. The Competition and Consumer Committee considers that using 'may' as a threshold test for providing remedies is imprecise, unnecessary and counterproductive. The widely used and understood threshold of 'likely' should instead be retained.

The proposed remedies

91. Part 2 of Schedule 1 to the Exposure Draft proposes new sections 243A and 243B of the ACL.[58]

92. Section 243A provides that, if a term has been declared an unfair contract term, then a party to that contract (or a regulator acting on behalf of one or more such parties) can apply for the Court to make orders against the party that benefited from that declared term. *Inter alia*, the Court can make orders it considers 'appropriate to

[58] ASIC Act ss 12GNE and 12GNF.

prevent or reduce loss or damage that may be caused' (emphasis added) by the unfair contract term.

93. Section 243B provides that, if a term has been declared an unfair contract term, a regulator can seek orders against the party that benefited from that term (Respondent). The Court can make orders it thinks appropriate 'to prevent or reduce loss or damage that may be caused' (emphasis added) by a term that is the same, or of substantially similar effect, to the declared term:

    (a) in any existing standard form small business or consumer contract to which the Respondent is a party; or

    (b) in any future standard form small business or consumer contract to which the Respondent is a party.

Issues with the proposed remedies

94. As a matter of both policy and practical operation, the Competition and Consumer Committee considers that there is no justification for introducing 'may' as a remedies threshold.

95. Neither the DRIS nor the Exposure Draft Explanatory Materials have provided any meaningful explanation of the basis for including the new term, or its interpretation. The Exposure Draft Explanatory Materials suggest 'may' is to be some lower standard than 'likely', stating under the existing provisions (bold emphasis added):

> *the court must be satisfied that loss or damage has occurred or is likely to occur. Under the Bill, a person will only need to show that the orders will prevent loss and damage that may be caused.*[59]

96. In turn, this suggests 'may' was introduced to help increase access to remedies, a goal discussed in the DRIS.[60]

97. Insofar as 'may' is intended to import a lower threshold than 'likely', the Competition and Consumer Committee considers the change is unnecessary. The word 'likely' is well known in competition and consumer law, and is supported by decades of jurisprudence.[61] The standard demanded by 'likely' is low, and easily achievable in many consumer and competition matters. There is no particular difficulty presented by UCTs that renders a 'likely' standard any more onerous, or less effective, than its application throughout the CCA or ACL.

98. Insofar as 'may' is intended to increase access to remedies, the Competition and Consumer Committee considers the effort will be counterproductive. Similar to the issues identified above in relation to the phrase 'substantially similar in effect', the term 'may' is unknown, and will give rise to extensive debate, expense, and legal appeals. Over time, a body of law may develop as to the meaning of 'may'. However, the costs, delays, and uncertainty required to reach that point would outweigh any potential marginal benefits that might ultimately accrue from replacing 'likely' with 'may'.

99. Further, while remedies under section 243A can be sought by a member of the public, remedies under section 243B can only be sought by a regulator. Any

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[59] Explanatory Materials, [1.31].

[60] Decision Regulation Impact Statement, 25-7.

[61] *Australian Competition and Consumer Commission v Pacific National Pty* (2020) 378 ALR 1, [213] - [246].

argument that a lower threshold is required to improve access to remedies for unsophisticated or vulnerable parties cannot be sustained in respect of section 243B. The ACCC, or other consumer regulators, are specialised, well-resourced bodies, who do not require additional support to 'access' remedies.

Removing 'may' will allow the remedies provisions to function more efficiently

100. The Competition and Consumer Committee considers flexible remedies are an important part of all ACL provisions, and supports a robust, effective remedies regime. In this case, however, the Competition and Consumer Committee considers the introduction of 'may' is both unnecessary and counterproductive.

101. The Competition and Consumer Committee submits that:

    (a) the relevant uses of 'may' be replaced with 'likely' in sections 243A and 243B; and

    (b) if the use of 'may' is retained, additional and specific guidance be provided in either the legislation or the Exposure Draft Explanatory Materials as to the interpretation, meaning, and application of this new term.

Reconsidered approach

102. As identified above, the Competition and Consumer Committee has significant concerns with the Exposure Draft as it is currently proposed, particularly in relation to the introduction of penalties, the rebuttable presumption, and the imposition of a new remedies threshold. The Competition and Consumer Committee has outlined the following amendments to the approach to the reforms proposed in the Exposure Draft:

    (a) include the proposed warning system in the penalties mechanism;

    (b) remove the multiple contraventions model;

    (c) remove the rebuttable presumption, or if one is to be included in the final form of the Exposure Draft, limit its scope and include a 'grace period' in the manner described in paragraphs 85-89 above; and

    (d) replace the use of 'may' with 'likely', or if 'may' is to be retained, provide further guidance as to its meaning.

103. The Competition and Consumer Committee submits that these amendments should be reflected in a further version of the draft legislation, to enable the UCT protections to achieve their intended purpose.

Additional issue – grouping provisions

104. The Competition and Consumer Committee also notes that the proposed definition of 'small business contract' does not take into account that many contracts may be entered into by large commercial entities that may not have any employees or turnover. Many large Australian corporate groups use service companies to employ staff for the wider group of companies.

105. Contracts entered into by subsidiaries of those large organisations may therefore be deemed to be 'small business contracts' even though the corporate group has

turnover and staff numbers that would exceed the proposed thresholds. This is particularly so given the removal of the contract value threshold.

106. Should the Exposure Draft legislation proceed, the Competition and Consumer Committee suggests that it be amended to include related body corporates in the definitions of a small business contract. Further, the revenue test should be reinstated to apply in addition to the employee test not alternatively.

107. Finally, it is difficult for businesses to know when they are dealing with a small business and it would be useful, in the Competition and Consumer Committee's view, to introduce a requirement for an indication to be placed on a website if a business considers itself a small business.

Financial Services Committee (Business Law Section)

108. The Financial Services Committee is a committee of the BLS and monitors developments in the laws and regulations governing financial services, actively contributing to public consultation on changes to these laws. Membership of the Financial Services Committee consists of legal practitioners from private practice, corporates, financial institutions and banks. Members interact closely and frequently with the providers of financial services regulated by the ASIC Act.

109. This section reflects the views of the Financial Services Committee. The Financial Services Committee sets out its views on a number of issues raised in relation to the proposed reforms in Table 1 below. Table 1 expands on the table provided at pages 10-13 of the Exposure Draft Explanatory Materials.

110. The consensus reached by the contributors to this submission in regard to the need for an increased transition and implementation period, has been noted at paragraphs 7-16 above. Further to this submission, the Financial Services Committee considers that unless the current six-month transition period is increased, there is a risk that regulators' final guidance will be issued without sufficient notice to allow the regulated population to properly implement it, including to seek any further clarification from the regulator as required. The Financial Services Committee notes that the Australian Securities and Investments Commission (**ASIC**) only released final guidance on the revised breach reporting obligations for financial services and credit licensees (which commence on 1 October 2021) on 7 September 2021. We consider this three-week lead time to be an unsatisfactory outcome and that, ideally, there should be at least three months (and preferably six months) between the date of release of new or updated regulatory guidance and the commencement date of new laws to which the guidance relates.

Table 1. Specific comments of the Financial Services Committee

Proposed law	***Current law***	***Financial Services Committee comments***
Definition of 'small business' and monetary thresholds		
The unfair contract term protections will apply to a small business contract if	The unfair contract term protections apply to a small business contract if one party to	The Financial Services Committee supports the removal of the monetary thresholds for contract

Proposed law	*Current law*	*Financial Services Committee comments*
one party to the contract is a business that employs fewer than 100 employees or has a turnover for the last income year of less than $10,000,000. Casual employees are excluded unless they are employed on a regular and systematic basis. Part time employees are to be counted as an appropriate fraction of a full-time equivalent.	the contract is a business that employs fewer than 20 employees and the upfront price payable under the contract does not exceed one of the two alternative monetary thresholds provided for in the law. Casual employees are excluded unless they are employed on a regular and systematic basis.	value as it reduces the complexity of the test. As a general observation, there are different definitions of 'small business' in different pieces of legislation and the Financial Services Committee would welcome greater consistency and harmonisation where appropriate. Financial Services Committee notes that the Australian Financial Complaints Authority (**AFCA**) Rules define a small business as one which employs less than 100 people and consider it appropriate for a business to have the same ability to access the AFCA complaints resolution scheme and protection under the UCT regime.[62] The $10 million turnover test is a difficult benchmark to measure and one that will vary from year to year which, in the Financial Services Committee's view, makes it an inappropriate threshold for the purpose. It would also be simpler and more consistent with other legislation to avoid drawing a distinction between casual and other employees for this purpose. If there is a turnover test, one question which arises is whether the amount ought to be revised or indexed in the future.
Pecuniary penalties and court orders		
A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or	No equivalent.	The Financial Services Committee supports the submissions made above by the Competition and Consumer Committee at paragraphs 31-52.

[62] Australian Financial Complaints Authority, Complaint Resolution Scheme Rules (13 January 2021) 43, s E.1.1 (definition of 'small business').

Proposed law	*Current law*	*Financial Services Committee comments*
rely on an unfair contract term.		
In addition to the current law, if a court has declared a term of a contract to be unfair, the court can make orders it considers appropriate to prevent or reduce loss or damage that has or may be caused by the unfair term. These orders can be made on application of a person or by the regulator on behalf of and with consent of a person.	The court may make orders in relation to a standard form contract that contains an unfair term, where a person has suffered or is likely to suffer loss or damage because of that term of the contract. In these circumstances a court may make an order (amongst other orders) to void, void ab initio, vary or refuse to enforce part or all of the relevant contract (or collateral arrangement). The court must consider that the order will redress, in whole or in part, the loss or damage suffered, or prevent or reduce the loss or damage suffered, or likely to be suffered. These orders can be made on application of a person or by the regulator on behalf of and with the consent of a person.	The Financial Services Committee is of the view that the description of the current law in the Exposure Draft Explanatory Materials is not entirely correct. It is not clear to the Financial Services Committee that ASIC would currently need the consent of a person to seek orders under the current section 12GNB of the ASIC Act. It is preferable that Exposure Draft Explanatory Materials provides an accurate description of the current law so that it can correctly describe the full extent of the proposed legislative change. The Financial Services Committee supports a requirement for ASIC to obtain express consent to seek an order of this nature on behalf of a person. Parties who may be potentially impacted by the court's decision could seek to be joined to the proceedings. The Financial Services Committee also supports the submissions made by the Competition and Consumer Committee at paragraphs 90-101 above concerning the use of the term 'may' to replace the more established use in existing jurisprudence of the word 'likely'.
In addition to the current law, if a court has declared a term of a contract to be an unfair contract term, the court can make orders it thinks appropriate to prevent or reduce loss or damage that has or	The court may make orders about a class of standard form contracts that are not party to a proceeding, where a class of persons has suffered or is likely to suffer loss or damage because of a term of a	The Financial Services Committee supports limiting the ability to seek these kinds of orders to the regulator.

Proposed law	*Current law*	*Financial Services Committee comments*
may be caused by the declared term. These orders can be made in relation to any existing standard form contract that contains a similar term to the term that has been declared as unfair. These orders can be made on application of the regulator only.	contract that has been declared an unfair contract term. In these circumstances a court may make an order (amongst other orders) to void, void ab initio, vary or refuse to enforce part or all of the relevant contracts (or collateral arrangement). The court must consider that the order will redress, in whole or in part, the loss or damage suffered, or prevent or reduce the loss or damage suffered, or likely to be suffered. These orders can be made on applications of the regulator only.	
In addition to the current injunction powers, the court can make orders injuncting a person from entering into any future contract that contains a term that is the same or similar in effect to a term that has been declared an unfair contract term.	Amongst other powers, the court can make orders in such terms as it considers appropriate injuncting a party from applying, relying on or purporting to apply or rely on a term of a contract that has been declared an unfair term.	The Financial Services Committee supports the submissions made above by the Competition and Consumer Committee.

Proposed law	*Current law*	*Financial Services Committee comments*
The court can issue an injunction to prevent a person from applying or relying on a term in any existing contract that is the same or similar in effect (to a term that has been declared unfair) whether or not that contract is before the court.		
Rebuttable presumption that term is unfair		
A contract term will be presumed to be unfair in a proceeding unless another party proves otherwise if that term is the same or similar in effect as a term that has been found to be unfair in another proceeding. The presumption only applies where the contract term subject to the proceeding is being proposed by the same person who proposed the term that was found to be unfair or the contract is in the same industry as the contract that contained the unfair term.	No equivalent.	The Financial Services Committee supports the submissions made above by the Competition and Consumer Committee. As noted above it may be unfair for some Providers to impose a particular term, but not for other Providers in the same industry whose business interests are materially different. One example in the financial services industry is that the legitimate business interests of a bank lender whose loans are funded through deposits may differ from those of a lender whose loans are funded from other sources(, such that it may be unfair for a bank to suspend a borrower's ability to redraw in a credit squeeze scenario, whereas the other lender may need to do this to protect its legitimate business interests. The Financial Services Committee agrees with the Competition and Consumer Committee with respect to the rebuttable presumption. In the event that the rebuttable presumption is ultimately retained in the new law, we submit that the presumption of unfairness should only apply in circumstances where there has been genuine adjudication of the issue by the court, particularly as to whether the term is reasonably

Proposed law	*Current law*	*Financial Services Committee comments*
		necessary to protect legitimate business interests. A tactical decision by one particular business not to fully contest whether the term is in fact unfair in court should not be interpreted as a conclusive determination of the merits. Whether to contest rather than settle proceedings is ultimately a business decision which is not always dictated by the merits and is likely to be impacted by other considerations including costs, risk appetite and carefully picking battles within the overall relationship that a business has with a regulator. In the appropriate circumstances (that is, following judicial determination) the Financial Services Committee would prefer to see any presumption of unfairness applied in a narrower context, as described above by the Competition and Consumer Committee.
Determining whether a contract is a standard form contract		
In addition to the current matters that must be taken into account when determining whether a contract is a standard form contract, a court must also take into account whether one of the parties has used the same or similar contract before.	In determining whether a contract is a standard form contract, a court must take into account a number of matters.	The Financial Services Committee supports this amendment.
When determining whether one party was required to reject or accept the terms of a contract in the form in which they were presented, and whether another party	In determining whether a contract is a standard form contract, a court must take into account a number of matters, including whether one party was required to reject or	The Financial Services Committee has no comment.

Proposed law	*Current law*	*Financial Services Committee comments*
was given an effective opportunity to negotiate the terms of the contract, the court must not consider: • whether a party had an opportunity to negotiate minor or insubstantial changes to terms of the contract; • whether a party had an opportunity to select a term from a range of options determined by another party; or • the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.	accept the terms of a contract in the form in which they were presented and whether another party was given an effective opportunity to negotiate the terms of the contract.	
Terms included by operation of a law		
In addition to the current exemptions to the unfair contract term provisions, contractual provisions that are taken to be included in a contract by operation of a law are also excluded. Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law, is exempt from the	Contractual provisions that are required, or expressly permitted by a law of the Commonwealth, or of a State or Territory, are exempt from the unfair contract term regime.	The Financial Services Committee supports this amendment. It is important that the unfair contracts regime is compatible with other laws.

Proposed law	*Current law*	*Financial Services Committee comments*
unfair contract term provisions.		
Non-parties		
The law refers to non-party to clarify the law applies to both consumers and small businesses.	The law refers to non-party consumers (despite applying to both consumers and small businesses).	The Financial Services Committee has no objection to this reform.

SME Business Law Committee (Business Law Section)

111. The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs. This section reflects the views of the SME Committee.

112. Further to its submission in 2020 the SME Committee continues to support the strengthening amendments contained in the Exposure Draft, including:

    - the changes to the definition of 'small business' to be either less than 100 employees, with part time staff proportionately counted or an annual turnover of up to $10 million;
    - the removal of the need to reference the size of the contract;
    - the inclusion of criteria to be used by courts in determining whether a contract is a 'standard form contract' including the frequency of contract use and listing matters not to be taken into account such as common circumstances where contract changes can be made, or options chosen;
    - providing courts with the ability to impose additional remedies to simply declaring the whole or a part of a contract void including contractual remedies and the ability to make preventative and deterrent orders; and
    - providing courts with the ability to provide injunctive relief and to make their determinations of an UCT binding on persons affected even if they are not parties to the proceedings.

113. The SME Committee also supported, and continues to support, the changes to make the inclusion and failure to remove UCTs illegal and attaching civil penalties, on the basis of the Committee's understanding that there is currently a low level of proactive compliance by large businesses in amending their standard form contracts to remove UCTs, and that those that did make amendments only did so at the insistence of the ACCC. The position of the SME Committee was, and remains, that by making the inclusion of, or failure to remove, UCTs in standard form contracts, illegal and attaching civil penalties will give large companies the necessary incentive to be pro-active in reviewing and amending their standard form contracts to remove UCTs.

114. Albeit supporting the imposition of penalties, the SME Committee continues to be concerned that further clarification is required on one aspect particularly before the draft legislation is finalised.

115. This concern of the SME Committee arises because the changes to the legislation do not change the basis upon which a clause is determined to be an UCT, and the changed legislation will continue for that determination to have to be made by a court. Accordingly, the SME Committee recognises that there is a need to ensure that parties to standard form contracts are made aware that a clause proposed to be included could be determined by a court to be an UCT, in which case a civil penalty may apply to the party who proposed the inclusion of, or relied on, the UCT.

116. The SME Committee notes that the previous submission made by the Competition and Consumer Committee also raised this issue, and while that submission did not support the imposition of any penalties, it did include a range of suggestions that could be applied, if penalties were included.[63] The SME Committee notes that these suggestions have been reiterated in the submission included herewith by the Competition and Consumer Committee.[64]

117. The SME Committee also supports this range of suggestions to seek to ensure parties to contracts should be made aware of when a proposed term may be determined by a court to be an UCT and then would be potentially subject to having penalties imposed.

118. The Competition and Consumer Committee noted that prohibitions which carry a penalty must be sufficiently certain to enable businesses to know, with a high level of certainty, what conduct will expose them to a financial penalty and that if financial penalties are introduced, which the draft legislation does, steps should be taken to ensure that they are only sought in circumstances for which clear guidance is provided.[65]

119. The SME Committee notes also that when the UCT provisions were originally extended to small business, the ACCC undertook an extensive education program to provide examples of what terms may be considered to be UCT and encouraged businesses that utilise standard form contracts to remove those clauses.

120. As mentioned, however, given that a contract party, or a regulator, must take a matter to court for determination as to whether a term is an UCT, there has not been as much activity as hoped in removing these terms from standard form contracts.

Australian Consumer Law Committee (Legal Practice Section)

121. The ACL Committee is a committee of the LPS. Members of the ACL Committee are lawyers with extensive professional experience and expertise in consumer protection law from a broad range of different practice types, including private legal practice, the independent bar, legal aid, community legal services, legal services in remote and regional communities and academia.

122. In their professional lives, members of the ACL Committee provide legal advice and representation to consumers from all walks of life in Australia, ranging from investors

[63] See Previous Law Council Submission, [11]-[17].

[64] See paragraphs 21, 23-24 and 48-52 above.

[65] Previous Law Council Submission, [13].

in sophisticated financial products to socially and economically disadvantaged people in remote communities.

123. The ACL Committee welcomes and supports the proposed strengthening of UCT legislation in the ACL and the ASIC Act. The reforms intend to reduce the prevalence of UCTs in consumer standard form contracts and the Committee considers this will have an overall positive impact for consumers.

124. Consumers are at the heart of the Australian economy. If consumers do not have choice, competition is stifled. While standard form contracts have obvious benefits for consumers in terms of cost savings which can be passed to the consumer, they also limit consumer choice. This limit needs to be balanced with a robust framework to ensure standard form contracts do not contain unfair terms. In 2008, the Productivity Commission's Review of Australia's Consumer Policy Framework stated:

> *By making consumers more confident about participating in markets, and penalising inappropriate business conduct, these measures also assist reputable suppliers.* ***Put simply, effective competition is stimulated by empowered consumers and responsive suppliers that trade fairly***.[66]

125. The legal practices of members of the ACL Committee provide insight into the impact of UCTs on consumers. Advice is frequently provided to consumers who have entered a consumer contract and are then disadvantaged by the impact of unfair terms. Frequently these terms are in relation to the cancellation of a consumer contract. The terms are structured so that it is the consumer who inevitably suffers the greater financial consequence of cancelling the contract.

126. The ACL Committee considers that the proposed reforms are necessary to prevent the ongoing use of UCTs. The existing protections do not adequately work to deter unfair business models, and do not adequately assist the regulator to address systemic unfair business practices as the regulator currently does not have power to take action against UCTs, or seek civil penalties against businesses in breach of UCTs. In the absence of these reforms, it is likely that stronger contractual parties in consumer and small business transactions will continue to propose UCTs and treat the occasional individual case where the terms have been declared void as an acceptable cost of business.

127. The ACL Committee considers that an appropriate balance is struck between the rights of consumers, small business and stronger contractual parties by the rebuttable presumption that, where a term has been found to be unfair, the same or similar term is unfair when it is used in a standard form contract by the same stronger contracting party or within the same industry. The presumption will facilitate efficient resolution of disputes and promote the replacement of UCTs with contractual terms that find a fairer balance of the interests of all parties to the contract.

128. The existence of a rebuttable presumption is not inconsistent with the rights of a defendant in civil penalty proceedings.

129. The ACL Committee welcomes the proposed changes allowing the regulator to seek orders to prevent loss caused to any person, whether a party or not, regarding the

[66] Productivity Commission, *Review of Australian's Consumer Policy Framework* (Inquiry Report No 45, 2008) vol 1, 4 (emphasis added).

same or similar terms, and allowing the regulator to seek orders to prevent a term that is the same or substantially similar to a term already declared unfair, from being included in future standard form contracts. The ACL Committee considers this proposed change will improve choice and fairness for consumers, and increase competition.

130. The ACL Committee supports the extension of the remedies for UCTs to enable compensatory and preventive orders.

131. The ACL Committee further welcomes the expansion of the consequences for the use of unfair terms in standard form contacts to now include civil penalty provisions, and consider this will be more likely to have a deterrent effect. The impact will be strengthened by the proposed changes which will allow Courts to issue public warning notices and allow regulators to apply for adverse publicity orders.

132. The ACL Committee is satisfied that the Exposure Draft fulfils the recommendations of the DRIS was finalised in September 2020 and achieves the objectives of the November 2020 meeting of the Legislative and Governance Forum on Consumer Affairs.

133. The ACL Committee strongly endorses the Exposure Draft and supports the future enactment of the Bill.

Law Society of South Australia

134. The LSSA provides the following comments.

Uncertainty

135. The LSSA notes the views previously expressed by the Competition and Consumer Committee, in the context of the draft Regulation Impact Statement, in particular the following statement:

> *Prohibitions which carry a penalty must be sufficiently certain to enable businesses to know, with a high level of certainty, what conduct will expose them to a financial penalty. The Competition and Consumer Committee's primary concern is that the test for unfairness is not sufficiently certain in this regard.*[67]

136. The LSSA agrees with the above proposition and the further concerns expressed by the Competition and Consumer Committee that the introduction of pecuniary penalties is not appropriate in the absence of clear legislative direction on what constitutes an 'unfair' contractual term. The LSSA is concerned that although useful additions to remedies and the definition of a small business are contemplated, the draft legislation does not appear to address the fundamental problem of lack of certainty about what is an unfair term.

137. Such terms are likely to change with developing case law, given that any terms 'substantially similar' to those found to be unfair will also be presumed to be unfair, as per the insertion of proposed subsection 24(5) of the ACL. Small businesses may simply not have resources to consistently ensure that their standard form contracts are free from unfair terms as the scope of what constitutes an unfair term expands.

[67] See Previous Law Council Submission, [13].

138. In this regard, the LSSA highlights the potential for inconsistency, noting that there may be decisions in borderline cases which may mean a certain term becomes unfair in one context but not in another.

139. The LSSA considers the broad and generalised description as to what may be 'unfair' presently set out in the CCA. In the view of the LSSA, the suggestion that this description would, by the effluxion of time and case law, obtain certainty of legislative meaning and effect is not an appropriate answer to what will be many years of continuing uncertainty as to when any business, including small businesses, may have transgressed the legislation.

140. The LSSA further considers that the third limb of the test of unfairness, (i.e. that the term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term) is rightly identified as the problem when such a question will have to be considered within many different and interrelated contexts, including:

    (a) different industries and markets;

    (b) different jurisdictions;

    (c) different technologies at work; and

    (d) different bargaining positions between parties (e.g. such that to protect itself from significantly greater and more powerful business enterprises a small business may use a standard form document incorporating clauses that might be unfair if imposed on a more vulnerable party, but may be more acceptable if used by a small business having regard to its potential vulnerability to larger trading partners).

141. The fact that the context will vary so greatly must bring in elements of a subjective assessment, which means that in different circumstances, even within the same market, a term may be considered both fair and unfair. What is reasonably fair to one, could reasonably be unfair to another, and in the view of the LSSA, it is not appropriate for any person to have to 'second guess' which position a court might ultimately take. The creation or furtherance of such debates is not an ideal legislative outcome.

Disproportionate Penalties

142. The LSSA also suggests that the possible penalties for contravention appear to be grossly disproportionate. The proposed amendment to subsection 224(3) of the ACL could mean a business that merely proposes an unfair contract term would be subject to a possible penalty of $10 million (or other potentially greater amounts, e.g. three times the value of the benefit obtained).

143. In the context of the other issues discussed above as to the uncertainty with the legislation, the LSSA particularly emphasises the fact that the proposed legislation would apply to an unfair contract term created by a small or medium enterprise and not just to large entities with substantial market power.

144. If pecuniary penalties are to be introduced, then the LSSA is of the view that these penalties should only apply to terms specifically listed by Parliament by regulation, or if necessary, to terms identified by appropriate regulatory bodies such as the ACCC/ASIC, as previously suggested by the SME Committee. This approach would still allow a court to determine if a contract term was unfair in all the circumstances

and apply the extended remedies now proposed but remove the pecuniary penalty where the term is not contrary to a published list.

Law Institute of Victoria

145. The LIV generally agrees with the proposed reforms. However, the LIV is of the view that the intent of the legislation could be significantly improved in the area of real property transactions and specifically contracts of sale, if the matters contained herein are considered.

146. In broad terms, contracts of sale for real property can be divided into three categories:

    (a) standard house and land;

    (b) off the plan house and land or land; and

    (c) commercial and other.

Standard House and Land Contracts

147. The threshold for the proposed legislation and indeed the current legislation to apply, is that it be considered a standard form contract.

148. Traditionally, house and land contracts are considered to some extent to be bespoke, in that they are always between different transaction parties; the only commonality being the party that prepares the contract, that being the conveyancer or lawyer.

149. In Victoria, the LIV, in conjunction with The Real Estate Institute of Victoria, publishes a copyright standard form of contract for the sale of real estate. The current edition of the contract is not considered to contain unfair contract terms. Legal practitioners, but not estate agents, may, however, adapt the contract to produce their own standard form contracts in a cookie cutter manner, and the adapted contracts may contain many unfair terms and terms contrary to other legislation such as payment of nomination fees, adjustment of land tax on a multiple holding basis, when a land tax figure on a single holding basis is available, and other penalties.

150. In the LIV's view, the market would be vastly improved were the concept of a standard form contract be extended to include a class of contracts prepared on substantially the same terms, to be used for the same purpose.

151. Specifically, if a conveyancer or lawyer prepares substantially the same contract for vendors, then as a group, those contracts should be considered standard form contracts.

152. This addresses the issue that the vendors themselves do not know if the contract produced for them has unfair terms, as they rely on the advice of the conveyancer. The conveyancer, however, should know whether the contract terms produced are unfair.

Off the Plan Contracts

153. The LIV supports the proposed amendments to the legislation. Specifically, the proposed change where the consideration of whether a party had an opportunity to

negotiate minor or insubstantial changes in terms of the contract is a welcome step forward, as this will enable the vast majority of off the plan contracts to be brought into the fold of being a standard form contract and hence subject to the legislation.