

14 September 2021

Director
Consumer Policy and Currency Unit
Market Conduct Division
Treasury

By email: UCTprotections@treasury.gov.au

Dear Director

Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair Contract Terms

Legal Aid NSW welcomes the opportunity to provide feedback to Treasury on the Exposure Draft of the Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair Contract Terms, aimed at strengthening protections for consumers and small businesses against unfair contract terms.

Legal Aid NSW provides legal services across NSW through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. The work of our civil law solicitors, including our specialist consumer law team, solicitors in regional offices and solicitors in the Civil Law Service for Aboriginal Communities, is focused on assisting the most vulnerable consumers in our community, including those with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and consumers experiencing domestic and family violence or elder abuse.

We also acknowledge research, which is consistent with the experience of our solicitors, that indicates everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.¹ These issues can further compound any barriers faced in dealing with consumer law problems.

¹ O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre* (1 November 2019).

Legal Aid NSW welcomes and supports the proposed strengthening of unfair contract terms legislation in Australian Consumer Law (**ACL**) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Legal Aid NSW's casework experience supports the need for reform to unfair contract terms. We are aware of numerous examples of unfair contract terms in consumer standard form contracts across various industries. Legal Aid NSW strongly supports the proposals to deter companies from use of contract terms that disadvantage consumers, by expanding regulatory powers and consequences for unfair terms. The reforms will positively re-shape the consumer landscape and result in overall improvements to the system.

We have consistently supported the extension of civil penalty provisions to unfair contract terms. Legal Aid NSW raised this issue in our submission to the ACL Review in 2016.²

Legal Aid NSW provides advice to clients who have entered into contracts and are subsequently disadvantaged by the real-life impact of unfair terms. Often, people in these situations access Legal Aid NSW advice services seeking assistance with contracts that are structured to impose financial costs on the client if they seek to cancel a contract. Unfair terms also adversely affect consumers who, due to unforeseen circumstances, are unable to access the products, and where cancellation fees would place them in significant financial hardship.

The barriers experienced by our clients are illustrated by the below case studies.

Roberta's story

Roberta signed a standard form contract for a training course in on-line trading. The total fee for the 12-month course was \$20,000. The contract stated that Roberta was not entitled to enrol in any of the training sessions until the total fee was paid. Roberta paid \$18,000 when she signed the contract.

Roberta was unable to commence the course as she could not pay the balance of the course fee and she was unable to borrow any more money. She became seriously ill and could not physically undertake the training.

Before the course commenced Roberta requested a refund of \$18,000, in light of her circumstances. The company refused. The company relied on terms in the contract

² Legal Aid NSW, *Submission to the Consumer Affairs Australia and New Zealand: Australian Consumer Law Review* (May 2016), 6-8 <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25056/Review-of-Australian-Consumer-Law-May-2016-Final-Submission.pdf>.

which provided that a participant had “no right to cancel” the contract more than five days after signing the contract and any remaining tuition fees were payable. The contract further provided that if a participant went ahead and cancelled after the sixth day, the company would retain 90% of the tuition fees already paid, as a cancellation fee. Legal Aid assisted Roberta to argue that the terms the company relied on were unfair, pursuant to the ACL; and should be void. Roberta was successfully able to recover the amount of \$18,000 from the company

Bernard’s story

Bernard enrolled with a private college for a 10-month massage course. The course consisted of three face to face sessions per week. Bernard paid a deposit of \$1,500 and was due to pay the total tuition fees of \$13,000 over the duration of the course by direct debit.

After the second week, Bernard sought to withdraw from the course for personal reasons as he was unexpectedly moving interstate.

Bernard contacted the college and advised them that he needed to withdraw from the course. Bernard stated that he would forgo the deposit and sought an agreement from the college that he would not have to pay the remainder of the course fees.

The college replied and relied on terms in the contract which provided that as he was outside the cooling off period (being 10 days) he was liable to pay entire cost of the course. Bernard was unable to pay; and the college engaged a debt collector who pursued Bernard for the remaining course fees.

Legal Aid NSW assisted Bernard to argue, pursuant to the ACL, that terms relied on by the college were unfair and should be void.

Legal Aid NSW strongly supports the proposals in the Exposure Draft Bill as the impact of the reforms at the regulator level could lead to an overall improvement in all standard form contracts, which would benefit consumers. This is particularly the case as the regulator can take proceedings to seek orders:

- to prevent a term that is the same or substantially similar as a term already declared unfair from being included in future standard form contracts
- to prevent or reduce loss caused to any person, whether a party or not to the proceedings, regarding the same or similar terms
- about an existing contract, whether or not it is the subject of the proceedings.

Legal Aid NSW also strongly supports an amendment to the Exposure Draft Bill to extend the court's powers to issue public warning notices and adverse publicity orders. This would act as a deterrent for businesses using unfair contract terms and facilitate increased public education about consumer rights.

Thank you for considering our submission. If you have any questions or require further information, please contact [REDACTED], [REDACTED], [REDACTED], on [REDACTED] or at [REDACTED].

Yours sincerely

Brendan Thomas
Chief Executive Officer