MASTER ELECTRICIANS AUSTRALIA

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Enhancement to Unfair Contracts Term Protections

J O'Dwyer / March 2020

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Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

Problem

MEA would agree that the problem of unfair contracts clauses continues to a scourge in the Electrical and Telecommunications industry and related building and construction industry. Attached at the end of this submission (Appendix 1) you will find a list of clauses that are of concern to various parts of the industry.

In addition to specific clauses a significant issue is the industry relies heavily on the Australian Standards form contract AS 4000 and AS 2124 which have not been reviewed or updated since 1997 and 1992 respectively. This is against a back drop of significant contract law evolution and legislation including GST and Unfair contract law regimes has moved significantly in the last 28 years.

We are now entering a time where business owners were not even born when these contracts were last updated. It has resulted in significant ability for contractors to rely on amendments and schedules / attachments to these contracts which make the terms and conditions in the AS 4000 and 2124 contracts null and void.

This problem is gathering pace and complexity and a swift change to these documents to modernise them is required.

4.0 Legality and penalties

The building and construction industry has always been an industry where unfair contracts terms and illegal terms have been used. Developers (who are not licenced) and Builders who wish to use their market power to roll the risk of projects down on to smaller players disproportionate to their size has been a feature and continues to be a feature of contracts.

Their use in the larger end of construction is driven by the legal fraternity and inhouse legal counsel to ensure as far as possible their interests are protected. It is fair to assume that ASIC and similar regulators struggle to match resourcing and skill with limited resources.

The Consultation paper raises 4 options in dealing with Legality and Penalties.

Option One

Option One in status quo and as such MEA does not support this option.

Option Two, Three and Four

The paper raises 3 other options

- Strengthen compliance and enforcement
- Making clauses illegal and attaching penalties
- Strengthening powers

MEA would support all three of the above. However, we believe that through a combination of actions the best result will be achieved. Additional resources for enforcement will assist particularly if there is a risk based approach of targeted auditing and intelligence driven selection of contracts to review. Significant advantages can be seen where as data sharing between relevant state ombudsman offices and federal investigators / inspectors would assist in targeting those with unscrupulous practices.

MEA also support making UCT illegal and attaching penalties as a significant deterrent. MEA however believes that to assist in cleaning up the drafting and suggestion of terms not only should there be accountability for companies engaging in such clauses their legal advisors and associated internal legal counsels should be held personally responsible for drafting and advising such clauses to be placed into contracts. This would significantly increase accountability of corporate structures not to act against legal advice and legal counsels would be at risk of professional disbarring / deregistering should they include illegal clauses.

Penalties are supported and should reflect a calculation method whereby a percentage of financial revenue has been obtained using the contract / losses incurred by the client who has entered into the contract. The court should have the discretion to evaluate not only if the contract is enforceable but also quickly and decisively assess damages and award costs.

MEA also supports strengthened powers for regulators to issue infringement notices. Whilst infringement notices may be appropriate for smaller less sophisticated companies and small businesses, larger corporates and solicitors may well ignore such infringements and as such penalties for noncompliance of infringements should lead to significant civil penalties and costs. The change to law must be supported by recent changes to compulsory examination and information gathering which was recently reissued. https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/ .

Regulatory guidance and education campaigns

MEA frequently gets request for a plain English explanation about terms and which are illegal obviously we cannot give legal advice and we refer members to law firms to assist. The main barrier we see to advancing knowledge in this area is

- time pressures of contractors and
- expenses to receive advice and evaluation of contracts.

To put the above two points into perspective we see frequently that time periods for responding to tenders and contracts is short and that due to significant competition the pressure on subcontractors and small businesses to accept tenders terms including evaluating and accepting the draft contract prior to submitting a tender can be as little as 5 business days but frequently only 2 weeks.

In addition to time pressures the costs for small contractors to engage a solicitor to review and provide advice at an hourly rate of somewhere between $300 and $600 and hour can cost upwards of $2000 to $3000 per contract. This can quickly add up over a 12-month period and become a significant cost to the business. Addressing UCT and making them illegal to be in contracts would alleviate a significant threat and cost to small businesses.

MEA can also refer members to the ASIC guide to unfair contract terms. The guide is a useful but underutilised resource (Guide to unfair contract terms) The guide itself may benefit from a more user friendly and industry specific guide for construction and commercial operations of small business.

Education campaigns we suggest are best delivered in conjunction with industry. Many industries are now developing Continuous Professional Development (CPD) processes to ensure businesses within industry are maintaining their level of education. Tasmania has introduced a CPD program across all licenced trades and to remain current they must complete training which equates to 36 points over a 3 year period. It would be advantageous to ensure that ASIC through various industry associations and bodies take advantage of these opportunities to educate participants. Tasmanian licensing and registration cpd program

In addition, ASIC may wish to join with RTO's and review material being used inside certificate III and IV for business whereby many trade and small business cover these types of topics, however briefly. Ensuring training material remains current for RTO's is imperative and essential for new small business operators.

5.0 Flexible remedies

MEA agrees particularly with the Consultation RIS regarding the following observations

> *Additionally, the current law is not clear whether, or the extent to which, the definition of 'non-party consumer' covers non-party small business and therefore whether remedies would be available to a small business that is not a party to proceedings brought by a regulator, but can demonstrate it has suffered or is likely to suffer loss or damage caused by an unfair term or terms.*

The same unfair terms can be used repeatedly

> *In addition, under the current law, even if a court declares a term in a standard form contract is unfair, it only applies to that one contract. This means the same (or similar) terms could continue to be used in other small business contracts. This applies even if businesses within the same industry frequently use the same standard form contract template when drawing up contracts. Essentially this allows for unfair terms to exist in standard form contracts unless and until a court determines they are unfair in that individual contract.*

The current position or status quo cannot in our view continue. Action should be taken. MEA does also support regulators taking action on behalf of a group of small businesses who have or are likely to have suffered loss.

MEA would support a combination of action of option three and four. Aligning remedies for non-party businesses and declaring "unfair" clauses that have been found by courts to be unfair is an appropriate response. Combined with MEA previous suggestion that legal representatives who draft and give advice on contracts face professional sanction to ensure UCT are not included is a systematic and medium-term approach that will reduce compliance costs and improve industry behaviour faster than enforcement actions alone.

MEA also supports the reverse onus on contract owners to demonstrate why in their circumstance a clause is not unfair. This balances the power differential between parties and places the enforcement / monitoring of clause on the regulator to oppose or support the applications in court.

6.0 Definition of small business contract

MEA understands the complexity of trying to devise the definition of what is a small business, however as we see from the RIS the data is somewhat complementary.

The RIS indicates that with headcount of 20 employees that 98% of businesses are covered. In examining the ABS 8165.0 Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019, the June 2019 figure states there was 2.313 million businesses in

Australia at June 2019. 98% of 2.313 is 2.226 million or approximately the same number of companies that have turnover up to and including $10 million. Given that these classifications seem to correspond MEA would suggest that a conditional test be adopted. The conditional test is the business and its related entities at the time the contract was signed has either less than 20 employees or revenue of less than $10 million the business is then classified as a small business.

MEA also supports option whereby aggregation of related body corporates is considered. This is particularly important as we have seen many legal strategies in corporate design to specifically take advantage of body corporates to hide a realistic view of actual size and avoid obligations. This has been particularly done whereby Businesses establish Companies to deal with assets, staffing and consulting in different entities and use many interrelated transactions on hire agreements and loans to try and disguise themselves as a small business when they are not.

7.0 Value threshold

MEA would support the removing of the threshold for contract value. MEA supports this on the basis that regardless of the value of the contract the size and resourcing of the small business does not necessarily change and certainly with larger contracts the power differential between the parties is significant if not enhanced given the increasing value of the contracts.

8.0 Clarity on standard form contracts

MEA would support the Courts being given the power to determine what is a standard form contract. Any legislative change should establish additional criteria to the court including

- the number of times a contract has been reused without alteration
- the number of times a contract has been used with incidental alteration
- the number of time a contract has been used with common or repeated alteration / variations

9.0 Minimum Standards

MEA will refrain from commenting on Minimum standards at this time as we do not believe the RIS explains in sufficient detail for a view to be formed.

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APPENDIX ONE

No	Term and Condition	Reason for considering unfair term
1	Clauses which confer power to assign and/or novate that contract to the detriment of the other party without that other party's consent.	These clauses empower the contractor to act as the subcontractor's attorney with authority to execute documents on the subcontractor's behalf to give effect to a novation of the subcontractor's agreement. It has the effect of enabling one party to unilaterally assign the contract and causes imbalance between the parties.
2	Indemnity clauses that excessively extend liability to the subcontractor	Most contracts contain various provisions under which the subcontractors indemnify the head contractor against all types of losses, including those resulting from the negligence or conduct of the head contractor themselves. For many of these, the subcontractor cannot be insured.
3	Defects rectification by third parties' clauses	They allow the head contractor to have a third party carry out defect rectification without notifying the subcontractor, thereby denying them the opportunity to attend to it themselves. Often this will result in the head contractor having the right to call on the subcontractor's bank guarantee or retention moneys.
4	No-collusion clauses	Some contracts seek to prohibit subcontractors from communicating in any way with relevant industry associations. Whilst these clauses might be interpreted as a measure to prevent collusion (which is clearly illegal regardless of the clause's inclusion in the contract), they in fact prevent subcontractors from obtaining cost effective legal advice offered by their association.
5	Payment of deposit before the subcontractor can sue	These clauses require the subcontractor to pay a sum (in some cases equivalent to ten percent of the amount being claimed) to the head contractor before action can be taken (court, dispute resolution, etc.). Such clauses effectively grant security for costs to the head contractor without a court order.
6	Release upon claim made	Where a subcontractor makes a progress claim or request for valuation, these clauses have the effect of preventing subcontractors from any further claim for any prior work. Subcontractors can therefore be left with out of

		pocket for expenses incurred on the job, but which have not yet been billed to the subcontractor (by the supplier, for example).
7	Warranties for design and document accuracy	Design risk occurs where the plans and drawings supplied by the main contractor to the subcontractor with the tender documents (relating to, for example, existing site conditions or design of the work) are inaccurate or incomplete. These inaccuracies result in the subcontractor incurring costs which cannot be recovered, as the subcontractor has provided a "warranty" in the subcontract that it has reviewed the relevant plans and documentation and satisfied themselves as to their accuracy and completeness.
8	Wrongful termination deemed to be for convenience	In the event that a head contractor's termination of a subcontractor is found to be wrongful by a court or arbitrator, these clauses have the effect of deeming the termination to be one of convenience, and therefore protected under the contract.
9	Deeds of release to obtain practical-final completion	If a subcontractor wants to be given practical completion (and get 2.5% of their retention money), they are forced to sign a deed of release, which requires them to release the builder from any further claims. It feels like such a practice has a subcontractor 'over a barrel'.
10	Termination for convenience clauses	They only allow for one party to terminate the contract. These clauses usually permit one party (usually the principal) to terminate the contract due to "convenience". Both the nature and the one-sidedness of this clause also flags it as a potentially unfair contract term.
11	Limited Liability-clauses that exclude or disproportionately limit the liability of the main contractor even if they are partially at fault.	A common feature of most construction contracts is a limitation of the parties' liability to each other. These limitations of liability may be considered unfair.
12	Any statement that restricts or denies rights to implied warranties	Potentially unreasonable limitations on implied warranties, for example, the head contractor does not warrant the fitness or suitability of any services it provides, such as electricity or lighting.
13	Provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention.	It limits a supplier's rights and it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.
14	Obligation to accelerate without compensation	These clauses oblige the subcontractor to accelerate works if directed by the head contractor, but do not allow for compensation for any extra costs incurred.
15	Prior works warranty	Before commencing work on a particular part of a site, subcontractors are being asked to warrant that prior works carried out by other trades are "suitable" for them to do their work. It is unreasonable for subcontractors to determine the completeness, and potentially carry the liability for, another party's work.

16	Unilateral variation clauses	It provides that a contractor is bound to execute variations to their scope of work if directed by a principal. In *ACCC v Bytecard Pty Limited* (Federal Court 24 July 2013) it was held that the right to unilaterally alter a contract was unfair.
17	Variation claims and unreasonable notification period for extensions of time	They are onerous and unnecessary preconditions or bars on claims for delay or for disruption caused by the principal. For example, where claims require high level of details to complete within unreasonably timeframes that can be as little as two days. These short time bars are designed to make it difficult for subcontractors to meet notice obligations and thereby lose entitlement to payment.
18	Termination clauses generally	Clauses of this type can result in an imbalance of power and risk where the legitimate interests and rights are not proportionate. Particularly where powers are provided to the recipient of goods and services to terminate but more limited powers are conferred on the supplier of those goods and services to terminate.
19	Clauses which entitle a principal or head contractor to exercise its absolute discretion against the interests of another party	Causes imbalance of power as it gives one party unilateral decision-making powers. It has the effect of enabling one party (e.g. the head contractor) to unilaterally determine whether the contract has been breached or to interpret its meaning.
20	Liquidated damages especially in the case of residential building	Underestimates the home owner's loss due to delay caused by the builder or construction company.
21	A clause requiring any dispute to go to arbitration (a compulsory arbitration clause)	Clauses which mandate participation in a dispute resolution process before the subcontractor can lodge a payment claim under security of payment legislation. This has the effect of slowing down cash flow and increasing legal costs, thereby increasing pressure on subcontractors to resolve disputes by giving up justifiable claims.
22	A cost escalation or 'rise and fall' clause, unless the contract price exceeds $500,000.	The onus is on the builder to calculate into the contract price any likely rise in costs caused by inflation, wage increases and the like. In Victoria, if a builder wants to include a cost escalation clause, the Director of Consumer Affairs Victoria must approve it. The director has not yet approved any cost escalation clauses.
23	Delay claims	Delay claims relate to the right of a party to claim damages for delays such as inclement weather or industrial action. Subcontractors are now commonly deemed to have taken into account any such delays when submitting their tender price and time for completion of the project which can be unrealistic.
24	Intellectual property transfers & warranties	Some contracts specify that a subcontractor must warrant its ownership of all intellectual property used in the works, which may be unrealistic. Furthermore, some contracts require that the subcontractor assigns all intellectual property to the head contractor.
25	Restrictions on key people	Some contracts prevent the subcontractor from reallocating or replacing key persons on the job without the head contractor's consent. Not only does this interfere with a subcontractor's business operations, but head

		contractors have alternative remedies if the subcontractor fails to perform the contract adequately.
26	Right to inspect records	Clauses that give the head contractor the right to inspect a subcontractor's records at any time can be drafted so broadly that it could be used during a dispute to gain access to documents they are not otherwise entitled to.
27	Right to vary down scope	These clauses allow the head contractor to vary the scope of work under the subcontract without limitation and are vulnerable to misuse.
28	Seizure of equipment	Some contracts will include clauses that give head contractors the right to seize a subcontractor's equipment to pay moneys claimed to be owing to the head contractor.
29	Statutory declarations and releases	These clauses require a subcontractor to submit a statutory declaration with their payment claim or request for valuation stating that all workers and suppliers have been paid. Some even require subcontractors to declare that all sub-subcontractors and suppliers have paid their staff.
30	Termination for inadequate progress	Clauses that entitle the head contractor to terminate a subcontractor's contract for inadequate progress are generally fair and reasonable. Clauses which give that right where the subcontractor fails to comply with a project program are also reasonable, provided the head contractor cannot unilaterally alter the program. However, increasingly common are clauses that allow the head contractor to terminate the contract for unsatisfactory progress without any reference to objective criteria (such as the project program).
31	Ipso facto clauses- Termination for insolvency	Termination for insolvency clauses can be drafted in such a way that the definition or determination of insolvency is at the discretion of the head contractor.
32	Automatic rollover	Automatic renewal terms that do not provide reasonable notice to notify and/or a period to exit the renewal may be unfair. This occurred in *ACCC v Chrisco Hampers* (Federal Court 2016), where it was held that an automatic rollover clause was unfair.