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TREASURY LAWS AMENDMENT (MEASURES FOR A LATER SITTING) BILL  
2021: UNFAIR CONTRACT TERMS REFORMS

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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## ***Table of contents***

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Glossary.....	5
Chapter 1      Enhancements to the unfair contract term regime.....	7

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# **Glossary**

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law as set out in Schedule 2 to the <i>Competition and Consumer Act 2010</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	<i>Treasury Laws Amendment (Measures For A Later Sitting) Bill 2021: Unfair Contract Terms Reforms</i>
CCA	<i>Competition and Consumer Act 2010</i>



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# Chapter 1

## Enhancements to the unfair contract term regime

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### Outline of chapter

1.1 This Bill amends the ACL and the ASIC Act to strengthen and clarify the existing unfair contract term provisions in order to reduce the prevalence of unfair contract terms in consumer and small business standard form contracts. The amendments introduce a civil penalty provision prohibiting the use of unfair contract terms in standard form contracts. The amendments also expand the class of contracts that are covered by the unfair contract term provisions.

### Context of amendments

#### Unfair contract terms

1.2 Standard form contracts are a commonly used and cost-effective option when conducting business, as they avoid the transaction costs associated with negotiated contracts.

1.3 However, such contracts are often offered on a ‘take it or leave it’ basis and can favour one party over another as a result. Consumers and small businesses generally lack the resources and bargaining power to effectively review and negotiate contract terms, or challenge their enforcement. The Bill builds on existing unfair contract term protections for consumers and small businesses in the ACL and the ASIC Act, in relation to standard form contracts, to further address this imbalance.

1.4 The existing protections dealing with unfair terms in standard form contracts were first introduced into the *Trade Practices Act 1974* in July 2010, and subsequently adopted into the ACL, to deal with terms in standard form contracts that:

- cause a significant imbalance in the parties’ rights and obligations;
- are not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such terms, and
- would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.

1.5 The ACL provisions address unfair contract terms in contracts for goods, services and the sale or grant of an interest in land. The equivalent ASIC Act provisions address unfair contract terms in contracts for financial products and services.

1.6 In November 2016, the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* extended the unfair contract term protections to standard form small business contracts that meet certain criteria. The extension of the protections to small business recognised that small businesses can often face the same challenges as consumers in contractual relationships.

1.7 The regime was further extended by the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2019*, which commenced in April 2021. This extended the unfair contract term protections under the ASIC Act to insurance contracts. This addressed Recommendation 4.7 – banning unfair contract terms in standard insurance contracts – of the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

### **Reviews of the unfair contract term regime**

1.8 On 21 November 2018, the Government released the Review of Unfair Contract Term Protections for Small Business: Discussion Paper. Information gathered through the 2018 review suggested that while the unfair contract term regime had improved protections for small business in certain industry sectors, it did not provide strong deterrence against businesses using unfair contract terms in their standard form contracts.

1.9 Additionally, the review found that some aspects of the current regime appear to have created ambiguity, uncertainty, and practical difficulties for businesses to comply with the law. Submissions to the 2018 review also highlighted the need for regulators to promote awareness of the unfair contract term protections and to improve the guidance provided to business, to support compliance with legislative requirements.

1.10 As a result of the findings from the 2018 review, the Government announced its intention to strengthen the unfair contract term protections. Treasury subsequently released a Consultation Regulation Impact Statement in December 2019, with consultation concluding in March 2020. In the consultation, almost 80 submissions were received, and a series of stakeholder roundtables were also held. The Decision Regulation Impact Statement was finalised in September 2020.

1.11 In November 2020, at the meeting of the Legislative and Governance Forum on Consumer Affairs, ministers considered the Decision Regulation Impact Statement and agreed that reforms were necessary to provide better protections for consumers and small



businesses from unfair contract terms. The Bill implements the reforms agreed by the ministers.

## Summary of new law

1.12 The Bill strengthens the remedies and enforcement of the regime by:

- providing courts with the power to **impose a pecuniary penalty** for a contravention of the prohibition on proposing, applying or relying on an unfair contract term provision in a standard form contract, in addition to the current ability to declare it ‘unfair’;
- **streamlining the powers of a court to make orders** to void, vary or refuse to enforce part or all of a contract (or collateral arrangement);
- **making clear a court’s power 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;
- making clear a **court’s power to issue injunctions** against a respondent with respect to existing or future consumer or small business standard form contracts entered into by a respondent, containing a term that is the same or is substantially the same as a term the court has declared to be an unfair contract term; and
- **creating a new rebuttable presumption that terms that have been found to be unfair** that are subsequently included in relevant contracts in similar circumstances, **are unfair.**

1.13 The Bill **expands the class of contracts** that are covered by the unfair contract term provisions by:

- **increasing the small business definition thresholds** (so that the regime captures an expanded class of small business standard form contracts); and
- **removing the contract value threshold** (so that the regime captures an expanded class of small business standard form contracts).

1.14 The Bill clarifies and strengthens the unfair contract term provisions generally by:

- exempting certain clauses from the unfair contract terms provisions where those clauses are included in standard form contracts in compliance with relevant Commonwealth, State or Territory legislation;
- ensuring that repeat usage of a contract must be taken into account by a court when determining whether a contract is a standard form contract;
- setting out matters that the court must not consider when determining whether a party was required to accept or reject terms of a contract or whether a party was given an effective opportunity to negotiate the contract. These new matters form part of the provisions about determining whether a contract is a standard form contract; and
- making technical amendments to make clear that remedies for non-party consumers are also applicable to non-party small businesses.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The unfair contract term protections will apply to a small business contract if 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 unfair contract term protections apply to a small business contract if one party to 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.
A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on an unfair contract term.	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>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.</p> <p>These orders can be made on application of a person or by the regulator on behalf of and with consent of a person.</p>	<p>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).</p> <p>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.</p> <p>These orders can be made on application of a person or by the regulator on behalf of and with the consent of a person.</p>
<p>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 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.</p> <p>These orders can be made on application of the regulator only.</p>	<p>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 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).</p> <p>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.</p> <p>These orders can be made on applications of the regulator only.</p>

<i>New law</i>	<i>Current law</i>
<p>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.</p> <p>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.</p>	<p>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.</p>
<p>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.</p>	<p>No equivalent.</p>
<p>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.</p>	<p>In determining whether a contract is a standard form contract, a court must take into account a number of matters.</p>

<i>New law</i>	<i>Current law</i>
<p>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 was given an effective opportunity to negotiate the terms of the contract, the court must <b>not consider:</b></p> <ul style="list-style-type: none"> <li>• whether a party had an opportunity to <b>negotiate minor or insubstantial changes</b> to terms of the contract;</li> <li>• whether a party had an opportunity to <b>select a term from a range of options</b> determined by another party; or</li> <li>• the extent to which a party to another contract or proposed contract was given an effective opportunity to <b>negotiate terms of the other contract or proposed contract.</b></li> </ul>	<p>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 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.</p>
<p>In addition to the current exemptions to the unfair contract term provisions, <b>contractual provisions that are taken to be included in a contract by operation of a law are also excluded.</b> 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 unfair contract term provisions.</p>	<p>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.</p>
<p>The law refers to non-party to clarify the law <b>applies to both consumers and small businesses.</b></p>	<p>The law refers to non-party consumers (despite applying to both consumers and small businesses).</p>

## Detailed explanation of new law

### Prohibiting the use, application or reliance of an unfair contract term

1.15 The Bill amends both the ACL and the ASIC Act to prohibit the inclusion or reliance on an unfair contract term in standard form contracts. If a court finds that a person has contravened the new prohibitions, it can order payment of a pecuniary penalty. *[Schedule 1, items 1 and 2, sections 23(2A) to 23(2C) of the ACL and sections 12BF(2A) to (2C) of the ASIC Act]*

1.16 This amendment provides for two separate prohibitions. The first makes clear that a person will be in breach of the law if they propose an unfair term in a standard form consumer or small business contract which they have entered into. *[Schedule 1, items 1 and 2, section 23(2A) of the ACL and section 12BF(2A) of the ASIC Act]*

1.17 A person can breach this 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. *[Schedule 1, items 1 and 2, section 23(2B) of the ACL and section 12BF(2B) of the ASIC Act]*

1.18 The second prohibition makes clear that a person will be in breach of the law if they apply or rely (or purport to apply or rely on) an unfair term of a standard form consumer or small business contract. A person can breach this 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. *[Schedule 1, items 1 and 2, section 23(2C) of the ACL and section 12BF(2C) of the ASIC Act]*

1.19 This Bill extends the existing powers of a court to order a pecuniary penalty in addition to making a declaration that a term is unfair to the unfair contract terms regime. *[Schedule 1, items 9 to 12, 25 and 26 sections 224(1)(a), 224(3) and 224(3A) of the ACL and the definition of ‘enforcement proceeding’ in section 12BA, GBA(6)(aa) of the ASIC Act]*

## Remedies available under the scheme

1.20 Under the current law, where the court determines a term in a standard form contract to be unfair, that term is automatically void (without the need for further action or orders to be made).

1.21 A court can also make orders declaring the whole or any part of a contract or collateral arrangement made between a respondent and another person to be void or void at any time as the court decides. The court may also vary a contract or arrangement and refuse to enforce any or all of the provisions of a contract or arrangement.

1.22 These orders can be made in relation to a person who is party to a proceeding before a court (or for whom the regulator has brought a matter on their behalf before a court) or in relation to non-party persons. A non-party is a person who is not party to the court proceedings but who may have nonetheless been injured, or is likely to be injured, by conduct of a respondent to those proceedings.

1.23 Importantly, all these orders can only be made in circumstances where a person (or class of persons) has suffered, or is likely to suffer, loss or damage because of the conduct of another person.

1.24 Specifically, in relation to the unfair contract terms regime, the policy intent of these types of orders is to allow the court to provide a

remedy both in relation to a person who is directly involved in court proceedings and also to people affected by the same conduct, which is the subject of court proceedings, but who are not directly involved in the court proceedings.

1.25 In relation to people who are not directly involved in the court proceedings, the law allows for a remedy to be granted to these people **without the need for the court to specifically assess their circumstances individually.**

1.26 Rather the law allows for the court to make orders on the basis of a person **belonging to a class of people.** That is, people also affected or likely to be affected, by the term determined to be unfair, without the need to specify which persons are part of that class or making a finding about the nature of any loss or damage suffered or likely to have been suffered by individuals within that class.

1.27 The above remedies are available under the general powers in the ACL and the ASIC Act (particularly sections 237(1), 238(1), 239(1) and 243 of the ACL and 12GN, 12GNB, 12GNC of the ASIC Act) and are available for contraventions of the ACL and the ASIC Act as well as in relation to the unfair contract term provisions.

1.28 The **Bill augments these powers by making additional remedies** available that specifically relate to unfair contract terms and are not available for other contraventions of the ACL and the ASIC Act. *[Schedule 1, items 5, 22 and 36, section 137D, sections 243A and 243B of the ACL and sections 12GNE and 12GNF of the ASIC Act]*

1.29 The Bill retains the automatic voiding provisions present in the existing law. That is, if a court finds a standard form contract to contain an unfair term, that term is automatically considered void by operation of the law.

1.30 The court can also **make orders to void, vary or refuse to enforce** part or all of a contract if the court thinks this is appropriate to prevent or reduce loss or damage that may be caused (or to remedy loss or damage that has occurred). The court can only make this type of order after the court has made a declaration that a term of a contract is unfair. This means the court will have already considered if the term would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on. The orders can be made upon application of a person or by the regulator on a behalf and with the consent of a person. *[Schedule 1, item 22 and 34, section 243A of the ACL and section 12GNE, 12GNF of the ASIC Act]*

1.31 This differs to the orders the court can make under section 237 and 238 of the ACL and 12GM of the ASIC Act, as under those provisions 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.** If loss and

damage has already occurred, then the court will need to be satisfied that the orders made will remedy this.

1.32 The amendments also allow the court to make orders, upon the application of the regulator, preventing a term that is the same or substantially similar in effect to a term that has been declared as unfair, from being included in any future standard form small business or consumer contracts by a person who is the respondent to the proceeding where the declaration about an unfair contract term was made. *[Schedule 1, items 22 and 36 section 243B(1)(a) of the ACL and section 12GNF(1)(a) of the ASIC Act]*

1.33 In addition to this, the amendments allow the court to make orders, upon application of the regulator, to prevent or reduce loss or damage which may be caused to any person (whether or not that person is party to proceedings for which the court is making the order) in relation to a term that is the same or substantially the same in effect to a term that has been declared unfair. These orders can be made in relation to any existing contract, whether or not that contract is subject to the proceedings for which the court is making the order. *[Schedule 1, items 22 and 36, section 243B of the ACL and section 12GNF of the ASIC Act]*

1.34 Without limiting the power of the courts to make these orders, the orders that the court can make under the powers described above include orders to prevent or restrain a person from including, applying or relying on a term that is the same or substantially the same in effect to a term that has been declared unfair in other of the respondent's standard form consumer or small business contracts. This replaces the power of the court to order an injunction previously provided under section 232(3) of the ACL and section 12GD(9) of the ASIC Act, which are repealed. *[Schedule 1, items 12, 22, 27 and 36, sections 232(3) and 243B(2) of the ACL and sections 12GD(9) and 12GNF(2) of the ASIC Act]*

1.35 The court can also make orders to void, vary or refuse to enforce part or all of a contract if the court thinks this is appropriate to prevent or reduce loss or damage that may be caused (or to remedy loss or damage that has occurred). *[Schedule 1, items 22 and 36, section 243B of the ACL and 12GNE of the ASIC Act]*

1.36 The Bill makes clear that orders can be made under the current section 237(1) and 239(1) of the ACL or of s12GNE(1) and s 12GNF of the ASIC Act and the new remedy provisions which extend to unfair contract terms in standard form contracts that are not specifically before the court. The Bill retains the current ability of the court to make certain orders under the ACL or ASIC Act regardless of whether an injunction or other order under the provisions specified, has been made. *[Schedule 1, items 12, 22 and 36, sections, 232 and 245 of the ACL and section 12GNG of the ASIC Act]*

1.37 An application for all the orders above can be made at any time within six years after the day on which a declaration that a term is an



unfair contract term is made. *[Schedule 1, items 22 and 36, sections 243A(3) and 243B(3) of the ACL and sections 12GNE(3) and 12GNF(3) of the ASIC Act]*

1.38 The Bill will extend the court's power to issue public warning notices and make orders disqualifying a person from managing a corporation. These powers will be extended to breaches of the unfair contract term provisions in both the ACL and the ASIC Act, where this was not previously available. This will create consistency between the ACL and the ASIC Act to allow regulators to issue to the public a written notice about persons who breach the unfair contract term provisions. *[Schedule 1, items 24, 30 and 31, section 248 of the ACL and sections 12GLC(1)(A) and 12GLD(1)(a) of the ASIC Act]*

1.39 The Bill will also ensure that regulators will be able to apply for adverse publicity orders under both the ACL and the ASIC Act. Adverse publicity orders allow a court to make an order, on the application of a regulator, requiring a person to publish information outlining that the court specifies. In this case the regulators will be able to apply for an order which requires a person who has contravened the ACL or ASIC Act through the use of an unfair contract term to publish that they have breached the unfair contract term regime on their website or in another publicly facing way. This power is already available under the ASIC Act. The Bill will amend the ACL to create a consistent set of powers between the ACL and the ASIC Act. *[Schedule 1, item 23, section 247(1)(a) of the ACL]*

## **Rebuttable presumption for a term that has been declared by a court to be unfair**

1.40 There is no restriction in the current law on a person using a term in a standard form contract that is similar or even identical to a term that has been declared unfair in previous proceedings. Such terms can be used repeatedly by a person in similar standard form contracts to those which have also been issued by that person and assessed by a court to be unfair. Similar or identical terms to those previously assessed by a court and found to be unfair can also be widely used by others in standard form contracts within the same industry.

1.41 The Bill provides that if a term (the original unfair term) of a contract has, in previous court proceedings, been found to be unfair, it will be presumed in a subsequent proceeding that a term that is the same or substantially similar in effect as the original term, is also unfair. The presumption applies where the term is proposed by the same person who proposed the original unfair term or where the term is part of a contract that is in the same industry as the contract that contained the original unfair term. *[Schedule 1, items 37 and 38, section 24(5) of the ACL and section 12BG(5) of the ASIC Act]*

1.42 The Bill encourages 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. This encourages compliance and provides greater clarity and certainty to consumers, small businesses, and the regulator when taking legal action to address unfair terms in standard form contracts, by being able to rely on previous court rulings.

1.43 The presumption that a term in a contract is unfair based on a previous court ruling can be rebutted by a contract-issuing party in a subsequent proceeding, by proving that it is not unfair in the particular circumstances of the case. [*Schedule 1, items 37 and 38, sections 24(5) of the ACL and section 12BG(5) of the ASIC Act*]

1.44 This rebuttable presumption, as it applies to the same contract-issuing party, can be differentiated from other reversed onus-of-proof cases as it is based on the previous behaviour of the relevant parties to the contract (or at a minimum, in the same industry). It is only enlivened where a business is seeking to use or rely on a contractual term which has previously been declared unfair. The rebuttable presumption therefore acts as a disincentive for companies to reuse terms they know are likely to be considered unfair.

1.45 The rebuttable presumption is intended to encourage contract-issuing parties to maintain thorough monitoring and record keeping of their contracts to ensure that unfair terms are removed from or not included in standard form contracts.

1.46 If the rebuttable presumption was not included, the regulator could be required to undertake costly and difficult legal prosecutions of the same provisions every time they were used by the contract-issuing party, despite those same provisions having previously been declared unfair and a contravention of the ACL and ASIC Act.

### **Example 1.1**

Golden Draws Bank and Joel's Software Co sign an agreement for a small business loan where Golden Draws Bank is the lender and Joel's Software Co is a small business within the definition in this Bill. The small business loan contract is a standard form contract that Golden Draws Bank uses for all its customers.

Golden Draws Bank includes in its standard form contracts a provision which allows them to unilaterally vary terms of the contract including the upfront price of the contract, the financial services provided under it, and other relevant terms. Golden Draws Bank's entitlement to do so is limited by the requirement that it give notice 1 day prior to any variation.

In court proceedings Joel's Software Co takes against Golden Draws Bank, the court finds these terms to be unfair contract terms and they are void as a result. The court considers these terms to be unfair as they allow Golden Draws Bank to vary the loan and reduce the amount of funds that the customer would otherwise be able to utilise. While it is required to provide notice, the notice period is too short and does not give Joel's Software Co sufficient opportunity to consider refinancing options.

Later, Golden Draws Bank tries to include the same clauses in a standard form contract with another party, Zoe's Photography. Zoe's Photography also takes Golden Draws Bank to court. Zoe's Photography is able to rely on the rebuttable presumption to show that the clauses are unfair, and the onus lies on Golden Draws Bank to prove the terms are not unfair in court.

## Determining what is a standard form contract

1.47 The unfair contract term protections only apply to standard form contracts. The law sets out matters that the court must take into account when determining whether a contract is a standard form contract.

### *Repeat usage of a standard form contract*

1.48 The Bill adds an additional matter that the court must take into account when determining whether a contract is a standard form contract.

1.49 The Bill makes clear that the **court must take into account** whether a party has entered into a contract that is the same or substantially similar to another contract entered into by that person and the number of times this has been done. This is a relevant factor because standard form contracts are used repetitively with the same or similar terms. [*Schedule 1, items 39 and 41, section 27(2)(ba) of the ACL and section 12BK(2)(ba) of the ASIC Act*]

### *Effective opportunity to negotiate*

1.50 Contracts, especially from large businesses, can be provided on a 'take it or leave it basis', with no opportunity for other parties to negotiate any or the vast majority of the terms of the contract. **In some instances, the party issuing the contract may allow limited changes to be made to the contract that are insubstantial in the context of the whole contract. These circumstances do not mean** the relevant consumer or small business was provided an effective opportunity to negotiate and point towards those contracts being standard form contracts.

1.51 The Bill provides clarity around two of the factors that may be taken into account by a court when determining whether a contract is a standard form contract.

1.52 When determining whether a party was able to genuinely negotiate a contract, a **court is to disregard instances where a party has negotiated minor** or insubstantial changes to the terms of a contract. A

party's ability to select from a pre-determined range of terms within a contract is also to be disregarded as evidence that an effective opportunity to negotiate is provided to that party. *[Schedule 1, items 40 and 42, section 27(3)(a) and (b) of the ACL and section 12BK(3)(a) and (b) of the ASIC Act]*

1.53 The court is also to disregard that a party to another similar contract has been given an effective opportunity to negotiate the terms of that contract. This clarifies that even if a small subset of consumers or small businesses are able to negotiate the terms of a contract that is issued to a broader group of consumers or small businesses, the court is not to take this into consideration when determining whether the contract issued to the broader group is a standard form contract. *[Schedule 1, items 40 and 42, section 27(3)(c) of the ACL and section 12BK(3)(c) of the ASIC Act]*

## Contract thresholds

### *Removal of the upfront price payable threshold*

1.54 The Bill removes the upfront contract value thresholds for the definition of a small business contract. *[Schedule 1, items 45 and 47, section 23(4) and (5) of the ACL and section 12BF(4), (5) and (6) of the ASIC Act]*

1.55 When the unfair contract term protections were extended to small business contracts in 2016, a contract value threshold was included to limit the scope of the protections to low value small business contracts. This was on the basis that it would be reasonable for a small business to undertake their own due diligence for contracts above a certain value.

1.56 Accordingly, one of the requirements for a contract to be considered a small business contract and covered by the existing unfair contract term protections is that:

- the upfront price payable under the contract does not exceed \$300,000; or
- if the contract has a duration of more than 12 months, the upfront price payable under the contract does not exceed \$1 million.

1.57 These upfront contract value thresholds have been eroded due to inflation in the cost of goods and services over time and are now too low to take into account the range of contracts small businesses enter into. Furthermore, the upfront price of a contract is not always available at the time of entering into a contract or may fluctuate based on market conditions. This can create uncertainty as to whether the contract is covered by the unfair contract term protections.

1.58 Additionally, the current upfront contract value threshold amounts **do not accommodate small businesses in industries where high value contracts with low profit margins are common as a matter of course.**

1.59 Further, where a small business has no ability to negotiate terms (as is the case with standard form contracts) and has no effective alternative sources of supply or acquisition, unfair contract terms cannot be avoided even with due diligence.

1.60 This means that provided a contract meets the other criteria of a small business contract, (as amended by the Bill outlined below), the contract entered into by the parties will be covered regardless of the upfront price payable under the contract. [Schedule 1, items 46 and 50, sections 250(2)(a) of the ACL and section 12GND(2)(a) of the ASIC Act]

#### *Changing the definition of small business contract*

1.61 In addition to removing the upfront price payable thresholds, the Bill amends the definition of small business contract to expand the class of contracts that will be captured by the unfair contract term provisions.

1.62 Under the current headcount threshold (which determines whether a business may be considered a 'small business' covered by the protections of the unfair contract term regime), it can be difficult for a contract-issuing party to determine the other party's employee numbers. The lack of clarity in the application of the test has led to uncertainty.

1.63 The amended definition requires that one party to a contract is a business that either employs fewer than 100 persons or has an annual turnover of less than \$10,000,000 for the previous income year. A party can satisfy one or both of these conditions to fall within the definition. [Schedule 1, items 45 and 47 to 49, section 23(4)(b)(i) in Schedule 2 to the CCA 2010 and section 12BF(4)(a), 12BH(2)(aa) and 12BL(3a) of the ASIC Act]

1.64 For the purposes of the employee threshold, all employees of the party to the contract must be counted, regardless of whether some of those employees are involved in the specific business that is subject to the contract.

1.65 A party includes and is not limited to a person, entity or body corporate.

1.66 The amendments also provide clarity on how employees are to be counted in determining whether a business falls within the 100 employee threshold. The Bill maintains the existing exclusion for casual employees not employed on a regular and systematic basis, but also introduces a pro rata assessment for staff employed on a part time basis. These threshold requirements more accurately reflect the reality of many small businesses and provide certainty as to which contracts will be covered by the regime. [Schedule 1, items 45 and 47, section 23(5) of the ACL and section 12BF(5) of the ASIC Act]

1.67 The turnover condition requires the party's turnover for the previous income year (within the meaning of the *Income Tax Assessment Act 1997*) to be less than \$10 million at or before the time the contract is

entered into. *[Schedule 1, items 45 and 47, section 23(4)(b)(ii) in Schedule 2 to the CCA 2010 and section 12BF(4)(b) of the ASIC Act]*

1.68 A party's turnover includes the sum of all supplies made by the party during the period as defined in the *A New Tax System (Goods and Services Tax) Act 1999*. The sum of supplies does not include supplies that:

- are input taxed;
- are not taxable under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*;
- are not connected with the party's business; or
- are not connected with the indirect tax zone.

*[Schedule 1, items 45 and 47, sections 23(6) and (7) of the ACL and sections 12BF(6) and (7) of the ASIC Act]*

### **Minimum standards provisions excluded from being unfair terms**

1.69 The current unfair contract term provisions exempt a term of a standard form consumer or small business contract from being declared an unfair term if it is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

1.70 However, the law does not clearly exempt terms that are read into a contract by the operation of a law of the Commonwealth, a State or a Territory. In some cases, a law only requires or reads terms into a contract on a contingent basis, that is, only requires certain contract terms be included in a contract if other types of terms have already been included in that contract. The Bill clarifies that all of these types of terms are exempt from the unfair contract term provisions. *[Schedule 1, Items 51 and 52, section 26(1) of the ACL and section 12BI(1) of the ASIC Act.]*

1.71 For example, some Commonwealth, State and Territory laws require that, if certain terms are included in a contract (term X), terms setting industry-specific requirements must also be included in the contract (terms A, B, C, etc.). In these scenarios, where term X of a contract exists, the relevant law either requires the inclusion of or is taken to include the terms A, B and C as a result.

1.72 While Terms A, B, C, etc. are required by a law of the Commonwealth, a State or Territory and therefore cannot currently be declared unfair, term X is not 'expressly permitted' nor 'required' in the way envisaged by the current exemptions. This means that term X could be challenged as unfair, despite a law having already contemplated the inclusion of term X in a contract, by virtue of requiring other terms be included in a contract should term X be included in a contract. The Bill amends the unfair contract term provisions to exempt these terms from the unfair contract term provisions.

## Example 1.2

Ajay's Phone Company (Ajay Co.) are seeking to rent a retail property from Sharon's Building Management Co (Sharon Co.) located inside building A. As part of the lease agreement Sharon Co. have included a term allowing them to terminate the lease if they want to demolish or renovate the building the relevant retail premise is located in.

Under the relevant State law, where a term is included in a contract for a termination of a retail lease on the grounds of the proposed demolition or renovation of the building in which the retail premises is located, the lease is taken to include other terms setting out how a person must notify or compensate a tenant as a result of the termination.

The term allowing Sharon Co. to terminate the lease agreement is exempt from the unfair contract term protections because it results in one or more other terms being included in the contract by operation of a law of a State. The terms about notice and compensation are exempt from the unfair contract term provisions as they have been included in the contract, or are taken to be so included, because of a law of a State.

1.73 The amendments make clear that if a law of the Commonwealth, a State or a Territory requires or reads in certain terms into a standard form consumer or small business contract then it cannot be an unfair contract term under the ACL or ASIC Act. *[Schedule 1, items 51 and 52, section 26(1) of the ACL and section 12BI(1) of the Australian Securities and Investments Commission Act 2001]*

1.74 This will ensure that the unfair contract terms regime does not cover terms that other laws require parties to include in their contracts and will minimise interference with freedom of contract while still ensuring appropriate protections for small businesses from unfair contract terms. It will also enable State and Territory governments to ensure that they are able to implement legislation that reflects the specific requirements of their jurisdiction.

## Provisions referring to non-party consumers

1.75 This Bill makes technical amendments to make it clearer on the face of the law that remedies for a breach of the unfair contract term provisions are available for both non-party consumers and non-party small businesses. These changes do not affect the way the law currently functions.

1.76 The Bill amends the law by replacing the definition of 'non-party consumer' with the concept of 'non-party'. *[Schedule 1, items 53, 54 and 63, section 2(1) (definition of non-party) in the ACL and section 12BA(1) (definition of non-party) of the ASIC Act]*

1.77 This change makes it clear that the remedies for a breach of the unfair contract term provisions are available to all non-parties, regardless of whether they are consumers or small businesses.

1.78 Amendments are made to the ACL to ensure all references to non-party consumers are references to non-parties. [Schedule 1, items 55 to 62, Division 4 of Part 5-2 (heading), Subdivision B of Division 4 of Part 5-2 (heading), section 239 (heading), paragraph 239(1)(c), paragraphs 239(3)(a) and (b), section 240 (heading), section 240, section 241 (heading) and section 241 of Schedule 2 to the CCA 2010].

1.79 Amendments are made to the ASIC Act to ensure all references to non-party consumers are references to non-parties. [Schedule 1, items 64 to 69, section 12GNB (heading), section 12GNB, section 12GNC (heading) and 12GNC of the ASIC Act].

## Other Amendments

1.80 The Bill makes amendments to the ACL to ensure that references to new provisions are incorporated into relevant sections to give effect to the unfair contract term regime. [Schedule 1, items 5 to 8, sections 137D, 137F(2)(b) and (c), section 137H, section 155(2)(b)(v), the definition of 'declared term' in section 2(1) and the definition of 'enforcement proceeding' in section 2(1) of the ACL]

1.81 The Bill makes amendments to the ASIC Act to ensure that reference to new provisions are incorporated into relevant sections to give effect to the unfair contract term regime. [Schedule 1, items 25, 26, 28 to 34, sections 12BA(1), 12GBA(6)(a), 12GF(1), 12GLA(4), 12GLC(1)(a), 12GN(1)(c) and 12GNB(1)(a)(i) of the ASIC Act]

1.82 The Bill also makes minor amendments to the ACL to update the readability and structure of the Acts that do not affect the way the law currently functions. [Schedule 1, items 12, 16 to 18 and 70, Subdivision A of Division 4 of Part 5-2 (heading), subdivision 237(1) (notes), Subdivision C of Division 4 of Part 5-2 (heading), section 239(1) (notes), Subdivision B of Part 5-2 (heading) and section 303(2) of the ACL]

## Application and transitional provisions

1.83 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. [Schedule 1, items 71 and 72, 304 of the ACL and section 350 of the ASIC Act]