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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (ENHANCING TAX INTEGRITY AND
SUPPORTING BUSINESS INVESTMENT) BILL 2022
INCOME TAX AMENDMENT (LABOUR MOBILITY PROGRAM) BILL 2022

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and
Community Housing)

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Unfair contract terms

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Outline of chapter

- 1.1 Schedule 4 to the Bill amends the CCA, ACL and the ASIC Act to strengthen and clarify the existing unfair contract terms provisions and to reduce the prevalence of unfair contract terms in consumer and small business standard form contracts. The amendments introduce a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard form contracts. The amendments also expand the class of contracts that are covered by the unfair contract terms provisions.
- 1.2 All references in this chapter to “regulators” are to the ACCC (in relation to the ACL) or to ASIC (in relation to the ASIC Act) unless otherwise stated.

Context of amendments

Unfair contract terms

- 1.3 Standard form contracts are a commonly used and cost-effective option when conducting business, as they avoid the transaction costs associated with negotiated contracts.
- 1.4 However, consumers and small businesses often lack the resources and bargaining power to effectively review and negotiate terms in standard form contracts. The existing unfair contract terms protections in the ACL and the ASIC Act provide that where a court finds a term is unfair, the term is void. This approach has not provided sufficient deterrence against the use of unfair terms, which remain prevalent in standard form contracts.
- 1.5 The existing unfair contract terms protections were first introduced in July 2010 into the *Trade Practices Act 1974* and were subsequently adopted into the ACL. Under the regime, a term in a standard form contract is unfair if it:
 - causes a significant imbalance in the parties’ rights and obligations;
 - is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by such a term; and
 - would cause detriment (financial or otherwise) to a party if the term were to be applied or relied on.
- 1.6 In determining whether a contract term falls within this definition, a court can consider such matters as it thinks relevant but must take into account the contract as a whole and the extent to which a term is transparent.
- 1.7 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.

- 1.8 In November 2016, the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* extended the unfair contract terms 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 a contractual relationship.
- 1.9 The regime was further extended by the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2019*, Schedule 1 to which commenced on 5 April 2021. This extended the unfair contract terms 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 terms regime

- 1.10 On 21 November 2018, the Government released the Review of Unfair Contract Term Protections for Small Business: Discussion Paper (2018 review). Information gathered through the 2018 review suggested that while the unfair contract terms 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.
- 1.11 Additionally, the 2018 review found that some aspects of the current regime appeared 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 terms protections and assist with compliance with the law by improving the guidance they provide to businesses.
- 1.12 Having considered the findings from the 2018 review, the Government announced in March 2019 its intention to strengthen the unfair contract terms 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.
- 1.13 In November 2020, at the meeting of the Legislative and Governance Forum on Consumer Affairs, ministers considered a Decision Regulation Impact Statement and agreed that reforms were necessary to better protect consumers and small businesses from unfair contract terms.

1.14 An exposure draft Bill was subsequently released for public consultation in August 2021.

Summary of new law

1.15 This Schedule strengthens the remedies and enforcement of the regime by:

- prohibiting the proposal of, use of, application of, or reliance on, unfair contract terms in a standard form consumer or small business contract;
- creating new civil penalty provisions for breaches of the prohibitions;
- clarifying 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; and
- 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.

1.16 This Schedule expands the class of contracts that are covered by the unfair contract terms 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 for contracts under the ACL and raising the value threshold for contracts regulated by the ASIC Act (so that the regime captures an expanded class of small business standard form contracts).

1.17 This Schedule clarifies and strengthens the unfair contract terms provisions generally by:

- 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;
- clarifying that a contract may still be a standard form contract despite there being an opportunity for:
 - a party to negotiate changes that are minor or insubstantial in effect;

- a party to select a term from a range of options determined by another party;
- a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.
- making technical amendments to make clear that remedies for non-party consumers are also applicable to non-party small businesses;
- 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;
- excluding certain categories of contracts from the unfair contract terms provisions, including:
 - the operating rules of licensed financial markets;
 - the operating rules of licensed clearing and settlement facilities; and
 - real time gross settlement systems approved as payment and settlement systems by the RBA; and
- exempting certain life insurance contracts from the scope of the unfair contract terms provisions.

1.18 This Schedule also requires that the relevant Commonwealth Minister cause a review of the amendments to the ACL, CCA and ASIC Act made by this Schedule to be completed within 6 months after the end of two years from commencement.

1.19 This Schedule does not alter the existing definition of an unfair term.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
Under the ACL, the unfair contract terms protections will apply to a small business contract if one party to the contract is a business that employs fewer than 100 persons or has a turnover for the last income year of less than \$10,000,000.	The unfair contract terms protections apply to a small business contract if one party to the contract is a business that employs fewer than 20 persons and the upfront price payable under the contract does not exceed one of the

Unfair contract terms

New law	Current law
<p>Under the ASIC Act, the protections will apply to a small business contract if the upfront price payable does not exceed \$5,000,000, and one party to the contract employs fewer than 100 persons or has a turnover for the last income year of less than \$10,000,000.</p> <p>Under both the ACL and ASIC Act part time employees are to be counted as an appropriate fraction of a full-time equivalent employee.</p>	<p>two alternative monetary thresholds provided for in the law.</p>
<p>A pecuniary penalty may be imposed if a person proposes, applies, relies or purports to apply or rely on, an unfair contract term.</p>	<p>No equivalent.</p>
<p>The court can make orders for a whole contract or collateral arrangement, including to void, vary or refuse to enforce the contract, if this is appropriate to prevent loss or damage that is likely to be caused. The new provisions do not require a court to consider that they will redress actual loss or damage.</p> <p>The court can also make orders, on 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.</p> <p>Additionally, the court can make orders, on the application of the regulator, to prevent or reduce loss or damage which is likely to be caused to any person by a term that is the same or substantially the same in effect to a term that has been declared unfair.</p>	<p>Where a court determines a term in a standard form contract to be unfair, it is automatically void.</p> <p>The court can also make orders for the whole or any part of a contract or collateral arrangement between the respondent and another person, including that the contract is void. These orders can be made by an affected party or by application of the regulator on behalf of either a party or a non-party. Such orders can only be made when a person or class of persons has suffered, or is likely to suffer, loss or damage.</p>
<p>In addition to the current injunction powers, the court can make an injunction restraining a person from:</p> <ul style="list-style-type: none"> • 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; or • applying, or relying on, a term in any existing contract that is the same or 	<p>Among other powers, the court can make an injunction in such terms as it considers appropriate restraining 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>

New law	Current law
<p>similar in effect to a term that has been declared unfair, whether or not that contract is before the court.</p>	
<p>In addition to the current matters, a court must also take into account whether one of the parties has used the same or a 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>
<p>A contract may be determined to be a standard form contract despite there being an opportunity for:</p> <ul style="list-style-type: none"> • a party to negotiate changes to contract terms that are minor or insubstantial in effect; • a party to select a term from a range of options determined by another party; or • a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract. 	<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 terms provisions, contractual provisions that are taken to be included in a contract by operation of a Commonwealth, state or territory law are also excluded to the extent that the relevant law mandates their inclusion.</p> <p>Additionally, a clause of a contract that results in other contract terms being included in a contract because of the operation of another law of the Commonwealth or a state or territory, is exempt from the unfair contract terms provisions insofar as the provisions would prevent the other terms from being included or operating as required by the law.</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 terms regime.</p>
<p>The law refers to “non-party” to clarify that the law applies to both consumers and small businesses.</p>	<p>The law refers to “non-party consumers” (despite applying to both consumers and small businesses).</p>

New law	Current law
<p>Certain categories of contracts are excluded from the operation of the unfair contract terms provisions. These include:</p> <ul style="list-style-type: none"> • the operating rules of licensed financial markets such as ASX Limited; • the operating rules of licensed clearing and settlement facilities; and • real time gross settlement systems approved as payment and settlement systems by the RBA. <p>Certain life insurance contracts are also excluded from the scope of the provisions in order to ensure positive consumer outcomes.</p>	<p>No equivalent.</p>

Detailed explanation of new law

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

- 1.20 This Schedule amends both the ACL and the ASIC Act to prohibit the inclusion of 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 a pecuniary penalty.
[Schedule 4, items 1 to 4, subsections 23(2A) to (2C) of the ACL and subsections 12BF(2A) to (2C), 12BG(1) and 12BH(1) of the ASIC Act]
- 1.21 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 4, items 1 to 4, subsections 23(2A) to (2B) of the ACL and subsections 12BF(2A) to (2C), 12BG(1) and 12BH(1) of the ASIC Act]
- 1.22 Each individual unfair term contained in a contract proposed by the person is considered a separate contravention and, as a result, a person can be found to have multiple contraventions in a single contract. While this could result in a high theoretical maximum penalty, a court will apply existing principles regarding the assessment of the pecuniary penalty to be imposed, to ensure that the total quantum of penalties is appropriate. Accordingly, these provisions are consistent with the *Guide to Framing Commonwealth Offences, Infringement*

Notices and Enforcement Powers.

[Schedule 4, items 1 and 2, subsection 23(2B) of the ACL and subsection 12BF(2B) of the ASIC Act]

- 1.23 The term ‘makes a contract’ in this Schedule includes where a person enters into a contract. It is not intended to apply where a person merely drafts or creates a new standard form contract template for later use.
- 1.24 A person will also be in breach of the law if they apply or rely on (or purport to apply or rely on) an unfair term of a standard form consumer or small business contract.
[Schedule 4, items 1 and 2, subsection 23(2C) of the ACL and subsection 12BF(2C) of the ASIC Act]
- 1.25 To apply or rely on (or purport to apply or rely on) means to give effect to or seek to enforce an unfair term of a contract. As such, a person can have multiple contraventions in relation to the same contract or unfair term of a contract if they apply or rely on multiple unfair terms or an unfair term or terms on multiple occasions.
- 1.26 This Schedule extends the existing powers of a court to order a pecuniary penalty in relation to breaches of the prohibitions, in addition to making a declaration that a term is unfair.
[Schedule 4, items 11 to 13, 27 and 28, subparagraph 224(1)(a)(ia) and subsections 224(3) and 224(3A) of the ACL and subsection 12BA(1) (definition of enforcement proceeding) and paragraph 12GBA(6)(aa) of the ASIC Act]
- 1.27 The Government’s expectation is that regulators will continue to take a reasonable and proportionate approach to enforcing the unfair contract terms provisions, including affording businesses an opportunity to respond to allegations of unfair terms before commencing any legal proceedings.

Remedies available under the unfair contract terms regime

- 1.28 This Schedule clarifies a court’s power to determine an appropriate remedy when it finds a term is unfair, introduces new penalty provisions, and makes some changes to improve the consistency of remedies available under the ACL and ASIC Act.
[Schedule 4, items 5 to 40, sections 137D, 137F(2)(b), (c) and (d), 137H(1)(b), 157(1AA)(b), 237(1)(a) and (b), 2(1) (definitions of declared term and enforcement proceeding), 224(1)(a)(ii), 224(3), 224(3A), 232(3), 237(1)(a) and (b), 237(3), 238(1), 242, 243A, 243B, 244, 245, 247(1)(a), 248(1)(a)(i) of the ACL and sections 12BA(1), 12GBA(6)(a), 12GD(9), 12GF(1), 12GG, 12HB(1)(b), 12GLA(4), 12GLC(1)(a), 12GLD(1)(a),

12GM(10), 12GN(1)(c), 12GN(9), 12GNB(1)(a)(i), 12GND, 12GNE, 12GNF and 12GNG of the ASIC Act]

- 1.29 Under the existing law, where the court determines a term in a standard form contract to be unfair, the term is automatically void.
- 1.30 A court can also make orders in relation to the whole or any part of a contract or collateral arrangement made between a respondent and another person, including that the contract or arrangement is void, varied, or is not able to be enforced. These orders can be made in relation to a person who is a party to a proceeding before a court (or on whose behalf the regulator has brought a matter before a court) or in relation to non-party persons.
- 1.31 **Importantly, all these orders can only be made where a person (or class of persons) has suffered, or is likely to suffer, loss or damage because of the conduct of another person.**
- 1.32 The above remedies are available under the general powers in the ACL and the ASIC Act (particularly subsections 237(1), 238(1), 239(1) and section 243 of the ACL and sections 12GN, 12GNB, 12GNC of the ASIC Act).
- 1.33 **This Schedule 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 4, items 5, 24 and 40, section 137D, sections 243A and 243B of the ACL and sections 12GNE and 12GNF of the ASIC Act]
- 1.34 **This Schedule retains the automatic voiding present in the existing law.** 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).**
- 1.35 This differs to the orders the court can make under sections 237 and 238 of the ACL and section 12GM of the ASIC Act. Under those provisions, the court must be satisfied that loss or damage has occurred or is likely to occur. Under this Schedule, **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 been suffered, then the court will need to be satisfied that the orders made will remedy this.
- 1.36 **The amendments also allow the court to make orders, on 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 4, items 24 and 40, paragraph 243B(1)(a) of the ACL and paragraph 12GNF(1)(a) of the ASIC Act]
- 1.37 In addition, the amendments allow **the court to make orders, on the 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 4, items 24 and 40, paragraph 243B(1)(b) of the ACL and section 12GNF of the ASIC Act]**

- 1.38 This Schedule makes clear that orders can be made under the current subsections 237(1) and 239(1) of the ACL or of subsections 12GNE(1) and 12GNF(1) 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. This Schedule 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 4, items 14, 24 and 40, sections 232(3), 243A, 243B and 245 of the ACL and sections 12GNE, 12GNF and 12GNG of the ASIC Act]**
- 1.39 An application for these orders 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 4, items 18, 24 and 40, subsections 237(3), 243A(3) and 243B(3) of the ACL and subsections 12GNE(3) and 12GNF(3) of the ASIC Act]**
- 1.40 This Schedule augments these powers by making additional remedies available that specifically relate to unfair contract terms. **[Schedule 4, items 5, 24 and 40, sections 137D, 243A and 243B of the ACL and sections 12GNE and 12GNF of the ASIC Act]**
- 1.41 This Schedule will extend the court's power to make adverse publicity orders and make orders disqualifying a person from managing a corporation. Adverse publicity orders allow a court to make an order, on the application of a regulator, requiring a person to publish information specified by the court. These powers will be extended to breaches of the unfair contract terms provisions in both the ACL and the ASIC Act, where this was not previously available. An adverse publicity order is available by application of the regulator where a pecuniary penalty has been ordered by the court under section 224 of the ACL or section 12GGB of the ASIC Act. This will create consistency between the ACL and the ASIC Act to allow regulators to take steps to further protect the public. **[Schedule 4, items 25, 26, 28, 33 and 35, paragraph 247(1)(a) and subparagraph 248(1)(a)(ia) of the ACL and paragraphs 12GBA(6)(aa), 12GLA(4)(aa) and 12GLD(1)(a) of the ASIC Act]**
- 1.42 This Schedule also extends ASIC's power under the ASIC Act to issue a public warning notice, warning the public about the conduct of a business, where ASIC has reasonable grounds to suspect that the business has breached the unfair contract terms provisions, ASIC is satisfied that a person has or is likely to suffer detriment because of the breach, and ASIC is also satisfied it is in the

public interest to issue such a notice. This is consistent with the existing power in section 223 of the ACL which allows the ACCC to issue the same notice on the same grounds for certain breaches of the ACL. Regulators need not rely on a court order that a term is an unfair contract term in order to meet the 'reasonable grounds' requirement in paragraph 12GLC(1)(a) of the ASIC Act and paragraph 223(1)(a) of the ACL. This will create consistency between the ACL and the ASIC Act and with other regulated behaviour provisions in the ASIC Act.

[Schedule 4, item 34, paragraph 12GLC(1)(a) of the ASIC Act]

- 1.43 Where a consumer or small business has suffered additional loss or damage in excess of that already redressed by the court in a related unfair contract terms proceeding taken by a regulator, they will retain their legal rights and remedies in relation to that loss or damage. These rights to legal recourse are only limited to the extent that the loss or damage has already been redressed or alleviated by a court order and the consumer or small business has accepted the redress or alleviation.
- 1.44 Consumers remain able to seek alternative compensation through existing mechanisms such as Australian Financial Complaints Authority determinations. This is consistent with existing court practice. This Schedule will not alter the way the Australian Financial Complaints Authority makes determinations but may provide additional considerations in its determinations of fairness.
- 1.45 Consumers and small businesses will maintain the ability to pursue certain remedies for breaches of the unfair contract terms protections in their state and territory's Tribunals where the relevant state or territory legislation permits this. This is dependent on state and territory court and tribunal powers, which vary between jurisdictions.
- 1.46 An application can be made for orders under subsections 243A(1) and 243B(1) of the ACL or under subsection 12GNE(1) or 12GNF(1) of the ASIC Act even if an enforcement proceeding in relation to an unfair contract term has not commenced. This allows an affected party, or a regulator (including on behalf of an affected party), to seek orders under subsection 243A(1) or 243B(1) of the ACL or subsection 12GNE(1) or 12GNF(1) of the ASIC Act in other legal proceedings (for example breach of contract proceedings against the affected party) without the affected party needing to commence civil penalty proceedings under those Acts.
- 1.47 Where an enforcement proceeding has commenced, this Schedule includes civil penalty provisions for breaches of the new unfair contract terms prohibitions that can be ordered by a court. The maximum penalties that can be issued under these new provisions can be found in section 224 of the ACL and section 12GBCA of the ASIC Act respectively.

[Schedule 4, items 11 to 14, 27 and 28, subparagraph 224(1)(a)(ia), subsections 224(3), 224(3A) and 232(3) of the ACL and subsection 12BA(1)

(definition of enforcement proceeding), and paragraph 12GBA(6)(aa) of the ASIC Act]

1.48 The maximum penalty that can be issued under these provisions in the ACL can be found in section 224 of the ACL and for an individual would be \$500,000. For a body corporate, the maximum penalty is the greater of:

- \$10,000,000;
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission, 3 times the value of that benefit; or
- if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.

[Schedule 4, items 12 and 13, subsections 224(3) and (3A) of the ACL]

1.49 The maximum penalty that can be issued under these provisions in the ASIC Act can be found in section 12GBCA of the ASIC Act. For an individual the maximum penalty is the greater of:

- 5,000 penalty units; or
- if the court can determine the amount of the benefit derived and detriment avoided because of the contravention, that amount multiplied by 3.

1.50 For a body corporate, the maximum penalty is the greatest of:

- 50,000 penalty units;
- the amount of the benefit derived and detriment avoided because of the contravention multiplied by 3; or
- 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision, or if that amount is greater than an amount equal to 2,500,000 penalty units, 2,500,000 penalty units.

[Schedule 4, items 27 and 28, subsection 12BA(1) (definition of enforcement proceeding) and paragraph 12GBA(6)(a) of the ASIC Act]

1.51 While these civil penalties are large, they are the maximum available and are appropriate in size. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that larger penalties are more appropriate for bigger companies, as they provide an adequate deterrent

to breaches of the unfair contract terms provisions. Further, under the ASIC Act the courts must consider factors including ‘the nature and extent of the contravention’ and ‘the circumstances in which the contravention took place’ and impose a penalty that is appropriate in the circumstances, including below the maximum penalty. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved.

- 1.52 Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with the new unfair contract terms provisions. The maximum civil penalty amounts that can be imposed under these new provisions are intentionally significant and are in line with the penalties for other breaches of the ACL and ASIC Act.

Determining what is a standard form contract

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

Repeat usage of a standard form contract

- 1.54 This Schedule adds an additional matter that the court must take into account when determining whether a contract is a standard form contract. 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 may include contracts made prior or subsequent to the contract in question. This is a relevant factor because standard form contracts are often used repetitively with the same or similar terms. This does not preclude the first iteration of a contract from being determined to be a standard form contract.

[Schedule 4, items 41 and 43, paragraph 27(2)(ba) of the ACL and paragraph 12BK(2)(ba) of the ASIC Act]

Effective opportunity to negotiate

- 1.55 Standard form contracts are often provided on a ‘take it or leave it’ basis, with no opportunity for the other party 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 mean the relevant consumer or small business may not have been provided an effective opportunity to negotiate.

- 1.56 This Schedule clarifies that a court can determine a contract is a standard form contract despite a number of factors. These factors include where a party has negotiated minor or insubstantial changes to the terms of a contract, or has been permitted to select from a pre-determined range of terms within a contract.
[Schedule 4, items 42 and 44, paragraphs 27(3)(a) and (b) of the ACL and paragraphs 12BK(3)(a) and (b) of the ASIC Act]
- 1.57 Similarly, a court may still determine a contract is a standard form contract even if a party to another contract has been given an opportunity to negotiate the terms of that contract. This clarifies that even if a 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 contract may still be a standard form contract.
[Schedule 4, items 42 and 44, paragraph 27(3)(c) of the ACL and paragraph 12BK(3)(c) of the ASIC Act]

Definition of a small business contract

Upfront price payable threshold

- 1.58 This Schedule removes the upfront contract value thresholds for the definition of a small business contract in the ACL and raises the threshold to \$5,000,000 in the ASIC Act.
[Schedule 4, items 47 and 49, subsections 23(4), (5), (6) and (7) of the ACL and subsections 12BF(4), (5), (6), (7) and (8) of the ASIC Act]
- 1.59 When the unfair contract terms protections were extended to small business contracts in 2016, a contract value threshold was included to limit the scope of the protections for small business contracts.
- 1.60 Accordingly, one of the requirements for a contract to be considered a small business contract and covered by the existing unfair contract terms 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 \$1,000,000.
- 1.61 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.

- 1.62 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.
- 1.63 Further, where a small business has no ability to negotiate terms and has no effective alternative sources of supply or acquisition, unfair contract terms cannot be avoided even with due diligence.
- 1.64 This Schedule removes the upfront price payable threshold under the contract as a criterion in determining if the contract is a small business contract under the ACL.
[Schedule 4, item 47, subsections 23(4) and (5) of the ACL.]
- 1.65 This Schedule maintains the contract threshold test for contracts for financial services but raises the cap to \$5,000,000. The \$5,000,000 threshold is consistent with the Australian Financial Complaints Authority’s exclusion of complaints about small business credit facilities that exceed \$5,000,000.
[Schedule 4, item 49, paragraph 12BF(4)(a) of the ASIC Act]

Employee numbers and annual turnover

- 1.66 In addition to removing the upfront price payable thresholds in the ACL and raising them in the ASIC Act, this Schedule amends the definition of small business contract to expand the class of contracts that will be captured by the unfair contract terms provisions.
- 1.67 Under the current headcount threshold (which determines whether a business may be considered a ‘small business’ covered by the protections), 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.
- 1.68 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 4, items 45 to 47 and 49 to 52, paragraphs 139G(2)(aa), 139G(2A)(a) and subsection 23(4)(b) of the ACL and paragraphs 12BF(4)(b), 12BH(2)(aa), 12BL(3)(a) and 12GND(2)(a) of the ASIC Act]
- 1.69 For the purposes of the employee threshold, all employees of the party to the contract must be counted. Employee numbers are intended to be calculated at the time a contract is entered into with a party and later changes in employee numbers will not affect whether the amended small business definition is met.
- 1.70 A party includes and is not limited to a person, entity or body corporate.
- 1.71 The amendments also clarify how employees are to be counted in determining whether a business falls within the 100-employee threshold. This Schedule 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 4, items 45 to 47 and 49 to 51, paragraphs 139G(2)(aa), 139G(2A)(a) and subsection 23(5), of the ACL and paragraphs 12BF(4)(a), subsection 12BF(6) and paragraphs 12BH(2)(aa), 12BL(3)(a) and 12GND(2)(a) of the ASIC Act]

- 1.72 The turnover condition requires the party's turnover for the previous income year (within the meaning of the ITAA 1997) to be less than \$10,000,000 at or before the time the contract is entered into.

[Schedule 4, items 47 and 49, subparagraph 23(4)(b)(ii) of the ACL and subparagraph 12BF(4)(b)(ii) of the ASIC Act]

- 1.73 A party's turnover includes the sum of all supplies made by the party during the period but does not include supplies that are, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act):

- input taxed;
- not for consideration (and are not taxable under section 72-5 of the GST Act);
- not connected with the party's business; or
- not connected with the indirect tax zone.

[Schedule 4, items 47 and 49, subsections 23(6) and (7) of the ACL and subsections 12BF(7) and (8) of the ASIC Act]

Minimum standards provisions

- 1.74 The current unfair contract terms 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 insofar that the term is required, or expressly permitted, by such a law.

- 1.75 However, the existing 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, it only requires certain contract terms be included in a contract if other types of terms have already been included in that contract. This Schedule clarifies that all of these types of terms are exempt from the unfair contract terms provisions.

[Schedule 4, items 53 and 56, subsection 26(1) of the ACL and subsection 12BI(1) of the ASIC Act.]

- 1.76 For example, some Commonwealth, state and territory laws require that, if a certain term or 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 deems to include, the terms A, B and C as a result. While terms A, B and C 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 Schedule exempts all these terms from the unfair contract terms provisions.
- 1.77 As a result, these terms cannot be declared unfair by their mere inclusion alone. However, the unfair contract terms protections can regulate the content of that term where it does not prevent the term from operating as the relevant law requires or envisages. If the term is included in such a way that would go beyond the requirement of the law and is unfair then the unfair contract terms protection can still be applied.

Example 1.1

Ajay’s Phone Company (Ajay Co.) is 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. has included a term allowing them to terminate the lease if they want to demolish or renovate the building the relevant retail property 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 property 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 terms 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 terms provisions as they have been included in the contract, or are taken to be so included, because of a law of a State.

- 1.78 This will ensure that the unfair contract terms regime does not cover terms that other laws require parties to include in their contracts while still ensuring appropriate protections for consumers and 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.

Contracts excluded from the unfair contract terms provisions

- 1.79 This Schedule excludes a limited number of specific contracts from the operation of the unfair contract terms protections where there are strong public policy reasons for doing so. This includes specific contracts that are integral to the operation of licensed markets, clearing and settlement facilities, and payments systems; and legacy life insurance contracts which, if covered, could result in some consumers being worse off.

Operating Rules of Financial Markets and Clearing and Settlement Facilities

- 1.80 This Schedule excludes the operating rules (including listing rules) of licensed financial markets and clearing and settlement facilities, such as ASX Limited, from the scope of the unfair contract terms regime. These rules are made and have effect as a contract in accordance with Subdivision B of Division 3 of Part 7.2 and Subdivision B of Division 2 of Part 7.3 of the *Corporations Act 2001*, respectively. Contracts that consist of, or relate to compliance with, listing rules of the licensed financial market between the operator of the licensed financial market and listed entities, responsible entities for registered schemes and operators of foreign passports funds are also included.
[Schedule 4, items 55 and 58, section 28A of the ACL and section 12BLC of the ASIC Act]
- 1.81 The exclusion includes contracts made under or in accordance with the operating rules, and extends to written procedures that are incorporated into or made or approved in accordance with, the operating rules.
[Schedule 4, items 55 and 58, section 28A of the ACL and section 12BLC of the ASIC Act]
- 1.82 Operating rules are contracts that govern the core operational functioning of licensed markets and clearing and settlement facilities as well as the admission standards for listed securities. Operating rules are integral to the operation of Australia's financial markets and, among other matters, provide for the finality and irrevocability of transactions. Application of the unfair contract terms provisions to these contracts could potentially interfere with, or create uncertainty around, particular terms of operating rules that are necessary to the maintenance of market stability and integrity.
- 1.83 Operating rules are subject to oversight by ASIC and disallowance by the relevant Minister. Sections 793D and 822D of the *Corporations Act 2001* require licensees to lodge amendments to operating rules with ASIC, and the

Minister may disallow changes under subsections 793E(3) and 822E(3) of the *Corporations Act 2001*.

Approved payment or settlement system contracts

- 1.84 This Schedule excludes contracts that establish, contain, or incorporate rules governing the operation of a payment or settlement system approved under section 9 of the *Payment Systems and Netting Act 1998*. The exemption includes contracts made in the course of, or for the purposes of, operating such a system.
[Schedule 4, items 54 and 57, subsection 28(5) of the ACL and subsection 12BL(4) of the ASIC Act]
- 1.85 The systems that are currently approved are the Reserve Bank Information and Transfer System, the Austraclear System and the Clearing House Electronic Sub-register System. These systems are critical to facilitating the orderly settlement of payment obligations in Australia and operate on a largely contractual basis. Application of the unfair contract terms provisions to these arrangements could potentially interfere with, or otherwise create uncertainty around, certain terms such as those which provide for the finality and irrevocability of the settlement of transactions.
- 1.86 Approved payment or settlement systems are typically subject to robust supervisory oversight. The Reserve Bank Information and Transfer System is owned and operated by the RBA and is subject to the general oversight, decision-making and audit processes of the Reserve Bank Board and Payments System Board. The Austraclear System and Clearing House Electronic Sub-register System are each licensed clearing and settlement facilities subject to supervisory oversight from ASIC and the RBA under Part 7.3 of the *Corporations Act 2001*, including disallowance powers in relation to operating rule changes.
- 1.87 The scope of this exemption includes the terms on which the RBA transacts in domestic financial markets if, and to the extent that, those terms are set out in the same contractual documents which contain the rules for the Reserve Bank Information and Transfer System as an approved payment or settlement system.

Certain life insurance contracts

- 1.88 The unfair contract terms provisions as amended by this Schedule do not apply to two categories of life insurance contract.

Guaranteed renewable life insurance policies

- 1.89 The unfair contract terms provisions as amended by this Schedule do not apply, and are taken never to have applied, to a guaranteed renewable contract that constitutes a life insurance policy within the meaning of the *Life Insurance Act 1995*, which was made before 5 April 2021, or was entered into before 5 April 2021 and subsequently renewed on or after 5 April 2021. Guaranteed renewable life insurance contracts are contracts whereby the insurer agrees to continue to provide cover on the terms of the original contract so long as the policy holder continues to pay premiums. Many of these contracts are legacy contracts, contracts that have lasted in excess of ten or twenty years and have the same terms as when they were originally entered into.
[Schedule 4, item 58, section 12BLB of the ASIC Act]
- 1.90 Since 5 April 2021 when the unfair contract terms protections were extended to insurance contracts in response to the Hayne Royal Commission, it has been unclear as to whether the existing unfair contract terms provisions have applied in relation to certain long-standing life insurance contracts. Guaranteed renewable life insurance contracts were not intended to be covered by the unfair contract terms provisions and the insurance industry has proceeded on this presumption, however this has not been clarified under the existing law. The potential for the unfair contract terms provisions to apply to these guaranteed renewable life insurance contracts creates uncertainty in the life insurance industry for both consumers and business. This may result in contracts being voided as a result of terms entered into many years before and that may have been fair at the time the contract was signed.
- 1.91 This may result in worse outcomes for the consumer. For example, a consumer who has been paying life insurance premiums for decades may not be insurable on the same terms, or at all, if their health and/or occupational circumstances have deteriorated since they first took out the cover. Therefore, these contracts have been excluded from this Schedule to remove this potential negative impact on consumers.

Life insurance policies

- 1.92 The unfair contract terms provisions as amended by this Schedule do not apply, and are taken never to have applied, to certain life policies within the meaning of the *Life Insurance Act 1995*, which have been replaced, linked or unlinked. Specifically, this means a life insurance contract entered into before 5 April 2021 which, subsequent to 5 April 2021, has been replaced for the following reasons:
- the replacement policy reinstates the previous policy and is issued at the request of the owner of the previous policy after the previous policy lapses;

- the replacement policy is a reissue of the previous policy to correct an administrative error in the previous policy;
- the replacement policy is issued, at the request of the owner of the previous policy, for one or more of the following reasons:
 - to change the ownership of the policy;
 - to extend or vary the cover provided under the policy in accordance with a term of the previous policy;
 - to change the terms relating to premiums paid under the policy; or
 - to link or unlink certain existing policies.

[Schedule 4, item 58, section 12BLA of the ASIC Act]

- 1.93 The exemption for linking and unlinking existing policies is to cover situations in which a policy holder changes the structure of their policy by connecting it with or separating it from another policy. For example, a consumer might convert a standalone TPD policy and a standalone death cover policy to one linked cover policy (covering both TPD and death) to reduce premiums. “Linked” covers are inter-dependent of each other. For example, with linked TPD and death cover, a claim for TPD would reduce the sum insured for a subsequent death claim. By contrast, “unlinking” separates out cover that was previously combined so that the policyholder holds two separate policies where a claim under one policy does not affect the sum insured under the other policy. This Schedule relies on the common definition of linking and unlinking as used in the insurance industry. The terms bundling and unbundling are used interchangeably with the terms linking and unlinking in the insurance industry and share a common definition.
- 1.94 The exemption in this Schedule for the correction of administrative errors allows for situations where the material content of the insurance contract is not changed but rather an administrative mistake has occurred in the creation of that contract. This includes situations where a name has been misspelled, a person’s gender has been incorrectly recorded or the wrong policy was opened accidentally. The correction of these errors may result in an issuing of a new policy on the same or substantially the same terms as the previous contract just without the error and this would apply the new unfair contract terms to these contracts if not exempted.

[Schedule 4, item 58, subsection 12BLA(2)(b) of the ASIC Act]

- 1.95 The replacements enumerated in subsections 12BLA(1) and (2) each count as renewals, novation or assignments under the law and would otherwise bring the insurance contracts into scope of the new unfair contract terms provisions. However, many of these contracts are legacy contracts, whose terms were agreed at the time they were entered into but may be unfair in the current context. The introduction of penalties in this Schedule creates an incentive for insurers to refuse to respond to customer-initiated requests relating to life insurance products, such as where a name has been misspelt on a policy, where

a customer takes up an option to add cover on terms set out in the original policy, or where a credit card expiry has resulted in a missed payment for the policy and automatic cancellation to avoid potentially breaching the unfair contract terms provisions.

- 1.96 To avoid potentially negative outcomes for consumers, this Schedule excludes these contracts from the scope of the unfair contract terms regime.
- 1.97 Where a replacement policy is issued to extend or vary the cover under the policy, and this involves varying a term of the policy that spells out the existing cover, then the new unfair contract terms regime will apply to the term as varied. However, if the extension or variation is achieved by adding new terms to the contract, only the new terms are affected.
- [Schedule 4, item 58, subparagraph 12BLA(2)(c)(ii) of the ASIC Act]*

Provisions referring to non-party consumers

- 1.98 This Schedule makes technical amendments to make it clearer that remedies for a breach of the unfair contract terms provisions are available for both non-party consumers and non-party small businesses. These changes do not affect the way the law currently functions.
- 1.99 This Schedule amends the law by replacing the definition of ‘non-party consumer’ with the concept of ‘non-party’. This change makes it clear that the remedies for a breach of the unfair contract terms provisions are available to all non-parties, regardless of whether they are consumers or small businesses.
- [Schedule 4, items 59, 60 and 69, subsection 2(1) (definition of non-party) and (definition of non-party consumer) in the ACL and subsection 12BA(1) (definition of non-party) of the ASIC Act]*
- 1.100 Amendments are made to the ACL to ensure all existing references to non-party consumers are amended to refer to non-parties.
- [Schedule 4, items 61 to 68, Division 4 of Part 5-2 (heading), Subdivision B of Division 4 of Part 5-2 (heading), section 239 (heading), subsection 239(1)(c), subsections 239(3)(a) and (b), section 240 (heading), section 240, section 241 (heading) and section 241 of the ACL]*
- 1.101 Amendments are made to the ASIC Act to ensure all existing references to non-party consumers are amended to refer to non-parties.
- [Schedule 4, items 70 to 75, section 12GNB (heading), sections 12GNB, 12GNB(6), 12GNC (heading) and 12GNC of the ASIC Act]*

Review of operation of the provisions

- 1.102 This Schedule requires that the Commonwealth Minister cause a review to be undertaken of the operation of the new unfair contract terms provisions

introduced into the ACL, CCA and ASIC Act. The review must relate to the operation of the provisions during the two years post-commencement.

[Schedule 4, item 80]

- 1.103 This mandated review will allow the Government to carefully examine the effectiveness of the reforms and any potential changes that should be considered. The review must be completed and a report on the review provided to the Minister within 6 months after the end of the period to which it relates, with a final report required to be tabled in Parliament within 15 days of the relevant Minister receiving a copy.

[Schedule 4, item 80]

Other amendments

- 1.104 This Schedule makes amendments to the ACL to ensure that references to new provisions are incorporated into relevant sections to give effect to the unfair contract terms regime.

[Schedule 4, items 5 to 10 and 14, section 137D, paragraphs 137F(2)(b) and (c), paragraph 137H(1)(b) and 157(1AA)(b), subsection 2(1) (definitions of declared term) and (definition of enforcement proceeding), and subsection 232(3) of the ACL]

- 1.105 This Schedule makes amendments to the ASIC Act to ensure that references to new provisions are incorporated into relevant sections to give effect to the unfair contract terms regime.

[Schedule 4, items 27, 28, 30 to 39, subsection 12BA(1), paragraph 12GBA(6)(a), subsections 12GF(1), subsections 12GG, 12HB(1)(b) and 12GLA(4), paragraph 12GLC(1)(a) and 12GLD(1)(a), subsection 12GM(10), paragraph 12GN(1)(c), subsection 12GN(1)(c) and subparagraph 12GNB(1)(a)(i) of the ASIC Act]

- 1.106 This Schedule 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 4, items 15, 17, 20 to 22, 620 and 77, Subdivision A of Division 4 of Part 5-2 (heading), subsection 237(1) (notes), Subdivision B of Part 5-2 (heading), subsection 239(1) (notes), Subdivision C of Division 4 of Part 5-2 (heading), Subdivision B of Division 4 of Part 5-2 of Schedule 2 (heading) and subsection 303(2) of the ACL]

Application and transitional provisions

- 1.107 The unfair contract terms amendments (other than item 58) will apply to new standard form contracts that are made at or after the commencement of Schedule 4 to the Bill. Schedule 4 to the Bill will commence on the day after

the end of the period of 12 months beginning on the day the Bill receives Royal Assent. The 12-month delay between Royal Assent and commencement is designed to give businesses time to review and adjust their contracts and practices if required to prepare for the new unfair contract terms provisions.

[Schedule 4, items 78 and 79, section 304 of the ACL and section 350 of the ASIC Act]

1.108 The amendments in Schedule 4 do not apply to a contract made before the commencement of the Schedule, except as provided for in the relevant sections of the ACL and the ASIC Act.

[Schedule 4, items 78 and 79, subsection 304(2) of the ACL and subsection 350(2) of the ASIC Act]

1.109 If the existing contract is renewed at or after the commencement of Schedule 4, the Schedule applies to the contract as renewed on and from the day on which the renewal takes effect.

[Schedule 4, items 78 and 79, subsection 304(3) of the ACL and subsection 350(3) of the ASIC Act]

1.110 A term of a contract varied after the commencement of Schedule 4 will also be covered by the unfair contract terms regime. If there has not already been a renewal of the contract, the amendments will apply only to the term or terms that have been varied, on and from the day on which the variation takes effect, and as if the contract as varied had been made on the variation day.

[Schedule 4, items 78 and 79, subsection 304(4) of the ACL and subsection 350(4) of the ASIC Act]

1.111 The amendments of sections 137D and 137F of the CCA made by Schedule 4 apply in relation to a contract to the same extent as the amendments of the ACL made by Schedule 4 apply in relation to the contract.

[Schedule 4, item 76]

1.112 Sections 12BLA and 12BLB have effect despite section 325 as inserted by Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*. However, sections 12BLA and 12BLB do not apply to the extent that their operation would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

[Schedule 4, item 79, section 351 of the ASIC Act]

1.113 Section 51(xxxi) of the Constitution provides that the Commonwealth Parliament may only legislate with respect to the acquisition of property by the Commonwealth on just terms. Where Schedule 4 would affect rights and obligations under a contract to the extent that it would result in the acquisition of property on unjust terms contrary to section 51(xxxi) of the Constitution, these contracts are exempted from the application of Schedule 4.

[Schedule 4, item 79, section 350 and subsection 351(2) of the ASIC Act]
