

Chapter 1

Introduction and overview of the bill

1.1 The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 was introduced by the government into the House of Representatives on 24 June 2015 (the bill). On 12 August 2015, pursuant to the Senate Standing Committee for the Selection of Bills' report,¹ the Senate referred the provisions of the bill to the Economics Legislation Committee for inquiry and report by 14 September 2015.

1.2 The bill would amend the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) and the Australian Consumer Law (ACL), set out in the *Competition and Consumer Act 2010* (the CCA Act). The amendments would extend the unfair contract term protections that are currently available to consumers to cover businesses with less than 20 employees agreeing to standard form contracts valued at less than a prescribed threshold. Currently, the ASIC Act and the ACL contain mirror consumer unfair contract term provisions. Under the ASIC Act, unfair contract terms apply to financial services and products; under the ACL, these consumer protection provisions apply to the supply of goods or services other than financial services or products and the sale or grant of an interest in land. These unfair contract provisions have been in operation since 1 July 2010.

1.3 The bill is designed to 'enhance rather than impede or duplicate existing industry regulatory protections'.² As such, the bill would also make provision for exempting small business contracts that are subject to prescribed laws that are deemed equivalent to the unfair contract term protections in the ASIC Act or the ACL, and which are enforceable.

1.4 The bill is the result of an extensive consultation process, including with key stakeholders and the general public. This process will be expanded on later in this chapter.

Provisions

1.5 Items 1–18 of the bill would amend the ASIC Act, with items 1–13 extending unfair contract term protections to small businesses. This amendment would be realised by adding a new class of contract—a 'small business contract'.

1.6 This is provided for by omitting singular references to 'consumer' in sections 12BA(1), 12BG(1), (2), (4), 12BH(1) and 12BI(1) of the ASIC Act, and by inserting 'or small business contract' after 'consumer contract' in sections 12BA(1) and 12BF(1).

1 The committee stated that the bill was referred to the Economics Legislation Committee 'to scrutinise potential impacts of the legislation and concerns raised during the consultation process to date'. Selection of Bills Committee, *Report No. 9 of 2015*, 12 August 2015, Appendix 1.

2 Explanatory Memorandum, paragraph 3.9.

1.7 Item 8 would insert a definition of a 'small business contract' at the end of section 12BF. This subsection would also set out the prescribed thresholds noted above. It reads:

- (4) A contract is a *small business contract* if:
 - (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - (b) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$100,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$250,000.
- (5) In counting the persons employed by a business for the purposes of paragraph (4)(a), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.
- (6) For the purposes of subsection (4) and despite subsection 12BI(3), in working out the upfront price payable under a contract under which credit is to be provided, disregard any interest payable under the contract.

1.8 Items 14–16 of the bill would exempt various contracts from the operation of the ASIC Act and remove further singular references to 'consumer' from relevant sections. Item 14 repeals and replaces entirely section 12BL. The new section ensures that the subdivision does not apply to a contract that is 'the constitution of a company, managed investment scheme or other kind of body',³ or small business contracts to which a 'prescribed law of the Commonwealth, a State or a Territory applies'.⁴ Subsection (3) of section 12BL provides further:

- (3) Before the Governor-General makes a regulation prescribing a law for the purposes of subsection (2):
 - (a) the Minister must be satisfied that the law provides enforceable protections for businesses employing fewer than 20 persons that are equivalent to the protections provided by this Subdivision together with Subdivision G; and

3 Item 14, substituting s 12BL(1).

4 Item 14, substituting s 12BL(2).

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- (b) the Minister must take into consideration:
- (i) any detriment to businesses of that kind resulting from prescribing the law; and
 - (ii) the impact on business generally resulting from prescribing the law; and
 - (iii) the public interest.

1.9 Item 17 would repeal and replace entirely section 12GND. The new section 12GND would provide the Court, upon application from a party to the contract or ASIC, with the additional power to declare that a term of a small business contract—and not just a consumer contract—is an unfair term. As per the definition of 'small business', a party to the relevant contract may only make such an application if, at the time that the contract was entered into, the party was a business that employed fewer than 20 persons.

1.10 Item 18 would add a new Part to the ASIC Act. Part 22 would provide that the amendments within the bill would only apply to a contract entered into, renewed or varied on or after the commencement of the schedule.

1.11 Items 19–47 of the bill would amend the CCA in near equivalent terms.

1.12 Item 26 inserts a new class of contract—a 'small business contract'—into Part 2–3 of the ACL, which relates to unfair contracts. Item 31 defines a 'small business contract' for the purposes of the ACL. The definition is almost identical to that in the ASIC Act—a business will only meet the definition of a small business if it employs fewer than 20 persons and the prescribed limits for the upfront price payable under the contract are the same. The only difference is that for a small business contract under the CCA Act, the amount of the upfront price payable will include any interest payable under the contract.

1.13 Item 40 inserts subsection (4) in section 28 which would ensure that, similarly to the amendments to the ASIC Act, the unfair contract protections will not apply where a prescribed law of the Commonwealth, a State or a Territory applies to the small business contract. Again, before a regulation is made so prescribing a law, item 23, inserting subsection (2A) in section 139G, provides that the Commonwealth Minister must be satisfied that the law provides enforceable protections for businesses employing fewer than 20 persons equivalent to those provided by the bill. The Minister must take into account the same considerations as detailed in paragraph 1.7 above, that is:

- (i) any detriment to businesses of that kind resulting from prescribing the law; and
- (ii) the impact on business generally resulting from prescribing the law; and
- (iii) the public interest.

1.14 Item 46 would repeal section 250 of the ACL and replace it entirely. The new section 250 would provide the Court, upon application from a party to the contract or the regulator, with the additional power to declare that a term of a small business

contract—and not just a consumer contract—is an unfair term. As per the definition of 'small business', a party to the relevant contract may only make such an application if, at the time that the contract was entered into, the party was a business that employed fewer than 20 persons

1.15 Finally, item 47 would add a new Part to the ASIC Act. Part 1A would provide that the amendments within the bill would only apply to a contract entered into, renewed or varied on or after the commencement of the schedule.

Financial implications

1.16 The bill will impose minor one-off transitional compliance costs on some businesses. While a precise figure is subject to a number of factors and is impossible to discern, analysis from the Office of Best Practice Regulation indicates that the bill will likely result in a net annual compliance burden of approximately \$50 million in the first year, with no ongoing compliance costs. Over 10 years, this equates to an average annual compliance cost of approximately \$5 million.⁵

1.17 Enforcement of the unfair contract terms will also require the expenditure of public revenue on regulators, including the use of the court system. The Explanatory Memorandum notes, however, that the government expects that the majority of complaints will be resolved administratively and not through recourse to litigation.⁶ In addition, the 2014–2015 Budget provided an additional \$1.4 million to the Australian Competition and Consumer Commission to support the implementation of this bill.

Consideration of the bill by parliamentary legislative scrutiny committees

1.18 The bill was considered by the Senate Standing Committee for the Scrutiny of Bills⁷ and the Parliamentary Joint Committee on Human Rights.⁸ Neither committee raised concerns about the proposed amendments.

Conduct of the inquiry

1.19 The committee advertised the inquiry on its website and wrote to relevant stakeholders and other interested parties inviting submissions by 28 August 2015. The committee received 30 submissions, including two confidential submissions. The 28 public submissions are listed at Appendix 1 and were published on the committee's

5 Explanatory Memorandum, paragraph 3.171.

6 Explanatory Memorandum, paragraph 3.168.

7 Scrutiny of Bills Committee, Alert Digest No.7 of 2015, p. 53, <http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/alerts/2015/pdf/d07.pdf?la=en> (accessed 3 September 2015).

8 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Twenty-fifth Report of the 44th Parliament*, August 2015, p. 2 http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2015/25_44/25th%20report.pdf?la=en (accessed 17 August 2015).

website. On 3 September 2015 the committee held a public hearing in Melbourne. A list of witnesses is at Appendix 2.

1.20 References to the committee Hansard are to the proof Hansard and page numbers may vary between the proof and the final Hansard transcripts.

Background to the bill

1.21 In May 2009 then Minister for Consumer Affairs, the Hon Chris Bowen MP, issued draft legislation to prohibit unfair contract terms. The proposed law, which ultimately became the Australian Consumer Law, covered business to business as well as consumer to business contracts. In relation to business to business contracts, the then Minister said:

Standard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases, it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.⁹

1.22 However, the bill that was eventually tabled in, and enacted by, Parliament excluded the protections from business to business contracts.

1.23 Prior to the 2013 Federal election, the Liberal–National Party proposed extending the consumer unfair contract term protections to small businesses. Following the election and consistent with the new–government's commitment, on 23 May 2014 the government released a discussion paper inviting comment on the proposed extension of unfair contract term protections to small businesses, designed to gather information on the extent of the problem and views from relevant stakeholders.

1.24 The Explanatory Memorandum to the Bill documents the results of this discussion paper. Conducted from 23 May to 1 August 2014, the consultation suggested that 'there is concern with unfair contract terms in small business contracts across a wide range of industries and circumstances'.¹⁰ The consultation process found that:

...small businesses, like consumers, are vulnerable to the inclusion of unfair terms in standard form contracts. Like consumers, they can lack the time and legal or technical expertise to understand or critically analyse such contracts and the bargaining power to negotiate terms. Compared to larger businesses, small businesses often have a more limited capacity to manage certain risks when transferred to them by the other party.¹¹

1.25 Following the outcome of the discussion paper, an online business survey was initiated to better understand business' experiences with unfair contract provisions, and an Exposure Draft Bill was hosted on the website of the Commonwealth Treasury,

9 Cited in SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 2; Spier Consulting, *Submission 4*, p. 1

10 Explanatory Memorandum, paragraph 3.7.

11 Explanatory Memorandum, paragraph 3.12.

inviting organisations and individuals to lodge a formal submission. The Explanatory Memorandum describes the outcome of the process:

There were 85 submissions received during the consultation (including 20 confidential submissions) and 287 responses to the online business survey, with respondents from a range of business sizes.

The Commonwealth Treasury also met with a number of stakeholders following this consultation process to discuss issues raised in their submissions and explore additional questions that had arisen. Discussions were also held with some stakeholders that did not make a formal submission to the consultation process.¹²

1.26 While some stakeholders preferred a non-regulatory response, the majority of the submissions received were supportive of legislative action to extend the consumer unfair contract term protections to small businesses.¹³ This bill is that legislative action.

Acknowledgements

1.27 The committee thanks the organisations who provided submissions to the inquiry and those who attended the public hearing.

12 Explanatory Memorandum, paragraphs 3.183–3.184.

13 Explanatory Memorandum, paragraphs 3.187.