Chapter 2

Views on the proposed changes

2.1 As outlined in the previous chapter, the bill amends the ASIC Act and the ACL. It does so by:

- extending the consumer unfair contract term protections in the ASIC Act and the ACL to small business contracts that meet the prescribed criteria; and
- making 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.

2.2 Submitters expressed a range of views on these changes. In particular, concerns were raised about the definition of a 'small business contract' and the exemption process. Submissions touching on the scope of the bill, rebuttable presumptions, the proposed transitional period and the existence of a mandated review into the operation of the bill subsequent to its passage were also received.

2.3 With regard to the bill as a whole, views ranged across the entire spectrum from supportive to not supportive. On one end, the Franchise Council of Australia (FCA) declared their 'grave[] concern[]' with the bill as it stood,[1] and the Housing Industry Association (HIA) considered it an 'unwarranted and unnecessary interference in commercial contracting'.[2] The Retail Council also indicated their in-principle objection to the bill. In their view, extending consumer protections to small businesses introduces a moral hazard by discouraging small business owners to 'operate in a professional manner including undertaking appropriate due diligence and obtaining professional advice when signing contracts'.[3] While the Shopping Centre Council of Australia (SCCA) opposed the intention of the bill, it recognised that the government has a mandate to enact it.[4]

2.4 At the other end of the spectrum, Independent Contractors Australia (ICA) supported the concept of the bill but—on 'strategic' grounds—recommended rejecting it because it does not go far enough.[5] Along the same lines the Combined Small Business Alliance of Western Australia recorded their 'abject disappointment' with—what they saw as—the limited protections for small businesses that the bill offers.[6] The Council of Small Business Australia took a more moderate line. The Council supported this 'ground breaking legislation' to more equitably allocate the bargaining

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1 Franchise Council of Australia, *Submission 7*, p. 2.

2 Housing Industry Association, *Submission 16*, p. 3.

3 Retail Council, *Submission 26*, p. 1.

4 Shopping Centre Council of Australia, *Submission 9*, p. 2.

5 Independent Contractors Australia, *Submission 2*, p. 1; *Proof Committee Hansard*, 3 September 2015, p.4, (Mr Ken Phillips).

6 Combined Small Business Alliance of Western Australia, *Submission 18*, p. 1.

power between small and large businesses, but recognised that the government needed to 'tread carefully in its first flush'.[7]

When is a term 'unfair'?

2.5 The bill proposes to protect small businesses from 'unfair' contract terms. It does this by extending the protections already available under the ASIC Act and the ACL. Under those Acts, a term is 'unfair' if it:

- causes a significant imbalance in the parties' rights and obligations under the contract; and
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- would cause detriment to a consumer if it were relied on.[8]

2.6 The ASIC Act and the ACL make clear that the determination of a contract term as 'unfair' is a holistic exercise. Both Acts provide that a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent; and the contract as a whole.[9] Each Act also includes the same list of 14 examples of unfair terms.

2.7 Significantly, the bill retains provisions in the ASIC Act and the ACL that provide that certain key terms of a standard form contract cannot be deemed unfair. For example, the unfair contract term protections do not apply to terms that define the main subject matter of the contract, or set the upfront price payable under the contract.[10]

2.8 The Credit & Investments Ombudsman supported the enactment of the bill. Its primary concern however, was in relation to small businesses being able to avail themselves of the protection. The Ombudsman strongly recommended that providers of goods and services under standard form contracts to small businesses be required to join a recognised external dispute resolution scheme in order to ensure small businesses could exercise their rights under the bill.[11]

What is a 'standard form' contract?

2.9 The bill will only apply to 'standard form' contracts. The Explanatory Memorandum notes that standard form contracts are 'a commonly used and cost effective option when conducting business, as they avoid the transaction costs associated with negotiated contracts'.[12]

2.10 The Motor Trades Association of (MTA) Queensland argued that the use of standard form contracts has 'introduced benefits to the economic environment that

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7 Council of Small Business Australia, *Submission 21*, p. 1.

8 ASIC Act, s. 12BG(1)(a)–(c); ACL, s. 24(1)(a)–(c).

9 ASIC Act, s. 12BG(2); ACL, s. 24(2).

10 ASIC Act, s. 12BI(1); ACL, s. 26.

11 Credit & Investments Ombudsman, *Submission 3*, p. 2.

12 Explanatory Memorandum, paragraph 3.10.

operates in Australia'.[13] These benefits include 'cost savings, efficiencies and consistency in the management of commercial risk in transactions'.[14] Nevertheless, as the Explanatory Memorandum goes on to state:

> …standard form contracts are often offered on a 'take it or leave it' basis, can be one-sided and have terms that are embedded in fine print. As some parties can lack the resources or skills to fully understand the implications of contract terms, businesses that offer standard form contracts have an incentive to include 'unfair' terms, that is, terms that advantage their position beyond their legitimate business interest and, if exercised, can cause detriment to the other party.[15]

2.11 MTA Queensland agreed that standard form contracts can be problematic:

> The downside of the standard form contract is that there is anecdotal evidence that it can be misused to impose market power on small to medium enterprises through unfair clauses. In transactions where one party is dominant; there is greater propensity for market power to manifest through the inclusion of unfair terms in standard form contracts. Further, small medium businesses (SMEs), because of their lack of market status through small scale or lower velocity of transactions do not have an ability to defend themselves against such unfair contractual terms and conditions.[16]

2.12 There was some concern about the effect of this legislation on the use (by business) of standard form contracts. The Business Council of Australia noted that these amendments may discourage the use of standard form contracts and thus reduce efficiency and increase transaction costs.[17]

2.13 The Housing Industry Association noted that Commonwealth legislation tends to assume that all standard form contracts 'are presented in a "take it or leave it" fashion'. However, the HIA explained that, 'for many commercial building transactions, standard form contracts are simply used as a template document which the parties work off and use as a basis for further negotiation'. In their view, the bill should be amended so as to ensure that terms that are individually negotiated, whether or not in standard form contracts, are exempt.[18]

What is a 'small business contract'?

2.14 The definition of a 'small business contract' proved a touchstone for commentary. As noted in Chapter 1, proposed s. 12BF(4) defines a small business contract by reference to two limbs: the number of employees; and, the value of the contract.

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13 Motor Trades Association Queensland, *Submission 8*, p. 1.

14 Motor Trades Association Queensland, *Submission 8*, p. 1.

15 Explanatory Memorandum, paragraph 3.10.

16 Motor Trades Association Queensland, *Submission 8*, p. 1.

17 Business Council of Australia, *Submission 11*, pp. 2, 4.

18 Housing Industry Association, *Submission 16*, p. 10.

(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.

2.15 Many submissions raised concerns with each of these limbs.

Employee headcount

2.16 Section 12BF(4)(a) defines a small business contract by reference to the number of employees of the business. A business with fewer than 20 persons qualifies as a small business, and—assuming the value of the contract satisfies s. 12BF(4)(b)—will be protected by the Bill. A business with more than 20 persons, notwithstanding the value of the contract, will not be. The employee headcount is thus critically important.

2.17 The bill adopts the definition of small business used by the Australian Bureau of Statistics (ABS)—fewer than 20 employees. The Explanatory Memorandum notes that this figure 'is a commonly used headcount measure and has been found by the ABS to provide a good proxy of small businesses'.[19]

2.18 However, many submissions noted that the proposed employee headcount threshold is inconsistent with other small business definitions. For example, the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Cth) defines a small business as a business with fewer than 100 employees or revenue under $5 million in the previous financial year.[20] Although not referring to this bill, the South Australian Small Business Commissioner considered that setting the threshold at 20 employees would be 'unnecessarily restrictive', and should be raised to a 'more realistic number'.[21]

2.19 The Australian Finance Conference (AFC), on the other hand, considered the headcount figure of 20 employees' excessive. In its view, this definition would potentially see '97 per cent of all commercial entities in Australia fall within its parameters and therefore potentially able to claim its protection'.[22]

2.20 The Explanatory Memorandum explains how the number of persons a business employs will be calculated. It states:

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19 Explanatory Memorandum, paragraph 3.127.

20 Australian Small Business Commissioner, *Submission 24*, p. 1; SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 3; Spier Consulting, *Submission 4*, p. 3;

21 South Australian Small Business Commissioner, *Submission 23*, p. 1.

22 Australian Finance Conference, *Submission 28*, p. 2.

> In calculating the number of persons a business employs, a head count approach (regardless of an employee's hours or workload) is used. Casual employees are to be counted only if they are employed on a regular or systematic basis, to account for seasonal variations. This is the approach used in the *Fair Work Act 2009*.[23]

2.21 The Victorian Small Business Commissioner suggested that it may be difficult for a business to know if their casual staff are 'regular' or not. In his view, 'it may be preferable to only include full and part time staff to remove the uncertainty of which casuals to include.'[24] In particular, the Commissioner explained that the application of the proposed protections will vary according to the businesses' mix of full time and part time staff.

> For example, a business may decide to change its mix of employees from 18 full time staff to 15 full time staff and 6 part time staff (at 0.5 time) in response to employee demand. The business and its activity levels are unchanged, yet standard form contracts entered into as an 18 employee business are protected against unfair terms, while as a 21 employee business they are not.[25]

2.22 The Commissioner noted that using a FTE count would 'overcome this issue'.[26] The South Australian Small Business Commissioner agreed that a FTE count should be used. However, the South Australian Small Business Commissioner was more concerned with increasing the overall threshold of employees.[27]

How can a business tell the size of its contracting partner?

2.23 Some submissions were concerned that any definition of a small business that relied on the number of employees would be problematic. The Shopping Centre Council of Australia considered that 'considerable time and expense will be involved…in determining the number of employees of a party with which they are contracting',[28] while the Queensland Law Society argued it would be 'onerous'.[29] The Insurance Council of Australia agreed, arguing that employee headcount is too 'fluid' and requiring businesses to ascertain the number of employees of another business would be 'impractical' for that figure is 'non-transparent'.[30] In their submission to the Exposure Draft, Arnold Bloch Leibler explained the difficulties that businesses may face in this regard:

> If the parties have an ongoing business relationship, they may have some idea of the size of each other's workforce. However, for one-off transactions—such as purchases over the internet—where standard form

23 Explanatory Memorandum, paragraph 1.28; 2.28

24 Victorian Small Business Commissioner, *Submission 25*, p. 1.

25 Victorian Small Business Commissioner, *Submission 25*, p. 1.

26 Victorian Small Business Commissioner, *Submission 25*, p. 1.

27 South Australian Small Business Commissioner, *Submission 23*, p. 1.

28 Shopping Centre Council of Australia, *Submission 9*, p. 8.

29 Queensland Law Society, *Submission 27*, p. 1.

30 Insurance Council of Australia, *Submission 22*, p. 2.

> contracts offer considerable efficiencies, a business would have no idea how many employees its counterparty has.[31]

2.24 The Victorian Small Business Commissioner also recognised this as a potential problem. He considered that a record should be made at the time of the contract execution noting 'whether or not the unfair term protections apply to that contract'.[32] The Shopping Centre Council of Australia recommended that a safe harbour provision be inserted. The Council submitted that businesses should be able to rely on what they are told by their counterparty about the number of persons that that business employees.[33] The Franchise Council of Australia and the Queensland Law Society supported this approach.[34]

2.25 Such a safe harbour arrangement may be particularly necessary when a question arises as to the appropriate time that the employee headcount number should be determined. The Australian Finance Conference considered that it appears the number should be established 'at point of entry into the contract'. But, as the AFC explained:

> The provision of funds may not occur under a commercial finance arrangement until a point after that date. The outcome might see an entity at contract execution falling outside the definition, but through an employee's resignation see the number of [employees] drop to 19 at the time the funds are extended.[35]

Are related companies included?

2.26 There was some confusion as to whether larger businesses could avail themselves of the protections afforded under the bill by creating small subsidiaries or related companies of less than 20 employees with which to contract. Submissions which questioned whether this was possible were unanimous in their view that, if it was, changes should be made.[36] The Queensland Law Society highlighted:

> Anomalies arise in relation to whether the test of "fewer than 20 employees" can be exploited by structural manipulation of a contracting entity. For example where the bill may give relief to a subsidiary of a large company/joint ventures or to Government owned corporations where they simply interpose a contracting entity they control but with fewer employees.[37]

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31 Arnold Bloch Leibler, *Submission 13, Attachment A*, p. 3.

32 Victorian Small Business Commissioner, *Submission 25*, p. 2.

33 Shopping Centre Council of Australia, *Submission 9*, pp. 8–9, Recommendation 4.2.

34 *Proof Committee Hansard*, 3 September 2015, p. 11 (Stephen Giles); Queensland Law Society, *Submission 27 Attachment 1*, p. 3.

35 Australian Finance Conference, *Submission 28*, p. 2.

36 See the Shopping Centre Council of Australia, *Submission 9*, p. 8; Federal Chamber of Automotive Industries, *Submission 17*, p. 1; SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 7; Business Council of Australia, *Submission 11*, p. 7; Spier Consulting, *Submission 4*, p. 7; Australian Bankers' Association, *Submission 14*, p. 2.

37 Queensland Law Society, *Submission 27*, p. 1.

2.27 The Shopping Centre Council of Australia explained that this concern was real in their industry:

> Some large retailers, for example, undertake their leasing through a separate service company which often employs fewer than 20 persons. This can also be true of major shopping centre landlords. For example, the responsible entity (lessor) of many institutionally owned shopping centres in Australia does not have any employees.[38]

2.28 The Shopping Centre Council of Australia remarked that it 'would obviously be nonsensical if such entities were able to seek relief under the new law'.[39] The Council recommended amending new section 3A of Schedule 2 to include 'any related body corporate' so as to avoid this potential problem.[40] Arnold Bloch Leibler noted a similar concern, arguing that, in addition to being 'arbitrary', the employee headcount threshold may be 'open to manipulation'.[41] Arnold Bloch Leibler explained:

> …as the threshold is something that is within the control of business, it may encourage behaviour to try to take advantage of the laws inappropriately. For example, a large company could set up a small subsidiary, employing fewer than 20 persons, to carry out its procurement activities.[42]

Should an employee headcount threshold be used at all?

2.29 The practical difficulties examined thus far led a number of submissions to question whether an employee headcount threshold was either practicable or effective as a measure of bargaining capacity and vulnerability. Many submissions regarded annual turnover as a fairer or clearer indicator—particularly where businesses whose staffing levels fluctuate might find that over the course of a year some contracts are protected and others are not.[43]

2.30 The Business Council of Australia (BCA) suggested drawing back to first principles. In their view not all business employing fewer than 20 persons are necessarily vulnerable; as such, the small business definition should be 'limited to businesses that are vulnerable or in a comparable position to consumers'.[44] The Housing Industry Association agreed with this approach, explaining that an employee headcount threshold would be problematic in the residential construction sector:

> It is not unusual for a relatively large building company to have relatively few employees as the majority of on-site construction activity is performed by independent trade subcontractors.[45]

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38 Shopping Centre Council of Australia, *Submission 9*, p. 8.

39 Shopping Centre Council of Australia, *Submission 9*, p. 8.

40 Shopping Centre Council of Australia, *Submission 9*, p. 8.

41 Arnold Bloch Leibler, *Submission 13*, p. 2.

42 Arnold Bloch Leibler, *Submission 13, Attachment A*, p. 4.

43 Victorian Small Business Commissioner, *Submission 25*, p. 2.

44 Business Council of Australia, *Submission 11*, p. 7.

45 Housing Industry Association, *Submission 16*, p. 7.

2.31 In the HIA's view, a 'better indicator of a businesses' financial and bargaining capacity' would be annual turnover. Although the HIA did not suggest a proposed figure, the Association noted that the 'ATO defines a small business as one with an annual turnover less than $2 million.'[46] The Australian Bankers' Association supported this approach and the ATO's $2 million threshold,[47] arguing that 'this is supported by and is consistent with the business survey data included in the [Regulation Impact Statement] for the Bill'.[48]

Committee's Views

2.32 The committee acknowledges the difficulties involved in defining a small business and that different regulatory regimes may do so differently. Nonetheless, the committee considers that the use of the ABS definition is appropriate. The committee also considers that, in practice, ascertaining the number of employees of a counterparty will not be too onerous. Businesses should simply ensure that before signing a contract both parties indicate the number of employees that they have and therefore, whether the contract will be subject to the unfair terms regime.

Recommendation 1

2.33 **The committee acknowledges and notes the concerns raised by various parties during this inquiry, and encourages the government to take these concerns into account in the course of implementing the extension of unfair contract term protections as set out in the bill.**

Monetary Threshold

2.34 Section 12BF(4)(b) defines a small business contract by reference to the monetary value and duration of the contract. A contract is a small business contract–and thus protected under the Bill–if, either, the 'upfront price payable' under the contract does not exceed $100,000, or if the contract has a duration of more than 12 months, the upfront price payable does not exceed $250,000. As Mr Hank Spier of Spier Consulting noted, 'the critical issue is the threshold level where the law applies to business to business contracts'.[49]

2.35 The Queensland Law Society considered that the proposed value was 'arbitrary, arguably too low and may be unnecessary'.[50] They contended further that the value of a contract does 'not necessarily equate to bargaining power'.[51]

2.36 The Explanatory Memorandum to the bill notes that feedback from the consultation process suggests that approximately 80 per cent of small business survey respondents would be covered by the proposed threshold.[52] However, not all

46 Housing Industry Association, *Submission 16*, p. 12.

47 Australian Bankers' Association, *Submission 14*, p. 2.

48 Australian Bankers' Association, *Submission 14*, p. 4.

49 Spier Consulting, *Submission 4*, p. 2.

50 Queensland Law Society, *Submission 27 Attachment 1*, p. 2.

51 Queensland Law Society, *Submission 27*, p. 1.

52 Explanatory Memorandum, paragraph 3.133.

submissions agreed with this claim. In particular, Independent Contractors Australia argued that this figure has 'no substance in fact', and in any case, '…even if the 80 per cent claim were accurate, why exclude 20 per cent of small business people from the protections?'[53]

2.37 The Victorian Small Business Commissioner identified another issue. The Commissioner noted that 'over time, the threshold amounts will be eroded by inflation or significant changes to the cost of certain activities'. The Commissioner continued:

> On this latter point, for example, we have identified the existence of "unfair" contract terms in many contracts in the waste collection/disposal sector. Should the cost of waste management services significantly increase through (eg.) increased landfill costs, contract prices may move from being under the threshold to being over it.[54]

2.38 In the Commissioner's view, it would be preferable to establish the threshold values by regulation rather than legislation in order to 'enable greater responsiveness to external factors eroding the relevance of the thresholds over time'.[55]

The thresholds should be increased

2.39 These thresholds attracted the attention of many submissions, with a majority arguing that the limitation of the protection from unfair contract terms to contracts worth less than $100,000, or $250,000 if longer than 12 months, is a mistake.

2.40 The Explanatory Memorandum notes that the threshold values are intended to reinforce 'the onus on small business to undertake due diligence for high value transactions'.[56] The Queensland Law Society, however, argued that this justification is not particularly convincing. In their view, due diligence 'does not provide an answer to, or relief against, the imposition of an unfair contractual term on a 'take it or leave it' basis'.[57]

2.41 The Tasmanian Small Business Council considered that the proposed thresholds are 'manifestly inadequate'.[58] The South Australian Small Business Commissioner agreed, arguing that the 'very low thresholds are extremely artificial and totally unjustified'.[59] Indeed, the Commissioner questioned why a monetary threshold was required at all. The Commissioner argued that:

> …an unfair term is unfair because of its nature, and excluding contracts because of an inappropriate and artificially low threshold means that unfair

53 Independent Contractors Australia, *Submission 2*, p. 3.

54 Victorian Small Business Commissioner, *Submission 25*, p. 2.

55 Victorian Small Business Commissioner, *Submission 25*, p. 2.

56 Explanatory Memorandum, paragraph 1.13.

57 Queensland Law Society, *Submission 27 Attachment 1*, p. 2.

58 Tasmanian Small Business Council, *Submission 12*, p. 1.

59 South Australian Small Business Commissioner, *Submission 23*, p. 1.

> contract terms in those excluded contracts will continue to adversely impact on small businesses being excluded under the initiative.[60]

2.42 In the Commissioner's view they should be removed in the first instance, or increased substantially.[61] Independent Contractors Australia agreed with this position. ICA explained that the consumer unfair contract term protections do not consider the price of a contract a determinative factor of fairness or unfairness.[62]

2.43 The Australian Newsagents' Federation Ltd (ANF) considered that the legislation 'needs to cover the majority of small businesses who are likely to be vulnerable to the effects of unfair contract terms, especially in industries…where small businesses are fairly captive to main suppliers and are susceptive to this type of behaviour'. In its view, this 'requires a transaction value threshold in the Bill that would encompass most small business contracts.'[63] The Federation recommended increasing the thresholds to $300,000 for contracts of a duration less than one year, and $1 million for multi-year contracts.

2.44 Independent Contractors Australia was also concerned with the threshold amounts. The ICA 'strongly support and advocate for the *concept* of extending the consumer unfair contracts protections to the 5.3 million individuals running Australia's small businesses' yet 'strongly oppose the current Bill'.[64] In the view of the ICA:

> The limitation of the protection to contracts worth less than $100,000 ($250,000 for contracts longer than 12 months) will significantly neuter the application of the protections for the 5.3 million people who should have those protections.[65]

2.45 Independent Contactors Australia suggested that the committee should either recommend 'the removal of the contract value limitation of the Bill' or, if the limitations are not removed, reject the Bill.[66]

2.46 The Australian Newsagents' Federation Ltd and the SME Business Law Committee of the Law Council of Australia noted how the proposed thresholds may have a perverse effect.

> Contractual terms with larger suppliers can often be the most difficult to negotiate yet due to the value they might fall outside the threshold. On the other hand smaller suppliers with less influence will fall within the threshold.

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60 South Australian Small Business Commissioner, *Submission 23,* p. 2.

61 South Australian Small Business Commissioner, *Submission 23,* p. 2.

62 Independent Contractors Australia, *Submission 2*, p. 5.

63 Australian Newsagents' Federation Ltd, *Submission 10*, p. 2.

64 Independent Contractors Australia, *Submission 2*, p. 1 (emphasis in original).

65 Independent Contractors Australia, *Submission 2*, p. 1.

66 Independent Contractors Australia, *Submission 2*, p. 1; *Proof Committee Hansard*, 3 September 2015, p. 1, (Mr Norman Lacy).

> Consequently if the two categories use the same potentially unfair terms, which is quite possible, one will be struck out, the other will not.[67]

2.47 As the Explanatory Memorandum notes, this was not the intention of the bill.[68]

The thresholds would not work for particular industries

2.48 Many submissions indicated their concern that the proposed thresholds would not work for particular industries. The Tasmanian Small Business Council contended that a $100,000 threshold would not work for shopping centre leases despite the fact that such leases are not 'high-value' contracts but simply small retail leasing.[69]

2.49 The Council of Small Business Australia also considered that the proposed thresholds are too low. In the Council's view these thresholds 'will not pick up some of the worst contracts imposed upon small business from big business, including leases, newsagent contracts and franchises'.[70] Spier Consulting agreed:

> In my view the thresholds are somewhat low and will exclude many small business contracts and particularly those with main suppliers and main customers which involve goods or goods and services.[71]

2.50 The SME Business Law Committee, Law Council of Australia agreed. In an expansive submission, the Law Committee explained how the proposed thresholds would operate in relation to seven industries:

> Grocery stores
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> A medium size independent grocery store will have many suppliers but there will be one main grocery wholesaler.
>
> Purchases from the main grocery wholesaler will be many millions of dollars annually, no matter the size of the store. In addition, in many States, a subsidiary of the wholesaler will supply liquor products, and again in the millions of dollars annually.
>
> Other major suppliers to grocers will be poultry suppliers, dairy products, bakers, and all will in most cases be in the millions of dollars annually, not to mention rent and utilities.
>
> Many of the supply contracts will be for more than one year. A typical contract, for instance, is for 5 years.
>
> Newsagencies
>
> A small suburban newsagency might spend some $250,000 annually on magazines, spread over three suppliers, but two dominate. Newspapers and phone cards will be approximately $100,000 as will rent.

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67 SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 3. See also Australian Newsagents' Federation Ltd, *Submission 10*, p. 3.

68 Explanatory Memorandum, paragraphs 3.33–3.34.

69 Tasmanian Small Business Council, *Submission 12*, p. 2.

70 Council of Small Business Australia, *Submission 21*, p. 1.

71 Spier Consulting, *Submission 4*, p. 2.

> Most of the supply contracts will be for more than one year.
>
> Hotels
>
> Most will have more than 20 employees and annual contracts with suppliers such as brewers and liquor wholesalers will be over the thresholds.
>
> Mortgage brokers
>
> Many brokers would get over $1 million dollars annually in commissions, many would get less but very few would get below $100,000.
>
> Petrol
>
> Where the service station operator buys the fuel the annual amount will in most cases be many millions of dollars.
>
> New motor vehicle dealers
>
> Again dealers buy motor vehicles (trucks and cars) for resale and the upfront cost for goods for resupply will be many millions of dollars. Interestingly in NSW the Motor Dealers and Repairers Act does not set a monetary threshold for a new motor vehicle supply contract to be regulated by their UCT protections.
>
> Pharmacies
>
> They deal with two wholesalers and annual or multiyear contracts would be well above the threshold level.[72]

2.51 Direct Selling Association of Australia (DSAA) also argued that the proposed thresholds would not work for their members. However, in its view, a lower threshold of $1,000 should be introduced for 'single contracts that are not regularly renewable'. According to DSAA 'this will ensure small contractual dealings can be undertaken without ambiguity as to the validity of the contract in cases such as a one–off very low value commercial agreement'.[73]

Too easy to avoid protections

2.52 Submissions argued that the defined monetary thresholds detracted from the intention of the bill and made it too easy for businesses to artificially structure their contracts in such a way so as to avoid the protections offered. Independent Contractors Australia noted:

> …large organizations will be able to manipulate contracts into 'appropriate' timeframes so that the 'upfront price' of a contract exceeds the $100,000 (or $250,000) limits set in the Bill. This will remove the contract from any consideration of unfairness. The large organization may have no intention to honour the notional time limit that has been set. All the contract then needs to have is an 'at whim' contract termination clause favouring the large organization. The contract can and will be as 'unfair' as the large organization wishes—but the organization will have legally avoided the reach of the unfair contract provisions for small business people.

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72 SME Business Law Committee, Law Council of Australia, *Submission 5*, pp. 4–5.

73 Direct Selling Association of Australia, *Submission 1*, p. 2.

> Not only is this scenario likely, but we believe that it will occur (with variations on the foregoing theme) and occur on a wide and systemic basis.[74]

2.53 Australian Newsagents Federation agreed, suggesting that large businesses could offer standard form contracts with a value of $100,001 in order to avoid the protections of the bill.[75]

2.54 A related concern of many submissions revolved around whether many small contracts with the same business may be added together in order to avoid the protections of the bill. The HIA supported the thresholds applying to one total contract, arguing that the provisions should be amended to ensure the 'cumulative value' is intended, i.e. 'if the contractor is engaged on 3 projects at a combined value that exceeds the $100,000 threshold then the ACL should not apply'.[76] The SME Business Law Committee, Law Council of Australia and Spier Consulting rejected this approach.[77]

The proposed thresholds should be retained

2.55 Not all submissions argued that the proposed thresholds should be increased, with some submissions arguing strongly in favour of retaining the proposed thresholds. Arguments advanced here centred on reducing the scope of red tape, the importance of contractual certainty, the obligation of all commercial operators to undertake appropriate due diligence before signing contracts and the risk that expanding the thresholds (and consequently the scope of the protections) will introduce a moral hazard.

2.56 The Shopping Centre Council of Australia declared their support for the proposed thresholds, indicating that the Council is 'strongly oppose[d]' to their increase.[78] In the SCCA's view, expanding the thresholds will reduce the incentive on small businesses to conduct due diligence and risk moral hazard. Mr Milton Cockburn, Shopping Centre Council of Australia, explained:

> In other words, people basically enter a business relationship and say, 'I'm protected by the government anyway, so I really don't have to do my own due diligence. I'll go into this and will sign the lease' or do whatever. Moral hazard is obviously a very real issue.[79]

2.57 The Business Council of Australia contended that all businesses engaging a contract above the proposed threshold should undertake due diligence. The Council submitted:

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74 Independent Contractors Australia, *Submission 2*, p 8.

75 Australian Newsagents Federation, *Submission 10*, p. 5.

76 HIA, *Submission 16*, p. 12.

77 SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 3; Spier Consulting, *Submission 4*, p. 3.

78 Shopping Centre Council of Australia, *Submission 9*, p. 8.

79 *Proof Committee Hansard*, 3 September 2015, p. 7.

> There is no strong policy case for increasing the threshold: any transactions over these amounts are sufficiently high to warrant seeking additional legal or financial advice by small businesses. Increasing the threshold further would also add to the regulatory costs associated with the Bill.[80]

2.58 The National Retail Association agreed with the BCA and the government. The NRA supported the proposed thresholds and agreed that 'it is reasonable for individual business owners to undertake their own due diligence' for larger contracts.[81]

2.59 The ICA strongly disagreed, considering that suggestions that small businesses should simply undertake their due diligence are 'value judgment[s]' that 'do[] not match the realities of the commercial world'.[82] The Australian Newsagents' Federation Ltd agreed, arguing that it is:

> overly simplistic and ingenuous to assume that by taking legal advice and doing due diligence that a small business operator will necessarily be able to inject equity and fairness into their contracting relationships with several multinational organisations who they contract with, or to easily walk away without losing their business, particularly on renewal.[83]

2.60 The South Australian Small Businesses Commissioner echoed these submissions, arguing that many small businesses have difficulty 'dealing with legal complexity.'[84]

What does 'upfront price' payable mean?

2.61 There was concern among some submissions over the meaning of 'upfront price' payable. As the monetary thresholds under s. 12BF(4)(b) revolve around this phrase, its definition is particularly important. The Australian Newsagents Federation considered that the phrase is 'confusing and vague'.[85]

2.62 The Regulation Impact Statement to the bill makes clear that 'upfront price' is meant to exclude payments that are contingent upon the occurrence or non-occurrence of an event, but does include the totality of the consideration that is paid under the contract:

> The upfront price also applies to the totality of the consideration that is paid for a supply, sale or grant under a contract. For example, where a contract provides for the supply of multiple goods or services, the upfront price will be the consideration for the total supply under the contract. …
>
> The upfront price also excludes 'other consideration' that is contingent on the occurrence or non-occurrence of a particular event. This is intended to exclude payments which do not relate to the supply under the contract, for

80 Business Council of Australia, *Submission 11*, p 6.

81 National Retail Association, *Submission 20*, p. 3.

82 Independent Contractors Australia, *Submission 2*, p. 10.

83 Australian Newsagents' Federation Ltd, *Submission 10*, p. 4 (emphasis in original).

84 South Australian Small Business Commissioner, *Submission 23*, p. 2.

85 Australian Newsagents Federation, *Submission 10*, p. 6.

> example, payments associated with non-price terms such as termination fees, or late payment fees.[86]

2.63 However, the Competition and Consumer Committee, Law Council of Australia explained that there are many forms of contingent payments that underpin the business model of small businesses that are not termination or late payment fees. For example, sales commissions, fees for services, franchise agreements, as well as dealership and distributor arrangements. Under the proposed approach, while the overall transaction value may be in excess of the thresholds, the exclusion of contingent payments means that high-value contracts may fall within the regime. In the Competition and Consumer Committee's view, 'upfront price' should be substituted in favour of 'total consideration'.[87]

2.64 The Queensland Law Society also considered that the drafting of 'upfront price' can be clarified. In its view, as currently worded, the provision detracts from the object and purpose of the bill.

> The Minister's clear stated policy intent is to limit the protections to lower value contracts where there is potential for an unfair allocation of contractual risk. The mechanism in the bill for determining the 'upfront price' lends itself to higher value transactions being captured simply because the payment arrangements are couched in language where the obligation to pay is considered contingent.[88]

2.65 Telstra reiterated the concerns of the Competition and Consumer Committee, Law Council of Australia and the Queensland Law Society'. Telstra argued that the way that the upfront price is calculated may mean that the proposed thresholds are too high by capturing 'high value contracts well in excess of the prescribed thresholds'.[89] In its submission, the 'upfront price' should be amended to the estimated total cost of the contract.[90]

2.66 The Federal Chamber of Automotive Industries was not concerned with the proposed thresholds as such. However, the Chamber noted its concern about 'two assumptions that are implicit in the definition of "upfront price"'.[91] In particular, the Chamber questioned whether consideration of a non-monetary kind would be included, and whether consideration not directly for the benefit of one party would be included. The FCAI explained:

> When a dealer enters into a dealer agreement with one of our members, the consideration (in a legal sense) is often not directly for the benefit of our member—for example the dealer might promise to carry out certain work such as renovating facilities. In this instance there is no reason why the cost

86 Explanatory Memorandum, paragraphs 1.23–1.24.

87 Competition and Consumer Committee, Law Council of Australia, *Submission 6*, p. 2.

88 Queensland Law Society, *Submission 27*, p. 2.

89 Telstra, *Submission 19*, p. 1.

90 Telstra, *Submission 19*, p. 1.

91 Federal Chamber of Automotive Industries, *Submission 17*, p. 1.

> of carrying out the works, which is paid to a third party, should determine whether or not the contract is of 'low value' and therefore subject to the Bill.
>
> In addition, invariably a dealer agreement will require the dealer to promise to represent and promote the distributor's brand to the best of the dealer's ability (or words to that effect). In a legal sense, this promise can also be categorised as 'consideration' and it is likely to fall within the definition of 'upfront price'. The issue—and our members' concern—is how will this promise be valued for the purposes of determining the 'upfront price'? In our view, the simple answer is that the Bill is not intended to capture this type of consideration: it is only concerned with consideration which has a monetary value.[92]

Time within complaints can be raised

2.67 The bill does not propose to limit the time that complaints can be raised. In this absence, ordinary statute of limitations legislation operating in the relevant jurisdiction would apply. The Franchise Council of Australia suggested that this approach may exacerbate problems inherent in the legislation.

2.68 The FCA indicated its concern that the bill may increase the likelihood that parties would rely on litigation. Mr Stephen Giles, Franchise Council of Australia, informed the committee that in their industry under the Franchising Code of Conduct 'about 80 per cent of the disputes are resolved by mediation'.[93]

2.69 Mr Giles suggested that measures could be introduced to limit the potential growth in costly litigation.

> What if someone could make a complaint about an unfair contract, but they could only do it in a short time? If some says, 'I've got an unfair contract,' they should not have three years or six years to make the claim. Give them 60 days or let them do it before they sign the contract so they sign under the protest.[94]

In the view of the Franchise Council of Australia, this additional measure would increase contractual certainty.

Committee's Views

2.70 The committee accepts the view of Independent Contractors Australia and the South Australian Small Business Commissioner that an unfair contract term is unfair irrespective of the value of the contract. The committee also acknowledges that small businesses may have difficulties in undertaking their due diligence and seeking out specialist advice when deciding whether to execute a contract with a counterparty. However, the committee is equally concerned with avoiding interfering in commercial contracts and adding to the regulatory burden suffered by all businesses and creating a moral hazard by removing the incentive for small businesses to seek specialist advice. By creating a threshold, the bill places the onus on small businesses to undertake due

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92 Federal Chamber of Automotive Industries, *Submission 17*, p. 2.

93 *Proof Committee Hansard*, 3 September 2015, p. 10.

94 *Proof Committee Hansard*, 3 September 2015, p. 11.

diligence for high-value transactions. The committee considers this the fairest approach.

2.71 The committee recognises that for specific industries or particular small businesses the size of the threshold may present difficulties. However, the committee relies on the extensive consultation process undertaken in 2014, which indicated that the proposed transaction value threshold would encompass most small business transactions. The committee therefore considers, at this stage, the proposed transaction thresholds appropriate. The committee also considers that as part of a future review process, consideration may be given to adopting these thresholds as a regulation to enable greater responsiveness to external events, if appropriate.

2.72 The committee appreciates concerns that the term 'upfront price' is confusing. However, the committee believes that the Explanatory Memorandum is clear: the upfront price applies to the totality of consideration paid under a contract. It does not include 'other consideration' that is contingent on the occurrence or non-occurrence of a particular event. As such, it is not limited to monetary consideration and does include consideration in–kind as questioned by the FCAI.

Education

2.73 Despite its in-principle objection to the bill, the Retail Council welcomed the employee headcount and monetary threshold limitations examined above. The Council noted, however, that the existence of these restrictions 'necessitates them being widely promoted to small business owners'.[95] The Council suggested an educational awareness campaign so that small businesses understand:

- what a standard form contract is;
- the dollar limits on contracts that are covered by these provisions;
- the definition of a small business for the purposes of these provisions;
- what an unfair term is—i.e. it is a specific term in a specific contract that has been ruled unfair by a court: not a term that the small business does not like or thinks is unfair;
- that key terms of the contract, such as the price, cannot be deemed unfair; and
- that even if a term is deemed to be unfair that does not mean that the whole contract is automatically void.[96]

2.74 The Retail Council considered that such a campaign would 'help minimise the risk that small business owners will never seek advice when signing any contract in the mistaken belief that these provisions cover all contracts that they are involved in'.[97]

95 Retail Council, *Submission 26*, p. 2.

96 Retail Council, *Submission 26*, p. 2.

97 Retail Council, *Submission 26*, p. 2.

Committee's Views

2.75 The committee appreciates that an education campaign may be worthwhile. However, the committee considers that small businesses should conduct their own due diligence to ascertain whether the contract that they are signing will be covered by the bill's protections.

Exemptions

2.76 The bill exempts 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. The Minister's Second Reading Speech provided the policy rationale for the exemption mechanism:

> This mechanism recognises the importance of avoiding regulatory duplication and unnecessary compliance costs in sectors where there are equivalent and enforceable protections against unfair contract terms.[98]

2.77 Indeed, as noted in Chapter 1, the bill is designed to 'enhance rather than impede or duplicate existing industry regulatory protections'.[99]

2.78 Many submissions questioned whether the proposed formula precisely achieved this purpose or whether slight changes needed to be made.

Equivalent or comparable protections

2.79 Before the Governor-General makes a regulation exempting an industry code or standard from the operation of the unfair contract terms protections, the Minister must be satisfied that the law provides enforceable protections that are 'equivalent' to the protections provided by the bill.[100] Many submissions questioned whether 'equivalence' is too high a standard.

2.80 The Shopping Centre Council of Australia informed the committee that their legal advice states that few, if any, existing laws would be exempted under the proposed standard, and as such, the 'objectives of avoiding regulatory duplication and unnecessary compliance costs will not be achieved'.[101] The SCCA also quoted from a submission to the Exposure Draft Bill from Baker and McKenzie, an independent legal firm who reached a similar conclusion:

> The proposed test would prevent the Minister from applying an exemption to small business contracts covered by existing industry-specific legislation designed to meet similar objectives, and having similar (but not necessarily equivalent) protections.

2.81 According to Baker and McKenzie, the use of the word 'equivalent' sets a very high standard. But, as Baker and McKenzie pointed out, further problems exist:

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98 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 August 2015, 57 (Senator the Hon Nigel Scullion).

99 Explanatory Memorandum, paragraph 3.9.

100 Item 14, substituting s 12BL(3)(a) into the ASIC Act; item 23, inserting s 139G(2A)(a) into the ACL.

101 Shopping Centre Council of Australia, *Submission 9*, p. 1, 6.

> This, together with the fact that it refers to enforcement and remedies **as well as** to contractual terms, will make it extremely unlikely that the Minister will be in a position to allow any such exemption.[102]

2.82 In the SCCA's view, the exemption standard should be reduced to permit the Minister to exempt laws that provide 'fair and adequate protections for small businesses' rather than equivalent protections.[103]

2.83 The Business Council of Australia, Telstra and the HIA agreed with the SCCA. The BCA contended that 'equivalence' is too narrow and that the exemption provisions should be redrafted to expand it.[104] Telstra argued that the Minister should be permitted to grant exemptions to industry codes where there is 'reasonably comparable protection, even if it is not equivalent in all respects'.[105]

2.84 Direct Selling Association of Australia went further, suggesting that the bill should be amended to allow 'the Minister to make general exemptions for any reason'.[106]

Terms required by law

2.85 The bill also provides that the unfair contract term protections do not apply to a contractual term to the extent that the term is a term required by a law of the Commonwealth, a State or a Territory.[107]

2.86 The Shopping Centre Council of Australia argued that this exemption mechanism is also too limited to achieve the objectives of the bill. The Council had their lawyers, Speed and Stracey, review the provision:

> Having regard to the sample of lease clauses and retail lease provisions reviewed Speed and Stracey concluded that the wording of the proposed exemption does not satisfactorily exempt all terms of a retail lease (that otherwise comply with State and Territory retail lease legislation) from the operation of the UCT provisions.[108]

2.87 The SCCA noted that, if correct:

> This raises the possibility that a term in a retail lease which has been contemplated by, say, the Parliament of NSW, and is considered satisfactory by that Parliament, could subsequently be declared void by a Federal Court judge. This is an outcome which must be avoided.[109]

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102 Shopping Centre Council of Australia, *Submission 9*, p. 6 (emphasis in original).

103 Shopping Centre Council of Australia, *Submission 9*, p. 7.

104 Business Council of Australia, *Submission 11*, p. 5.

105 Telstra, *Submission 19*, p. 2.

106 Direct Selling Association of Australia, *Submission 1*, p. 2.

107 Item 14, substituting s 12BL(2) into the ASIC Act; item 40, inserting (4) at the end of s. 28 of Schedule 2 into the ACL.

108 Shopping Centre Council of Australia, *Submission 9*, p. 7.

109 Shopping Centre Council of Australia, *Submission 9*, p. 7.

2.88 The SCCA explained that the nature of retail tenancy laws in Australia rely on minimum standards. Therefore Mr Milton Cockburn, Shopping Centre Council of Australia, continued:

> …we think a very minor amendment to section 26(1)(c) would pick up that fact to make it clear that if it meets the minimum standards of a state law or a territory law or even a Commonwealth law then, in fact, the [unfair contract terms] protections would not apply.[110]

2.89 In the words of Mr Angus Nardi, Shopping Centre Council of Australia, this amendment would better achieve the objectives of the bill by 'avoid[ing] duplicate regulation'.[111]

Exemption or a defence

2.90 Although arguing that the bill should not include a ministerial exemption procedure at all, the Australian Newsagents Federation agreed in substance with the SCCA. In the view of the ANF, contracts prescribed by law or mirroring a mandatory code should be a defence to a claim under the bill.[112] The SME Business Law Committee, Law Council of Australia agreed with the ANF, contending that it would be better to frame exemptions as a defence:

> The SME Committee's view is that the alternative proposed is preferable because Codes do not prescribe an entire contract and to exclude a sector on the basis of the existence of a mandatory Code, such as, franchising, causes anomalies.[113]

Industry–specific exemptions

2.91 The possibility that the Minister may exempt specific industry codes from the operation of the bill was seized on by some submissions to argue for a blanket exemption. The Explanatory Memorandum notes the background to this position:

> In response to concerns in some industry sectors regarding the prevalence of unfair contract terms and contracting practices more broadly, several industry-specific measures have been introduced that protect against unfair contract terms.[114]

2.92 The Franchise Council of Australia and the Direct Selling Association of Australia argued that the bill should be amended to provide blanket exemptions for their respective industries, in accordance with the requirements of their industry codes of conduct.[115] The Insurance Council of Australia felt the same, arguing that small

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110 *Proof Committee Hansard*, 3 September 2015, p. 6.

111 *Proof Committee Hansard*, 3 September 2015, p. 6.

112 Australian Newsagents Federation, *Submission 10*, p. 8.

113 SME Business Law Committee, Law Council of Australia, *Submission 5*, p. 7.

114 Explanatory Memorandum, paragraph 3.238.

115 Direct Selling Association of Australia, *Submission 1*, p. 2; Franchise Council of Australia, *Submission 7*, p. 5.

business insurance contracts should be 'explicitly prescribed as exempt',[116] as equivalent protections already exist under the *Insurance Contracts Act 1984*.

2.93 The Housing Industry Association followed this approach too. The HIA cited the Decision Regulation Impact Statement of the bill, which found that the *Independent Contractors Act 2006* (Cth) 'provides a substantial level of protection'.[117] In the HIA's view, contractual certainty should require that the bill be amended to 'specifically exclude contracts already covered by the ICA from coverage under the ACL'.[118]

2.94 The Competition and Consumer Committee, Law Council of Australia suggested that the bill should make specific exemption for industry codes already prescribed under s 51AE of the CCA.[119] These codes are: the Unit Pricing Code; the Franchising Code of Conduct; the Oil Code; and the Horticulture Code of Conduct.

Committee's views

2.95 The committee considers that the proposed exemption process is appropriate. The overwhelming rationale of the bill is to protect small businesses in a vulnerable position from the predatory activities of larger businesses through standard form contracts. Exempting the application of the bill to industries offering 'comparable' but not 'equivalent' protections defeats this purpose.

2.96 Further, the committee considers that the current process of Ministerial exemption is appropriate. Rather than legislating for blanket industry–specific exemptions, businesses should persuade the relevant Minister to declare certain enforceable codes equivalent. This will ensure that industry continues to develop their own codes and standards of conduct.

Scope of the bill

2.97 Some submissions indicated their concern with the scope of application of the bill. As it stands, the unfair contract term protections apply whether a small business is a purchaser or supplier of goods and services.

2.98 Direct Selling Association of Australia acknowledged 'the potential for small business to experience unfairness in acquiring goods and services for business purposes and understands the government's objectives in applying unfair contract terms to these transactions'. However, DSSA argued that 'the Bill extends these existing policy protections that relate to consumables further so that they also cover contracts that do not involve the supply or acquisition of goods and services but are purely commercial relationships'.[120]

116 Insurance Council of Australia, *Submission 22*, p. 1.

117 Explanatory Memorandum, paragraph 3.240.

118 Housing Industry Association, *Submission 16*, p. 14.

119 Competition and Consumer Committee, Law Council of Australia, *Submission 6*, p. 7.

120 Direct Selling Association of Australia, *Submission 1*, p. 1.

2.99 The Business Council of Australia argued that the bill should only apply when small businesses are purchasers, not suppliers.[121] The BCA noted that the policy rationale for the bill—'that there is a potential imbalance in resources, understanding or bargaining power when a small business is presented with a standard form contract by another party'—is unlikely to apply when a small business is a supplier.[122] Rather, extending the protections for these circumstances would reduce the use of standard form contracts and result in higher transaction costs for both parties.

2.100 The Shopping Centre Council of Australia and the Housing Industry Association agreed, arguing that the bill should exclude contracts between two small businesses from its coverage.[123] In the HIA's view, 'it is not the government's role to interfere in commercial contracts between two small businesses'.[124]

2.101 Arnold Bloch Leibler agreed with HIA's approach. However, ABL also suggested that the bill should be limited further. In their view, the bill should only apply to the sale of consumer products to small businesses, that is:

> To a supply of goods or services, or a sale of an interest in land, 'to a person [which can be an individual or company] where the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption'.[125]

2.102 In addition, ABL argued that the bill should be consistent with the New Zealand unfair contract term regime that commenced in March 2015. This approach would limit the application of the bill so that the unfair contract terms would not apply to:

> goods or services that are acquired for the purpose of re-supplying them in trade, consuming them in the course of a process of production or manufacture or, in the case of goods, repairing or treating, in trade, other goods or fixtures on land.[126]

2.103 No other submissions raised this point.

2.104 On the other hand, the Australian Automotive Dealer Association suggested that the scope of the bill could be widened. In its view, contracts between franchisors and franchisees should be automatically protected, regardless of the definition of a small business contract under the legislation.[127]

Committee's views

2.105 The committee appreciates that the operation of the bill in relation to small business to small business contracts may appear inconsistent with the policy rationale.

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121 Business Council of Australia, *Submission 11*, p. 3.

122 Business Council of Australia, *Submission 11*, p. 4.

123 Shopping Centre Council of Australia, *Submission 9*, p. 12.

124 Housing Industry Association, *Submission 16*, p. 13.

125 Arnold Bloch Liebler, *Submission 13*, p. 2.

126 Arnold Bloch Liebler, *Submission 13*, p. 2.

127 Australian Automotive Dealer Association, *Submission 15*, p. 1.

However, the committee does not believe that this is the case. The bill intends to protect vulnerable small businesses by prohibiting unfair contract terms in standard form contracts. A small business may be vulnerable notwithstanding that it is contracting with another small business.

Onus of proof

2.106 Two rebuttable presumptions under the CCA are retained under the bill. Some submissions argued that these presumptions are not justified in a business-to-business relationship.

Standard form contract

2.107 Under the CCA, a rebuttable presumption exists which shifts the onus of proof on the defendant in determining whether a contract is a standard form contract. Section 27(1) of Schedule 2 provides that:

> If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

2.108 This provision is retained under the bill.

2.109 The Shopping Centre Council of Australia argued that while the reversal of onus of proof 'may be justified in a business-to-consumer contract where a reasonable assumption can be made that a business would have greater resources than an ordinary consumer to prove a contract was not a standard form contract', it is not justifiable in a business-to-business relationship, which is 'obviously commercial in nature'.[128] The Franchise Council of Australia agreed, considering it 'unfair and unreasonable to reverse the onus of proof in business contracts'.[129]

2.110 The SCCA and the FCA went further. The SCCA argued that including this presumption may give rise to 'moral hazard' by discouraging small businesses from seeking specialist advice, and could leave businesses vulnerable to 'vexatious or whimsical legislation',[130] while the FCA considered it may 'encourage spurious claims' and damage businesses.[131]

Term reasonably necessary to protect legitimate interests

2.111 Section 24(4) of Schedule 2 of the CCA contains a second rebuttable presumption. It provides:

> For the purposes of subsection 1(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless the party proves otherwise.

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128 Shopping Centre Council of Australia, *Submission 9*, p. 10.

129 Franchise Council of Australia, *Submission 7*, p. 9.

130 Shopping Centre Council of Australia, *Submission 9*, p. 10.

131 Franchise Council of Australia, *Submission 7*, p. 8.

2.112 The Franchise Council of Australia considered that retaining this provision in the bill may leave businesses vulnerable to 'commercial blackmail'.[132] The Shopping Centre Council of Australia agreed that the rebuttable presumption was unnecessary in a business-to-business relationship. The SCCA considered:

> In the case of retail leases particular terms are included in a lease because years of operational and legal experience have found them necessary to protect the lessor's legitimate interests. They are not included simply to make the lease document as thick as possible. If it is to be left to the discretion of judges (most of whom lack commercial experience or expertise) to decide what is in the best interests of the owners or investors in a shopping centre (or any other large complex business), then the usual onus of proof should apply.[133]

2.113 The Housing Industry Association[134] and the Queensland Law Society supported this position; arguing that it was 'unfair' and the burden of proof should lie with the complaining party.[135]

Committee's views

2.114 The committee appreciates the concerns of the Franchise Council of Australia and the Shopping Centre Council of Australia. However, the committee considers that the operation of the rebuttable presumptions is appropriate in these circumstances.

Transitional period

2.115 The bill comes into force six months after receiving the Royal Assent,[136] in order to allow businesses to review and amend their standard form contracts and operational procedures in order to comply with the new legislation.

2.116 Nevertheless, some submissions argued that the transitional period should be extended to allow businesses more time to comply. The Australian Bankers' Association and the Australian Finance Conference recommended extending the transition period to 12 months,[137] and the Insurance Council of Australia to 18 months.[138]

Committee's views

2.117 The committee accepts the need for a transitional period between the Act receiving the Royal Assent and its coming into force in order for businesses to review their compliance. The committee understands the concerns of the Australian Bankers' Association and the Insurance Council of Australia, but in light of the government's

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132 Franchise Council of Australia, *Submission 7*, p. 3.

133 Shopping Centre Council of Australia, *Submission 9*, p. 11.

134 Housing Industry Association, *Submission 16*, p. 10.

135 Queensland Law Society, *Submission 27*, p. 1.

136 Item 2(1).

137 Australian Bankers' Association, *Submission 14*, p. 2; Australian Finance Conference, *Submission 28*, p. 3.

138 Insurance Council of Australia, *Submission 22*, p. 3.

pre-election commitment to this legislation and the significant consultation process that has already been undertaken, considers that a six–month transitional period, as set out in the bill as it currently stands, is appropriate.

Review

2.118 Some submissions recommended that the operation of the bill be reviewed after its entry into force in order to ascertain whether it has struck the appropriate balance between protecting small businesses from unfair contract terms and has not inequitably increased regulatory burdens.

2.119 The Australian Newsagents Federation recommended review within 12 months,[139] and the Business Council of Australia after 3 years.[140] The Motor Trades Association of Queensland suggested reviewing the operation of the Act in 2 or 3 years.[141]

Committee's views

2.120 The committee considers that this legislative amendment has raised considerable attention. In light of the significant number of small businesses that will be affected, the committee considers it appropriate to review the operation of these legislative amendments after 3 years. This review process should enable a future Parliament to accurately ascertain the effect of the legislation and enact appropriate reforms, if necessary, to better reflect the policy rationale.

Recommendation 2

2.121 **The committee recommends that the legislative amendment be reviewed after 3 years.**

Recommendation 3

2.122 **Noting Recommendation 1 and 2, the committee recommends that the Senate pass the bill.**

Senator Sean Edwards
Chair

139 Australian Newsagents Federation, *Submission 10*, p. 8.

140 Business Council of Australia, *Submission 11*, p. 3.

141 Motor Trades Association Queensland, *Submission 8*, p. 2.