

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 of the Commonwealth (along with the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 currently before the Commonwealth Parliament) will insert a Schedule 2 to the Trade Practices Act 1974 of the Commonwealth setting out the provisions of the new Australian Consumer Law agreed to by the Council of Australian Governments.

The objects of this Bill are:

(a) to amend the Fair Trading Act 1987 to enact provisions concerning unfair contract terms that will eventually form part of the new Australian Consumer Law when it commences, and

(b) to make consequential amendments to the Contracts Review Act 1980.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Explanatory note page 2

Fair Trading Amendment (Unfair Contract Terms) Bill 2010

Explanatory note

Schedule 1 Amendment of Fair Trading Act 1987

No 68

Unfair contract term provisions from Australian Consumer Law

Schedule 1 [1] inserts proposed Part 5G in the Fair Trading Act 1987 containing provisions drawn from the new Australian Consumer Law relating to unfair terms in consumer contracts that are standard form contracts. A consumer contract is a contract for the supply of goods or services (or for a sale or grant of an interest in land in trade or commerce) to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The proposed Part contains the following provisions:

(a) Proposed section 60ZC defines certain terms that are used in the proposed Part.

(b) Proposed section 60ZD provides that an unfair term in a consumer contract that is a standard form contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. If a contract claim in relation to a consumer contract containing such an unfair term is brought before a court or tribunal (such as the Consumer, Trader and Tenancy Tribunal) having jurisdiction to deal with the claim, the court or tribunal will be required to treat the term as being void.

(c) Proposed section 60ZE provides that a term is unfair if:

(i) it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and

(ii) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and

(iii) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(d) Proposed section 60ZF gives examples of terms that may be unfair.

(e) Proposed section 60ZG makes it clear that a term is not to be treated as being unfair to the extent that it defines the main subject matter of the contract, sets an upfront price payable under the contract or is a term required by a Commonwealth, State or Territory law.

(f) Proposed section 60ZH provides that if a party to proceedings alleges that a

contract is a standard form contract, it is to be presumed to be such a contract unless another party to the proceedings proves otherwise. The proposed section also sets out factors that a court or tribunal must take into account in determining whether a contract is a standard form contract.

(g) Proposed section 60ZI provides for the proposed Part not to apply to certain kinds of marine contracts or to the constitutions of companies, managed investment schemes and other bodies.

Explanatory note page 3

Fair Trading Amendment (Unfair Contract Terms) Bill 2010

Explanatory note

Enforcement and remedies in relation to unfair contract terms

Schedule 1 [4] inserts proposed section 64B in the Fair Trading Act 1987 to enable the Director-General or, with leave, a party to a consumer contract that is a standard form contract to apply to the Supreme Court for a declaration that a term in contracts of that kind is unfair.

Schedule 1 [3] amends section 62 of the Fair Trading Act 1987 to make it clear that a contravention of proposed Part 5G does not constitute an offence. Schedule 1 [2] amends section 61 of the Act to make it clear a reference in Part 6 of the Act (in which sections 61 and 62 are located) to a contravention of proposed Part 5G is read as a reference to a party to a consumer contract applying or relying on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

Schedule 1 [5]–[13] amend Part 6 (Enforcement and remedies) of the Fair Trading Act 1987 to enable the Director-General and certain other persons to obtain certain other remedies in the event that a party to a consumer contract seeks to apply or rely on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

Schedule 1 [14] amends section 86A of the Fair Trading Act 1987 to make it clear that the Minister or the Director-General may issue public warnings under that section in relation to business practices involving the use of terms in consumer contracts that are standard form contracts that are or may be unfair.

Schedule 1 [15] makes an amendment to section 89 of the Fair Trading Act 1987 that is consequential on the amendments made to the Contracts Review Act 1980 by Schedule 2.

Savings and transitional provisions

Schedule 1 [16] amends Schedule 5 to the Fair Trading Act 1987 to insert provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [17] amends clause 12 of Schedule 5 to the Fair Trading Act 1987 to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Consequential amendment of Contracts

Review Act 1980 No 16

Schedule 2 amends the Contracts Review Act 1980 to make it clear that the provisions of that Act are not limited or restricted by, and do not limit or restrict the operation of, the provisions of proposed Part 5G of the Fair Trading Act 1987 (as inserted by Schedule 1 [1]).