
AUSTRALIAN BUSINESS GROWTH FUND BILL 2019

EXPOSURE DRAFT EXPLANATORY MATERIALS

The Australian Business Growth Fund

Outline of chapter

1.1 The Bill authorises investment by the Commonwealth in the Australian Business Growth Fund, and appropriates \$100 million for that purpose.

Context of the measure

1.2 A challenge for small and medium enterprises seeking to grow can be access to capital. In 2018, the Reserve Bank of Australia and the Small Business and Family Enterprise Ombudsman released separate reports outlining the difficulties Australian small and medium enterprises face in accessing finance.

1.3 The Reserve Bank of Australia found that banks were reluctant to finance start-ups given the high risks involved. Entrepreneurs found it difficult to borrow more than around \$100,000 on an unsecured basis to support their day-to-day trading activities. In addition, medium-sized businesses reported that it was hard to obtain additional finance once they have pledged all of their real estate as collateral. As a result, many entrepreneurs delay expanding their businesses until the expansion can be funded from retained profits.

1.4 Both the Reserve Bank of Australia and Small Business and Family Enterprise Ombudsman reports concluded that certain business models are not suited to debt finance, as there is often a distinct time gap between investing in a business' future growth and realising sufficient profit to repay the debt. Equity financing would often be more appropriate for these business models. However, this is not always an attractive option for small and medium enterprises because of the loss of management control of the enterprise if traditional private equity funds are used.

1.5 Australia currently lacks a patient capital market for small and medium enterprises. Patient capital can provide entrepreneurs the finance needed to expand without relinquishing control of their business. Patient capital equity funds established in the United Kingdom and Canada have shown that there is a need for this type of finance and that patient capital investment can be profitable for investors.

1.6 The Government will help small businesses grow by co-investing with other financial institutions to establish an Australian Business Growth Fund that will provide equity finance to small businesses across a range of industries and locations.

Summary of new law

1.7 Part 1 of the Bill sets out when the Bill commences, the objects of the Bill, definitions of key terms used in the Bill, and the application of the Bill. This Part also contains a simplified outline of the Bill.

1.8 Part 2 of the Bill authorises the Minister to invest in the Australian Business Growth Fund and places limitations on the exercise of the Minister's investment powers.

1.9 Part 3 of the Bill contains administrative provisions that support and govern the Minister's powers to invest in the Australian Business Growth Fund.

Detailed explanation of new law

Part 1—Preliminary provisions

Short title

1.10 The Bill, once enacted, may be cited as the *Australian Business Growth Fund Act 2019*. [Section 1]

Commencement

1.11 The Bill will commence on the day after the Bill receives the Royal Assent. [Section 2]

Objects and simplified outlines

1.12 The object of the Bill is to increase investment in Australian small and medium enterprises by the Commonwealth participating in, and investing in (together with other persons), the Australian Business Growth Fund in accordance with the Bill. [Section 3]

1.13 The Bill contains a simplified outline, as do Parts 2 and 3 of the Bill for those individual parts. The simplified outlines are included to assist readers to understand the substantive provisions of the Bill. These outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions of the Bill. [Sections 4, 9 and 17]

Definitions

1.14 The Bill includes definitions of expressions used in the Bill. Key definitions are explained throughout this explanatory memorandum as part of the explanation of the substantive provision to which they relate. [Section 5]

Crown and geographic application

1.15 The Bill, once enacted, will bind the Crown in each of its capacities. However, the Bill will not make the Crown liable to be prosecuted for an offence. *[Section 6]*

1.16 The Bill, once enacted, will extend to every external Territory, and will extend to acts, omissions, matters and things outside Australia. *[Sections 7 and 8]*

Part 2—Commonwealth investment in the Australian Business Growth Fund

Powers of the Minister

1.17 The Bill authorises investment by the Commonwealth in a Corporations Act company that will become the Australian Business Growth Fund.

1.18 This investment may be given effect by the Minister, on behalf of the Commonwealth, doing a combination of one or more of the following:

- forming, or participating in the formation of, a Corporations Act company; *[Paragraph 10(1)(a)]*
- acquiring shares (either by purchase or subscription) in a Corporations Act company, or becoming a member of a Corporations Act company; *[Paragraph 10(1)(b)]*
- acquiring debentures of a Corporations Act company. *[Subsection 10(2)]*

1.19 A **Corporations Act company** is defined as a body corporate that is incorporated, or is taken to be incorporated, under the *Corporations Act 2001*. **Debenture** has the same meaning as in the *Corporations Act 2001*. *[The definitions of “Corporations Act company” and “debenture” in section 5]*

1.20 These powers can only be exercised in relation to one company. Once these powers are exercised in relation to a company, that company is known as the **Australian Business Growth Fund** or **Fund** for the purposes of the Bill. *[The definitions of “Australian Business Growth Fund” or “Fund” in section 5, and subsections 10(3) and (4)]*

1.21 The Minister may, on behalf of the Commonwealth, enter into arrangements with the Fund, a member of the Fund, or a subsidiary of the Fund, relating to the operations of the Fund. **Subsidiary** has the same meaning as in the *Corporations Act 2001*. *[The definition of “subsidiary” in section 5, and section 11]*

1.22 The Minister is conferred with the rights, responsibilities, duties and powers associated with being a member or shareholder of the Fund,

holding debentures of the Fund or being a party to an arrangement with the Fund. *[Section 12]*

Limitations on the powers of the Minister

1.23 The Bill primarily relies on the power of the Parliament to make laws with respect to ‘trade and commerce with other countries, and among the States’ (section 51(i) of the Constitution) and for the government of territories (section 122 of the Constitution).

1.24 To this end, the Minister can only exercise the powers conferred on the Minister if certain arrangements have been made, or will be made before the Fund makes any investment. These arrangements will require the Fund to apply money received from the Commonwealth only:

- with respect to trade or commerce:
 - between Australia and places outside Australia; or
 - among the States; or
 - within a Territory, between a State and a Territory or between 2 Territories; or
- with respect to a Territory.

[Subsections 13(1) to (3)]

1.25 However, these arrangements are not intended to prevent the Fund from generating a commercial return. *[Example to subsection 13(2)]*

1.26 The Minister is required to divest any shares in, or debentures of, the Fund as soon as practicable:

- if these arrangements are not, or are no longer, in place; or
- if these arrangements have not been effective.

[Subsection 13(4)]

1.27 The restrictions on the exercise of Ministerial powers apply equally to the exercise of the Minister’s rights, responsibilities and duties under section 12. *[Subsection 13(5)]*

1.28 The provisions in this Part do not have the effect of limiting the executive power of the Commonwealth. *[Section 15]*

1.29 The Minister must also ensure that the Fund does not become a Commonwealth company (see section 89 of the *Public Governance, Performance and Accountability Act 2014*). This means that the Minister must ensure that the Commonwealth:

- does not control the composition of the Fund’s board; or

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- is not in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the Fund; or
 - does not hold more than one half of the issued share capital of the Fund (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

[Section 14]

1.30 Rules made under the Bill may make provision for, or in relation to, the exercise of rights, responsibilities, duties or powers by the Minister under the Bill. This power may be used particularly in the case where these powers are delegated. *[Section 16]*

Part 3—Miscellaneous provisions

Appropriation

1.31 The Consolidated Revenue Fund is appropriated to the extent of \$100 million for the purposes of paying costs, expenses and other obligations incurred by the Commonwealth in connection with its investment in the Fund. This may include, for example, the costs of acquiring shares in the Fund, or paying amounts payable under arrangements made with the Fund or its members. *[Section 18]*

Delegation

1.32 The Minister may delegate the Minister's powers, functions or duties under the Bill to:

- the Secretary of the Department; or
- an SES employee, or an acting SES employee, in the Department; or
- an APS employee who holds, or is acting in, an Executive Level 2, or equivalent, position in the Department.

[Subsections 19(1) and (2)]

1.33 The Minister will not be able to delegate the power to make rules under section 22.

1.34 Before delegating a power, function or duty, the Minister must have regard to the seniority of the position to which a position-based delegation is made, or the qualifications or expertise to which an individual delegation is made. This provision is directed toward ensuring that a person can only be delegated a power, function or duty if the person will be capable of exercising the delegated powers or performing the delegated functions or duties. *[Subsection 19(3)]*

1.35 The delegate must comply with any relevant rules made by the Minister. *[Subsection 19(4)]*

1.36 It is intended that the powers, functions and duties delegated under section 19 will only be delegated to officials in certain areas of the Department of the Treasury that are best placed to exercise those powers, or perform those functions or duties. This ensures that there is not a wide delegation of the Minister's powers, functions or duties under this Bill.

Governance

1.37 The Department's annual reports under the *Public Governance, Performance and Accountability Act 2013* will be required to include a report on the operation of the Bill. *[Section 20]*

1.38 Three years after commencement, the Minister will be required to cause a review of the operation of the Bill to be undertaken. The review must include a review of the effectiveness of this Bill in meeting the Bill's objects. A report of the review must be given to the Minister, and the Minister must table a copy of the report in each House of the Parliament within 15 sitting days of that House. *[Section 21]*

Rules

1.39 The Minister will have the power to, by legislative instrument, make rules prescribing matters:

- required or permitted by the Bill to be prescribed by the rules; or
- necessary or convenient to be prescribed for carrying out or giving effect to the Bill.

[Subsection 22(1)]

1.40 The rules cannot:

- create an offence or civil penalty;
- provide coercive enforcement powers;
- impose a tax;
- set an amount to be appropriated from the Consolidated Review Fund; or
- directly amend the text of the Bill.

[Subsection 22(2)]

1.41 The only matter covered by paragraph 22(1)(a) is set out in section 16, relating to limitations on the Minister's rights, responsibilities, duties or powers under the Bill.