

EXPOSURE DRAFT

2013-2014-2015

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

No. , 2015

(Treasury)

**A Bill for an Act to amend legislation in the
Treasury portfolio, and for related purposes**

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A Bill for an Act to amend legislation in the Treasury portfolio, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

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2 Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 No. , 2015

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Australian Securities and Investments Commission Act 2001

1 Subsection 12BA(1) (paragraph (b) of the definition of *non-party consumer*)

Omit “consumer”.

2 Subsection 12BA(1) (definition of *rely on*)

After “consumer contract”, insert “or small business contract”.

3 Subsection 12BA(1)

Insert:

small business contract has the meaning given by
subsection 12BF(4).

4 Subsection 12BA(1) (definition of *transparent*)

After “consumer contract”, insert “or small business contract”.

5 Subsection 12BA(1) (definition of *unfair*)

After “consumer contract”, insert “or small business contract”.

6 Section 12BF (heading)

Repeal the heading, substitute:

12BF Unfair terms of consumer contracts and small business contracts

7 Subsection 12BF(1)

After “consumer contract”, insert “or small business contract”.

8 At the end of section 12BF

Add:

(4) A contract is a *small business contract* if:

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Schedule 1 Amendments

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

9 Subsections 12BG(1), (2) and (4) and 12BH(1)

Omit “consumer”.

10 After paragraph 12BH(2)(a)

Insert:

- (aa) the detriment that a term of that kind would cause to small
businesses of the kind referred to in subsection 12BF(5); and

11 Section 12BI (heading)

Repeal the heading, substitute:

12BI Terms that define main subject matter of consumer contracts or small business contracts etc. are unaffected

12 Subsection 12BI(1)

Omit “consumer”.

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Amendments Schedule 1

13 Subsections 12BI(2) and (3)

Omit “consumer contract referred to in subsection 12BF(1)”, substitute “contract”.

14 Section 12BL

Repeal the section, substitute:

12BL Contracts to which this Subdivision does not apply

- (1) This Subdivision does not apply to a contract that is the constitution of a company, managed investment scheme or other kind of body.
- (2) This Subdivision does not apply to a small business contract that is covered by a law of the Commonwealth, a State or a Territory that is a law prescribed by the regulations.
- (3) Before the Governor-General makes a regulation for the purposes of subsection (2) prescribing a law:
 - (a) the Minister must be satisfied that the law provides enforceable protections for small businesses of the kind referred to in subsection 12BF(5) that are equivalent to those provided by this Subdivision together with Subdivision G; and
 - (b) the Minister must take into consideration:
 - (i) any detriment to small businesses of that kind resulting from the prescription of the law; and
 - (ii) the impact on business generally resulting from the prescription of the law; and
 - (iii) the public interest.

15 Subsections 12GD(9), 12GM(10) and 12GN(9)

Omit “consumer”.

16 Subparagraph 12GNB(1)(a)(ii)

Omit “consumer”.

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Schedule 1 Amendments

17 Subsections 12GND(1A) and (2)

Repeal the subsections, substitute:

- (2) The Court may, on the application of a small business, of the kind referred to in subsection 12BF(5), that is a party to a small business contract or on the application of ASIC, declare that a term of such a contract is an unfair term.
- (3) Subsections (1) and (2) do not apply unless the contract is a standard form contract that is:
 - (a) a financial product; or
 - (b) a contract for the supply, or possible supply, of services that are financial services.
- (4) Subsections (1) and (2) do not apply if Subdivision BA does not apply to the contract.
- (5) Subsections (1) and (2) do not limit any other power of the Court to make declarations.

18 At the end of the Act

Add:

Part 23—Application provision relating to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015

310 Application

- (1) The amendments made by Schedule 1 to the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* apply in relation to a contract entered into on or after the commencement of that Schedule.
- (2) The amendments do not apply to a contract entered into before the commencement of that Schedule. However:

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Amendments Schedule 1

- 1 (a) if the contract is renewed on or after that commencement—
2 the amendments apply to the contract as renewed, on and
3 from the day (the renewal day) on which the renewal takes
4 effect, in relation to conduct that occurs on or after the
5 renewal day; or
6 (b) if a term of the contract is varied on or after that
7 commencement and paragraph (a) has not already applied in
8 relation to the contract—the amendments apply to the term as
9 varied, on and from the day (the variation day) on which the
10 variation takes effect, in relation to conduct that occurs on
11 and after the variation day.
- 12 (3) If paragraph (2)(b) of this section applies to a term of a contract,
13 subsection 12BF(2) and section 12BK of this Act apply to the
14 contract.
- 15 (4) Despite paragraphs (2)(a) and (b) and subsection (3) of this section,
16 the amendments do not apply to a contract, or a term of a contract,
17 to the extent that the operation of the amendments would result in
18 an acquisition of property (within the meaning of
19 paragraph 51(xxxi) of the Constitution) from a person otherwise
20 than on just terms (within the meaning of that paragraph of the
21 Constitution).

Competition and Consumer Act 2010

19 Paragraph 137D(b)

Omit “consumer”.

20 Subparagraphs 137F(2)(b)(ii) and (d)(ii)

Omit “consumer”.

21 Subsection 139G(2)

Omit “consumer”.

22 After paragraph 139G(2)(a)

Insert:

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Schedule 1 Amendments

- 1 (aa) the detriment that a term of that kind would cause to small
2 businesses; and

3 **23 After subsection 139G(2)**

4 Insert:

- 5 (2A) Before the Governor-General makes a regulation for the purposes
6 of subsection 28(4) of Schedule 2 prescribing a law:
- 7 (a) the Commonwealth Minister must be satisfied that the law
8 provides enforceable protections for small businesses that are
9 equivalent to those provided by Part 2-3, together with
10 Parts 5-1 and 5-2, of Schedule 2; and
- 11 (b) the Commonwealth Minister must take into consideration:
- 12 (i) any detriment to small businesses resulting from the
13 prescription of the law; and
- 14 (ii) the impact on business generally resulting from the
15 prescription of the law; and
- 16 (iii) the public interest.

17 **24 Subsection 2(1) of Schedule 2 (paragraph (b) of the**
18 **definition of *non-party consumer*)**

19 Omit “consumer”.

20 **25 Subsection 2(1) of Schedule 2 (definition of *rely on*)**

21 After “consumer contract”, insert “or small business contract”.

22 **26 Subsection 2(1) of Schedule 2**

23 Insert:

24 ***small business***: see section 3A.

25 ***small business contract***: see subsection 23(4).

26 **27 Subsection 2(1) of Schedule 2 (paragraph (b) of the**
27 **definition of *transparent*)**

28 After “consumer contract”, insert “or small business contract”.

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Amendments Schedule 1

28 Subsection 2(1) of Schedule 2 (definition of *unfair*)

After “consumer contract”, insert “or small business contract”.

29 After section 3 of Schedule 2

Insert:

3A Meaning of small business

(1) A business is a *small business* if it employs fewer than 20 persons.

(2) In counting the persons employed by a business, a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.

30 Section 23 of Schedule 2 (heading)

Repeal the heading, substitute:

23 Unfair terms of consumer contracts and small business contracts

31 Subsection 23(1) of Schedule 2

After “consumer contract”, insert “or small business contract”.

32 At the end of section 23 of Schedule 2

Add:

(4) A contract is a *small business contract* if:

(a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and

(b) at the time the contract is entered into, at least one party to the contract is a small business; and

(c) 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.

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Schedule 1 Amendments

1 **33 Subsection 24(1) of Schedule 2**

2 After “consumer contract”, insert “or small business contract”.

3 **34 Subsections 24(2) and (4) of Schedule 2**

4 Omit “consumer”.

5 **35 Subsection 25(1) of Schedule 2**

6 Omit “(1)”.

7 **36 Subsection 25(1) of Schedule 2**

8 After “consumer contract”, insert “or small business contract”.

9 **37 Subsection 25(2) of Schedule 2**

10 Repeal the subsection.

11 **38 Section 26 of Schedule 2 (heading)**

12 Repeal the heading, substitute:

13 **26 Terms that define main subject matter of consumer contracts or**
14 **small business contracts etc. are unaffected**

15 **39 Subsection 26(1) of Schedule 2**

16 After “consumer contract”, insert “or small business contract”.

17 **40 Subsection 26(2) of Schedule 2**

18 Omit “consumer”.

19 **41 At the end of section 28 of Schedule 2**

20 Add:

21 (4) This Part does not apply to a small business contract that is covered
22 by a law of the Commonwealth, a State or a Territory that is a law
23 prescribed by the regulations.

24 **42 Subsection 232(3) of Schedule 2**

25 Omit “consumer”.

43 Subparagraph 237(1)(a)(ii) of Schedule 2

Omit “consumer”.

44 Paragraph 238(1)(b) of Schedule 2

Omit “consumer”.

45 Subparagraph 239(1)(a)(ii) of Schedule 2

Omit “consumer”.

46 Subsection 242(1) of Schedule 2

Omit “consumer”.

47 Section 250 of Schedule 2 (heading)

Repeal the heading, substitute:

250 Declarations relating to consumer contracts and small business contracts

48 Subsections 250(2) and (3) of Schedule 2

Repeal the subsections, substitute:

(2) A court may, on the application of a small business that is a party to a small business contract or on the application of the regulator, declare that a term of such a contract is an unfair term.

(3) Subsections (1) and (2) do not apply unless the contract is a standard form contract.

(4) Subsections (1) and (2) do not apply if Part 2-3 does not apply to the contract.

(5) Subsections (1) and (2) do not limit any other power of the court to make declarations.

49 At the end of Chapter 6 of Schedule 2

Add:

Schedule 1 Amendments