

2015

EXPOSURE DRAFT

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TREASURY LEGISLATION AMENDMENT (SMALL BUSINESS AND UNFAIR  
CONTRACT TERMS) BILL 2015

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EXPLANATORY MATERIAL

(Circulated by the authority of the Minister for Small Business,  
the Hon Bruce Billson MP)



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

| <b><i>Abbreviation</i></b> | <b><i>Definition</i></b>  |
|----------------------------|---|
| ACCC                       | Australian Competition and Consumer Commission  |
| ACL                        | Australian Consumer Law   |
| ASIC                       | Australian Securities and Investments Commission  |
| ASIC Act                   | <i>Australian Securities and Investments Commission Act 2001 (Cth)</i>                        |
| CC Act                     | <i>Competition and Consumer Act 2010 (Cth)</i>  |
| The Exposure Draft         | Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Exposure Draft 2015 |



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# **Chapter 1**

## ***Amendments to the Australian Securities and Investments Commission Act 2001 (Cth)***

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### **Outline of chapter**

1.1 Schedule 1 to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Exposure Draft 2015 (Exposure Draft) contains amendments to extend the consumer unfair contract term provisions in the *Australian Securities and Investment Commission Act 2001 (Cth)* (ASIC Act) to small businesses agreeing to standard form contracts valued less than a prescribed threshold.

### **Context of amendments**

1.2 Small businesses, like consumers, are vulnerable to unfair terms in standard form contracts, as they are often offered contracts on a “take it or leave it” basis and lack the resources to understand and negotiate contract terms. There is potential for detriment where unfair contract terms are enforced in standard form contracts with small businesses.

1.3 Consultations indicated that unfair contract terms often allocate contract risks to the party that is less able to manage them (usually small businesses), as they are less likely to have robust risk management policies or be in a position to absorb the costs associated with a risk allocated to them eventuating.

1.4 Small businesses often lack in-house legal expertise and the cost of obtaining legal advice, particularly for low-value contracts, can be disproportionate to the potential benefits of entering into such contracts. Where small businesses decide to not enter into contracts due to their lack of confidence in understanding and negotiating terms or the cost of obtaining legal advice, they may miss out on market opportunities.

1.5 Existing laws largely address ‘unfair’ behaviour in business dealings, rather than unfair contract terms. Moreover, the protections available under the ASIC Act for unfair contract terms are currently only afforded to consumers and not businesses.

1.6 The extension of the unfair contract terms protection to cover small businesses will address this vulnerability by allowing unfair contract terms to be declared void, providing a remedy for small businesses. This will reduce the incentive to include and enforce unfair terms in small business contracts, providing a more efficient allocation of risk in these contracts and supporting small business' confidence in agreeing to contracts.

1.7 Small businesses differ from consumers in that they also engage in high-value commercial transactions that are fundamental to their business and where it may be reasonable to expect that they undertake appropriate due diligence (such as seeking legal advice). Limiting the extension of the unfair contract terms protection to low-value small business contracts that are standard form will support time-poor small businesses entering into contracts for day-to-day transactions, while maintaining the onus on small businesses to undertake due diligence when entering into high-value contracts.

## Summary of new law

- 1.8 The Exposure Draft amends the ASIC Act to:
- extend the consumer unfair contract term provisions in the ASIC Act to cover small business contracts that are standard form and valued less than a prescribed threshold; and
  - allow for the exemption of small business contracts that are standard form and that are subject to prescribed laws deemed equivalent to the unfair contract term provisions in the ASIC Act, and which are enforceable.

## Comparison of key features of new law and current law

| <i>New law</i>   | <i>Current law</i>  |
|--|---|
| The unfair contract term provisions in Subdivision BA of Division 2 of Part 2 of the ASIC Act protect consumers, and those small businesses that agree to standard form contracts valued less than a prescribed threshold. | The unfair contract term provisions in Subdivision BA of Division 2 of Part 2 of the ASIC Act protect consumers only. |
| The Commonwealth Minister has the power to specify exemptions from the unfair contract terms provisions  | No equivalent.  |



|   |  |
|---|--|
| contained in Division 2 of the ASIC Act where small business contracts are covered by another law that is enforceable and equivalent. |  |
|---|--|

## Detailed explanation of new law

1.9 Part 2 of the ASIC Act contains provisions that protect consumers from unfair contract terms. This Chapter extends these provisions to also cover small business contracts.

1.10 Specifically, section 12BF of the ASIC Act provides that an unfair contract term in a standard form consumer contract will be void. The Exposure Draft amends section 12BF to provide that an unfair contract term in a standard form small business contract will also be void. *[Schedule 1, Item 7: subsection 12BF(1) of Division 2 of Part 2]*

1.11 The extension of section 12BF to standard form small business contracts will not preclude the availability of the existing protections for consumer contracts, including where there is any overlap (for instance, if the parties to a contract include a consumer and a small business).

### *Meaning of small business contract*

1.12 A contract is a small business contract if, at the time it is entered into, at least one party is a small business, and the upfront price payable under the contract does not exceed either \$100,000, or \$250,000 if its duration is more than 12 months. *[Schedule 1, Item 8: subsection 12BF(4) of Division 2 of Part 2]*

1.13 The threshold for the upfront price payable under the contract reinforces the onus on small businesses to undertake due diligence for high-value transactions. A two-tiered transaction value threshold is used to account for multi-year contracts. The consultation process indicated the preferred transaction value threshold would encompass most small business transactions.

1.14 The definition of a small business contract uses the concept of 'upfront price' in defining the transaction value threshold. The phrase 'upfront price' is defined in section 12BI(2) as the consideration that is provided, or is to be provided, for the supply under the contract, and which is disclosed at or before the time the contract is entered into. However, it does not include any amount that is contingent on the occurrence or non-occurrence of a particular event. For the purpose of defining the transaction threshold, when determining the upfront price for

a credit contract, any interest payable under the contract is not to be considered.

1.15 The transaction value threshold for a small business contract makes reference to the upfront price of the contract. In determining the upfront price for this purpose, interest payable under the contract should not be included, as specified in subsection 12BF(6). [*Schedule 1, Item 8: subsection 12BF(6) of Division 2 of Part 2*]

1.16 This will ensure that small business contracts of the same value are treated equally and that movements in interest rates do not affect the scope of the protection. It will also allow businesses to calculate a contract's value more easily when determining whether they can rely on the protection.

1.17 It should be noted that pursuant to subsection 12BI(1), the unfair contract terms protection does not apply to a term of a standard form consumer or small business contract that sets out the main subject matter or the upfront price of the contract, or a term that is required or expressly permitted by law. The concept of upfront price for this purpose includes the principal and interest payable under the contract (see paragraph 2.69 of the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 1) 2010 (Cth)).

#### ***Meaning of small business***

1.18 A business is taken to be a small business if it employs fewer than 20 persons, excluding casual employees not employed on a regular or systematic basis. [*Schedule 1, Item 8: subsection 12BF(5) of Division 2 of Part 2*]

1.19 While this is different to the definition of small business in subsection 12BC(2) of the ASIC Act, it is consistent with the definition used in the unfair contract term provisions of the Australian Consumer Law. This will avoid confusion in how the unfair contract terms protection applies under both laws.

1.20 A threshold of less than 20 employees has been chosen for this definition, as it is a commonly used head count measure and has been found by the Australian Bureau of Statistics to provide a good proxy of small businesses.

1.21 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* (Cth).

***Exempting contracts subject to industry-specific legislation and regulation that are deemed enforceable and equivalent***

1.22 An industry-specific law (legislation or regulation) of the Commonwealth, a state or a territory, that is enforceable and equivalent to the unfair contract term protections can be exempted from the scope of the ASIC Act's protection for small businesses. Industry self-regulation cannot be exempted as these are voluntary measures. *[Schedule 1, Item 14: subsection 12BL(2) and paragraph 12BL(3)(a) of Division 2 of Part 2]*

1.23 This regulation-making power allows the Government to limit the operation of the ASIC Act to ensure that the unfair contract terms protection does not duplicate protections contained in another law.

1.24 At the same time, before a law is prescribed as an equivalent and enforceable measure, the Commonwealth Minister must consider the public interest, the overall impact of providing the exemption, and the impact on small businesses of prescribing the law. *[Schedule 1, Item 14: paragraph 12BL(3)(b) of Division 2 of Part 2]*

1.25 This is intended to provide a robust framework for the exercise of the regulation-making power.

## **Consequential amendments**

1.26 In extending the consumer unfair contract terms protection to small business contracts, references to consumer contracts have been modified to also refer to small business contracts. This includes:

- In the interpretation section, section 12BA, the definition of a number of terms used in the ASIC Act's unfair contract terms law: non-party consumer, rely on, small business contract, transparent and unfair. *[Schedule 1, Items 1-5: subsection 12BA(1) of Division 2 of Part 2]*
- The headings of the unfair contract terms provisions of the ASIC Act. *[Schedule 1, Items 6 and 11: sections 12BF and 12BI of Division 2 of Part 2]*
- The reference to contracts in Subdivision BA of Part 2 of the ASIC Act. *[Schedule 1, Items 9, 12 and 13: subsections 12BG(1)-(2) and (4), 12BH(1) and 12BI(1)-(3) of Division 2 of Part 2]*
- To insert a requirement for the detriment to small business of prescribing a term under section 12BH(1)(n) to be considered in the same way as the detriment to consumers

from prescribing such terms are considered. *[Schedule 1, Item 10: subsection 12BH(2)(aa) of Division 2 of Part 2]*

- Consequential amendments to Subdivision G of Division 2 of Part 2 of the ASIC Act, which outline the enforcement and remedy provisions for unfair contract terms. *[Schedule 1, Items 15-17: subsections 12GD(9), 12GM(10), 12GN(9), 12GND(2)-(5) and paragraph 12GNB(1)(a)(ii) of Division 2 of Part 2]*

## Application and transitional provisions

1.27 The amendments apply to varied terms, and contracts entered into or renewed on or after the day the legislation comes into effect. This will occur the day after the end of the period of 6 months beginning on the day the legislation receives Royal Assent. The amendments do not apply to a contract or term of a contract if it would result in the acquisition of property otherwise than on just terms pursuant to paragraph 51(xxxi) of the Commonwealth Constitution. *[Schedule 1, Item 18]*

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## **Chapter 2**

# ***Amendments to the Competition and Consumer Act 2010 (Cth)***

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### **Outline of chapter**

2.1 Schedule 1 to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Exposure Draft 2015 (Exposure Draft) contains amendments to extend the consumer unfair contract term provisions in the Australian Consumer Law (ACL) of the *Competition and Consumer Act 2010* (Cth) (CC Act) to small businesses agreeing to standard form contracts valued less than a prescribed threshold.

### **Context of amendments**

2.2 Small businesses, like consumers, are vulnerable to unfair terms in standard form contracts, as they are often offered contracts on a “take it or leave it” basis and lack the resources to understand and negotiate contract terms. There is potential for detriment where unfair contract terms are enforced in standard form contracts with small businesses.

2.3 Consultations indicated that unfair contract terms often allocate contract risks to the party that is less able to manage them (usually small businesses), as they are less likely to have robust risk management policies or be in a position to absorb the costs associated with a risk allocated to them eventuating.

2.4 Small businesses often lack in-house legal expertise and the cost of obtaining legal advice, particularly for low-value contracts, can be disproportionate to the potential benefits of entering into such contracts. Where small businesses decide to not enter into contracts due to their lack of confidence in understanding and negotiating terms or the cost of obtaining legal advice, they may miss out on market opportunities.

2.5 Existing laws largely address ‘unfair’ behaviour in business dealings, rather than unfair contract terms. Moreover, the protections available under the ACL for unfair contract terms are currently only afforded to consumers and not businesses.

2.6 The extension of the unfair contract terms protection to cover small businesses will address this vulnerability by allowing unfair contract

terms to be declared void, providing a remedy for small businesses. This will reduce the incentive to include and enforce unfair terms in small business contracts, providing a more efficient allocation of risk in these contracts and supporting small business' confidence in agreeing to contracts.

2.7 Small businesses differ from consumers in that they also engage in high-value commercial transactions that are fundamental to their business and where it may be reasonable to expect that they undertake appropriate due diligence (such as seeking legal advice). Limiting the extension of the unfair contract terms protection to low-value small business contracts that are standard form will support time-poor small businesses entering into contracts for day-to-day transactions, while maintaining the onus on small businesses to undertake due diligence when entering into high-value contracts.

2.8 The Legislative and Governance Forum on Consumer Affairs agreed in November 2013 to consider an extension of unfair contract term provisions in the ACL to small businesses, and agreed to the amendments under the *Intergovernmental Agreement for the Australian Consumer Law* on 13 April 2015.

## Summary of new law

- 2.9 The Exposure Draft amends the ACL to:
- extend the consumer unfair contract term provisions in the ACL to cover small business contracts that are standard form and valued less than a prescribed threshold; and
  - allow for the exemption of small business contracts that are standard form and that are subject to prescribed laws deemed equivalent to the unfair contract term provisions in the ACL, and which are enforceable.

## Comparison of key features of new law and current law

| <i>New law</i>  | <i>Current law</i>   |
|---|--|
| The unfair contract term provisions in Part 2-3 of the ACL protect consumers, and those small businesses that agree to standard form contracts valued less than a | The unfair contract term provisions contained in Part 2-3 of the ACL protect consumers only. |

|  |                |
|--|----------------|
| prescribed threshold.  |                |
| The Commonwealth Minister has the power to specify exemptions from the unfair contract terms provisions contained in Part 2-3 of the ACL where small business contracts are covered by another law that is enforceable and equivalent. | No equivalent. |

## Detailed explanation of new law

2.10 Schedule 2 of the CC Act sets out the ACL, with Part 2-3 of the ACL containing the consumer unfair contract terms protection. This Chapter extends these provisions to also cover small business contracts.

2.11 Specifically, section 23 of the ACL provides that an unfair contract term in a standard form consumer contract will be void.

2.12 The Exposure Draft amends section 23 to provide that an unfair contract term contained in a standard form small business contract will also be void. *[Schedule 1, Item 31: subsection 23(1) of Part 2-3 of Schedule 2]*

2.13 The extension of section 23 to standard form small business contracts will not preclude the availability of the existing protections for consumer contracts, including where there is any overlap (for instance, if the parties to a contract include a consumer and a small business).

### *Meaning of small business contract*

2.14 A contract is a small business contract if, at the time it is entered into, at least one party is a small business; with the subject of the contract relating to the supply of goods or services or sale or grant of an interest in land, and the upfront price payable under the contract does not exceed either \$100,000, or \$250,000 if its duration is more than 12 months. *[Schedule 1, Item 32: subsection 23(4) of Part 2-3 of Schedule 2]*

2.15 The threshold for the upfront price payable under the contract reinforces the onus on small businesses to undertake due diligence for high-value transactions. A two-tiered transaction value threshold is used to account for multi-year contracts. The consultation process indicated the preferred transaction value threshold would encompass most small business transactions.

2.16 The definition of a small business contract uses the concept of 'upfront price' in defining the transaction value threshold. The phrase 'upfront price' is defined in section 26(2) as the consideration that is

provided, or is to be provided, for the supply, sale or grant under the contract, and which is disclosed at or before the time the contract is entered into. However, it does not include any amount that is contingent on the occurrence or non-occurrence of a particular event.

### ***Meaning of small business***

2.17 A business is taken to be a small business if it employs fewer than 20 persons, excluding casual employees not employed on a regular or systematic basis. [*Schedule 1, Item 29: section 3A of Part 2-3 of Schedule 2*]

2.18 For the purpose of consistency in the unfair contract terms law, the definition of small business is mirrored in the unfair contract term provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) in relation to the unfair contract terms protection. This will avoid confusion in how the unfair contract terms protection applies under both laws.

2.19 A threshold of less than 20 employees has been chosen for this definition, as it is a commonly used head count measure and has been found by the Australian Bureau of Statistics to provide a good proxy of small businesses.

2.20 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* (Cth).

### ***Exempting contracts subject to industry-specific legislation and regulation that are deemed enforceable and equivalent***

2.21 An industry-specific law (legislation or regulation) of the Commonwealth, a state or a territory, that is enforceable and equivalent to the unfair contract term protections can be exempted from the scope of the ACL's protection for small businesses. Industry self-regulation cannot be exempted as these are voluntary measures. [*Schedule 1, Item 41: subsection 28(4) of Part 2-3 of Schedule 2*]

2.22 This regulation-making power allows the Government to limit the operation of the ACL to ensure that the unfair contract terms protection does not duplicate protections contained in another law.

2.23 At the same time, before a law is prescribed as an equivalent and enforceable measure, the Commonwealth Minister must consider the public interest, the overall impact of providing the exemption, and the



impact on small businesses of prescribing the law. *[Schedule 1, Item 23: subsection 139G (2A) of Division 9 of Part XI]*

2.24 This is intended to provide a robust framework for the exercise of the regulation-making power.

## Consequential amendments

2.25 In extending the consumer unfair contract terms protections to small business contracts, references to consumer contracts have been modified to also refer to small business contracts. This includes:

- In the definitions section, section 2 of Schedule 2, the definition of a number of terms used in the ACL's unfair contract terms law: non-party consumer, rely on, small business, small business contract, transparent and unfair. *[Schedule 1, Items 24-28: subsection 2(1) of Chapter 1 of Schedule 2]*
- The headings of the unfair contract terms provisions of the ACL. *[Schedule 1, Items 30 and 38: sections 23 and 26 of Part 2-3 of Schedule 2]*
- To insert a requirement for the detriment to small business of prescribing a term under paragraph 25(n) to be considered in the same way as the detriment to consumers from prescribing such terms are considered. *[Schedule 1, Item 22: subsection 139G(2)(aa) of Division 9 of Subdivision G]*
- The reference to contracts in Part 2-3 of Schedule 2 of the ACL; *[Schedule 1, Items 33-37 and 39-40: subsections 24(1)-(2) and (4), 26(1)-(2) and section 25 of Part 2-3 of Schedule 2]*
- Consequential amendments to Division 7 of Part XI and Part 5-2 of Schedule 2, which outline the declaration, enforcement and remedy provisions for unfair contract terms. *[Schedule 1, Items 19-21: paragraph 137D(b) and subparagraphs 137F(2)(b)(ii) and (d)(ii) of Division 7 of Part XI and subsection 139G(2) of Division 9 of Part XI; Schedule 1, Items 42-48: subsections 232(3), 242(1), 250(2)-(5), paragraph 238(1)(b) and subparagraphs 237(1)(a)(ii), 239(1)(a)(ii) of Part 5-2 of Schedule 2]*

## Application and transitional provisions

2.26 The amendments apply to varied terms, and contracts entered into or renewed on or after the day the legislation comes into effect. This

will occur the day after the end of the period of 6 months beginning on the day the legislation receives Royal Assent. The amendments do not apply to a contract or term of a contract if it would result in the acquisition of property otherwise than on just terms pursuant to paragraph 51(xxxi) of the Commonwealth Constitution. *[Schedule 1, Item 49]*