

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for a later sitting) Bill 2021: Unfair
contract terms reforms**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1	The day after the end of the period of 6 month beginning on the day this Act receives the Royal Assent.	

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Schedule 1—Unfair Contract Terms

Part 1—Prohibition of unfair contract terms

Division 1—Amendment of the Competition and Consumer Act 2010

Competition and Consumer Act 2010

1 After subsection 23(2) of Schedule 2

Insert:

(2A) A person contravenes this subsection if:

- (a) the person enters into a contract; and
- (b) the contract is a consumer contract or small business contract; and
- (c) the contract is a standard form contract; and
- (d) a term of the contract is unfair; and
- (e) the person proposed the unfair term.

Note: A pecuniary penalty may be imposed for a contravention of this subsection: see section 224.

(2B) A person who contravenes subsection (2A) commits a separate contravention of that subsection in respect of each term that is unfair and that the person proposed.

(2C) A person contravenes this subsection if:

- (a) the person applies or relies on, or purports to apply or rely on, a term of a contract; and
- (b) the contract is a consumer contract or small business contract; and
- (c) the contract is a standard form contract; and
- (d) the term is unfair.

Note: A pecuniary penalty may be imposed for a contravention of this subsection: see section 224.

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1 Division 2—Amendment of the Australian Securities and 2 Investments Commission Act 2001

3 *Australian Securities and Investments Commission Act 2001*

4 **2 After subsection 12BF(2)**

5 Insert:

- 6 (2A) A person contravenes this subsection if:
- 7 (a) the person enters into a contract; and
 - 8 (b) the contract is a consumer contract or small business
9 contract; and
 - 10 (c) the contract is a standard form contract; and
 - 11 (d) the contract is either a financial product or a contract for the
12 supply, or possible supply, of financial services; and
 - 13 (e) a term of the contract is unfair; and
 - 14 (f) the person proposed the unfair term.
- 15 (2B) A person who contravenes subsection (2A) commits a separate
16 contravention of that subsection in respect of each term that is
17 unfair and that the person proposed.
- 18 (2C) A person contravenes this subsection if:
- 19 (a) the person applies or relies on, or purports to apply or rely
20 on, a term of a contract; and
 - 21 (b) the contract is a consumer contract or small business
22 contract; and
 - 23 (c) the contract is a standard form contract; and
 - 24 (d) the contract is either a financial product or a contract for the
25 supply, or possible supply, of financial services; and
 - 26 (e) the term is unfair.

27 **3 Subsection 12BG(1)**

28 Omit “subsection 12BF(1)”, substitute “section 12BF”.

29 **4 Subsection 12BH(1)**

30 Omit “subsection 12BF(1)”, substitute “section 12BF”.

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1 Part 2—Remedies

2 Division 1—Amendment of the Competition and 3 Consumer Act 2010

4 *Competition and Consumer Act 2010*

5 Section 137D

6 Repeal the section, substitute:

7 **137D Compensation orders etc. arising out of unfair contract terms**

8 In determining whether to make an order under subsection 237(1)
9 or 238(1) of the Australian Consumer Law in relation to a
10 contravention of a provision of Part 2-2 or 2-3 of the Australian
11 Consumer Law, the court may have regard to the conduct of the
12 parties to the proceeding referred to in that subsection since the
13 contravention occurred.

14 **6 Paragraphs 137F(2)(b) and (c)**

15 Repeal the paragraphs, substitute:

- 16 (b) an application under section 232 of the Australian Consumer
17 Law for an injunction against the person in relation to a
18 contravention of a provision of Chapter 2, 3 or 4 of the
19 Australian Consumer Law; or
20 (c) an action under subsection 236(1) of the Australian
21 Consumer Law against the person in relation to a
22 contravention of a provision of Part 2-1 or 2-3, or of
23 Chapter 3, of the Australian Consumer Law; or

24 **7 Subsection 2(1) of Schedule 2 (definition of *declared term*)**

25 Repeal the definition, substitute:

26 *declared term*: see sections 239(1)(a)(ii), 243A(1) and 243B(1).

27 **8 Subsection 2(1) of Schedule 2 (paragraph (b) of the 28 definition of *enforcement proceeding*)**

29 Omit “and 239”, substitute “, 239, 243A and 243B”.

30 **9 Before subparagraph 224(1)(a)(ii) of Schedule 2**

31 Insert:

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(iia) section 23(2A) or (2C) (about unfair terms in standard form consumer or small business contracts);

10 Subsection 224(3) of Schedule 2 (before table item 2)

Insert:

- 2A section 23(2A) or (2C) (a) if the person is a body corporate—the greater of the amounts mentioned in subsection (3A); or (b) if the person is not a body corporate—\$500,000.

11 Subsection 224(3A) of Schedule 2

After “items 1,”, insert “2A,”.

12 Subsection 232(3) of Schedule 2

Repeal the subsection.

13 Subdivision A of Division 4 of Part 5-2 of Schedule 2 (heading)

Repeal the heading.

14 Paragraphs 237(1)(a) and (b) of Schedule 2

Repeal the paragraphs, substitute:

- (a) on application of a person (the *injured person*) who has suffered, or is likely to suffer, loss or damage because another person has engaged in conduct in contravention of a provision of Chapter 2, 3 or 4; or
- (b) on the application of the regulator made on behalf of, and with the consent in writing of, one or more such injured persons;

15 Subsection 237(1) of Schedule 2 (notes 1 and 2)

Repeal the notes, substitute:

Note: The orders that the court may make include all or any of the orders set out in section 243.

16 Subsection 237(3) of Schedule 2

Repeal the subsection, substitute:

- (3) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action accrued that relates to the conduct referred to in that subsection.

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17 Subsection 238(1) of Schedule 2

Repeal the subsection, substitute:

(1) If:

(a) a proceeding is instituted in a court under a provision of Chapter 4 or this Chapter (other than this section); and

(b) the court finds that a party to the proceeding (the *injured person*) has suffered loss or damage, or is likely to suffer loss or damage, because another person has engaged in conduct in contravention of a provision of Chapter 2, 3 or 4;

the court may make such order or orders as it thinks appropriate against the other person, or against a person involved in that conduct.

Note: The orders that the court may make include all or any of the orders set out in section 243.

18 Subdivision B of Division 4 of Part 5-2 of Schedule 2 (heading)

Repeal the heading.

19 Subsection 239(1) of Schedule 2 (notes 1 and 2)

Repeal the notes, substitute:

Note: The orders that the court may make include all or any of the orders set out in section 243.

20 Subdivision C of Division 4 of Part 5-2 of Schedule 2 (heading)

Repeal the heading.

21 Section 242 of Schedule 2

Repeal the section.

22 Sections 244 and 245 of Schedule 2

Repeal the sections, substitute:

243A Orders made in favour of party to contract containing unfair term

(1) If a declaration has been made under section 250 in relation to a term (the *declared term*) of a contract, a court may:

(a) on the application of a party to the contract; or

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- 1 (b) on the application of the regulator made on behalf of, and
2 with the consent in writing of, one or more parties to the
3 contract;
4 make against a party (the *respondent*) to the contract who is
5 advantaged by the declared term such order or orders (other than
6 an award of damages) as the court thinks appropriate to prevent or
7 reduce loss or damage that may be caused, or to redress, in whole
8 or in part, loss or damage that has been caused, to any person by
9 the declared term.
- 10 (2) Without limiting subsection (1), the orders that a court may make
11 against the respondent include all or any of the following:
12 (a) an order declaring the whole or any part of the contract, or of
13 a collateral arrangement relating to the contract:
14 (i) to be void; and
15 (ii) if the court thinks fit—to have been void ab initio or
16 void at all times on and after such date as is specified in
17 the order (which may be a date that is before the date on
18 which the order is made);
19 (b) an order:
20 (i) varying the contract, or such a collateral arrangement, as
21 specified in the order; and
22 (ii) if the court thinks fit—declaring the contract or
23 arrangement to have had effect as so varied on and after
24 such date as is specified in the order (which may be a
25 date that is before the date on which the order is made);
26 (c) an order refusing to enforce any or all of the provisions of the
27 contract, or of such a collateral arrangement.
- 28 (3) An application under subsection (1) may be made at any time
29 within 6 years after the day on which the declaration under
30 section 250 was made.

31 **243B Orders made on application of the regulator to prevent and** 32 **remedy unfair contract terms**

- 33 (1) If a declaration has been made under section 250 in relation to a
34 term (the *declared term*) of a contract, a court may, on the
35 application of the regulator, make against a party (the *respondent*)
36 to the contract who is advantaged by the declared term such order
37 or orders (other than an award of damages) as the court thinks
38 appropriate:

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- 1 (a) to prevent a term (a *similar term*) that is the same, or
2 substantially similar, in effect to the declared term from
3 being included in any future contract:
4 (i) to which the respondent is a party; and
5 (ii) that is a consumer contract or small business contract;
6 and
7 (iii) that is a standard form contract; or
8 (b) to prevent or reduce loss or damage that may be caused, or to
9 redress, in whole or in part, loss or damage that has been
10 caused, to any person by a similar term that is included in
11 any existing contract:
12 (i) to which the respondent is a party; and
13 (ii) that is a consumer contract or small business contract;
14 and
15 (iii) that is a standard form contract;
16 whether or not the future or existing contract is identifiable when
17 the court makes the order or orders.
- 18 (2) Without limiting subsection (1), the orders that a court may make
19 against the respondent include all or any of the following:
20 (a) an injunction restraining the respondent from entering into
21 any future contract that is of the kind referred to in
22 paragraph (1)(a) and includes a similar term;
23 (b) an injunction restraining the respondent from applying or
24 relying on a similar term of any existing contract that is of
25 the kind referred to in paragraph (1)(b) and includes a similar
26 term;
27 (c) an order declaring the whole or any part of any existing
28 contract of the kind referred to in paragraph (1)(b), or of a
29 collateral arrangement relating to such a contract:
30 (i) to be void; and
31 (ii) if the court thinks fit—to have been void ab initio or
32 void at all times on and after such date as is specified in
33 the order (which may be a date that is before the date on
34 which the order is made);
35 (d) an order:
36 (i) varying such an existing contract, or such a collateral
37 arrangement, as specified in the order; and
38 (ii) if the court thinks fit—declaring the contract or
39 arrangement to have had effect as so varied on and after
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- 1 such date as is specified in the order (which may be a
2 date that is before the date on which the order is made);
3 (e) an order refusing to enforce any or all of the provisions of
4 such an existing contract, or of such a collateral arrangement.
- 5 (3) An application under subsection (1) may be made at any time
6 within 6 years after the day on which the declaration under
7 section 250 was made.
- 8 (4) An order made under this section against the respondent binds a
9 person affected by the order, even if the person is not a party to the
10 proceedings in which the order is made.

11 **245 Interaction with other provisions**

- 12 (1) An application may be made under section 237(1), 239(1),
13 243A(1) or 243B(1) even if an enforcement proceeding in relation
14 to the conduct or term referred to in that section has not been
15 instituted.
- 16 (2) A court may make an order under a provision of this Division
17 whether or not the court:
18 (a) grants an injunction under Division 2; or
19 (b) makes an order under any other provision of this Division or
20 under section 236, 246, 247 or 248.
- 21 (3) Nothing in this Division limits the generality of Division 2.

22 **23 Paragraph 247(1)(a) of Schedule 2**

23 After “Part 2-2”, insert “or 2-3”.

24 **24 After subparagraph 248(1)(a)(i)**

25 Insert:

- 26 (ia) a provision of Part 2-3 (which is about unfair contract
27 terms);

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1 **Division 2—Amendment of the Australian Securities and**
2 **Investments Commission Act 2001**

3 *Australian Securities and Investments Commission Act 2001*

4 **25 Subsection 12BA(1) (definition of *enforcement***
5 ***proceeding*)**

6 Omit “section 12GNB”, substitute “sections 12GNB, 12GNE and
7 12GNF”.

8 **26 Before paragraph 12GBA(6)(a)**

9 Insert:

10 (aa) a provision of Subdivision BA;

11 **27 Subsection 12GD(9)**

12 Repeal the subsection.

13 **28 Subsection 12GF(1)**

14 After “a provision of”, insert “Subdivision BA (sections 12BF to
15 12BM),”.

16 **29 Subsection 12GLA(4) (before paragraph (a) of the**
17 **definition of *contravening conduct*)**

18 Insert:

19 (aa) contravenes a provision of Subdivision BA (sections 12BF to
20 12BM); or

21 **30 Paragraph 12GLC(1)(a)**

22 After “Subdivision”, insert “BA,”.

23 **31 Paragraph 12GLD(1)(a)**

24 After “Subdivision”, insert “BA,”.

25 **32 Subsection 12GM(10)**

26 Repeal the subsection.

27 **33 Paragraph 12GN(1)(c)**

28 After “a provision of”, insert “Subdivision BA (sections 12BF to
29 12BM) or”.

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34 Subsection 12GN(9)

Repeal the subsection.

35 Subparagraph 12GNB(1)(a)(i)

After “Subdivision”, insert “BA,”.

36 After section 12GND of Schedule 2

Insert:

12GNE Orders made in favour of party to contract containing unfair term

- (1) If a declaration has been made under section 12GND in relation to a term (the *declared term*) of a contract, a court may:
- (a) on the application of a party to the contract; or
 - (b) on the application of ASIC made on behalf of, and with the consent in writing of, one or more parties to the contract;
- make against a party (the *respondent*) to the contract who is advantaged by the declared term such order or orders (other than an award of damages) as the court thinks appropriate to prevent or reduce loss or damage that may be caused, or to redress, in whole or in part, loss or damage that has been caused, to any person by the declared term.
- (2) Without limiting subsection (1), the orders that a court may make against the respondent include all or any of the following:
- (a) an order declaring the whole or any part of the contract, or of a collateral arrangement relating to the contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
 - (b) an order:
 - (i) varying the contract, or such a collateral arrangement, as specified in the order; and
 - (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

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- 1 (c) an order refusing to enforce any or all of the provisions of the
2 contract, or of such a collateral arrangement.
- 3 (3) An application under subsection (1) may be made at any time
4 within 6 years after the day on which the declaration under
5 section 12GND was made.

6 **12GNF Orders made on application of ASIC to prevent and remedy** 7 **unfair contract terms**

- 8 (1) If a declaration has been made under section 12GND in relation to
9 a term (the *declared term*) of a contract, a court may, on the
10 application of ASIC, make against a party (the *respondent*) to the
11 contract who is advantaged by the declared term such order or
12 orders (other than an award of damages) as the court thinks
13 appropriate:
- 14 (a) to prevent a term (a *similar term*) that is the same, or
15 substantially similar, in effect to the declared term from
16 being included in any future contract:
 - 17 (i) to which the respondent is a party; and
 - 18 (ii) that is a consumer contract or small business contract;
19 and
 - 20 (iii) that is a standard form contract; or
 - 21 (b) to prevent or reduce loss or damage that may be caused, or to
22 redress, in whole or in part, loss or damage that has been
23 caused, to any person by a similar term that is included in
24 any existing contract:
 - 25 (i) to which the respondent is a party; and
 - 26 (ii) that is a consumer contract or small business contract;
27 and
 - 28 (iii) that is a standard form contract;
- 29 whether or not the future or existing contract is identifiable when
30 the court makes the order or orders.
- 31 (2) Without limiting subsection (1), the orders that a court may make
32 against the respondent include all or any of the following:
- 33 (a) an injunction restraining the respondent from entering into
34 any future contract that is of the kind referred to in
35 paragraph (1)(a) and includes a similar term;
 - 36 (b) an injunction restraining the respondent from applying or
37 relying on a similar term of any existing contract that is of

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- 1 the kind referred to in paragraph (1)(b) and includes a similar
2 term;
- 3 (c) an order declaring the whole or any part of any existing
4 contract of the kind referred to in paragraph (1)(b), or of a
5 collateral arrangement relating to such a contract:
6 (i) to be void; and
7 (ii) if the court thinks fit—to have been void ab initio or
8 void at all times on and after such date as is specified in
9 the order (which may be a date that is before the date on
10 which the order is made);
- 11 (d) an order:
12 (i) varying such an existing contract, or such a collateral
13 arrangement, as specified in the order; and
14 (ii) if the court thinks fit—declaring the contract or
15 arrangement to have had effect as so varied on and after
16 such date as is specified in the order (which may be a
17 date that is before the date on which the order is made);
- 18 (e) an order refusing to enforce any or all of the provisions of
19 such an future contract, or of such a collateral arrangement.
- 20 (3) An application under subsection (1) may be made at any time
21 within 6 years after the day on which the declaration under
22 section 12GND was made.
- 23 (4) An order made under this section against the respondent binds a
24 person affected by the order, even if the person is not a party to the
25 proceedings in which the order is made.

26 **12GNG Interaction with other provisions**

- 27 (1) An application may be made under subsection 12GNE(1) or
28 12GNF(1) even if an enforcement proceeding in relation to the
29 declared term referred to in that subsection has not been instituted.
- 30 (2) A court may make an order under section 12GNE or 12GNF
31 whether or not the court:
32 (a) grants an injunction under section 12GD; or
33 (b) makes an order under any other provision of this Division.
- 34 (3) Nothing in this Division limits the generality of section 12GD.
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1 **Part 3—Rebuttable presumption that term is unfair**

2 **Division 1—Amendment of the Competition and** 3 **Consumer Act 2010**

4 *Competition and Consumer Act 2010*

5 **37 At the end of section 24 of Schedule 2**

6 Add:

7 (5) If:

- 8 (a) it is established in a proceeding in a court that a term of a
9 contract is unfair; and
10 (b) a party to another proceeding in a court alleges that a term of
11 another contract is unfair; and
12 (c) the term referred to in paragraph (b) is the same, or
13 substantially similar, in effect to the term referred to in
14 paragraph (a); and
15 (d) either:

- 16 (i) the person who proposed the term referred to in
17 paragraph (b) is the same person who proposed the term
18 referred to in paragraph (a); or
19 (ii) the contract referred to in paragraph (b) was entered into
20 in the same industry as the contract referred to in
21 paragraph (a);

22 then it is presumed for the purposes of the other proceeding that the
23 term referred to in paragraph (b) is unfair, unless another party to
24 the other proceeding proves that it is not unfair.

25 **Division 2—Amendment of the Australian Securities and** 26 **Investments Commission Act 2001**

27 *Australian Securities and Investments Commission Act 2001*

28 **38 At the end of section 12BG**

29 Add:

30 (5) If:

- 31 (a) it is established, in a proceeding in a court exercising
32 jurisdiction in a matter arising under this Division, that a
33 term of a contract is unfair; and

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- (b) a party to another such proceeding alleges that a term of another contract is unfair; and
 - (c) the term referred to in paragraph (b) is the same, or substantially similar, in effect to the term referred to in paragraph (a); and
 - (d) either:
 - (i) the person who proposed the term referred to in paragraph (b) is the same person who proposed the term referred to in paragraph (a); or
 - (ii) the contract referred to in paragraph (b) was entered into in the same industry as the contract referred to in paragraph (a);
- then it is presumed for the purposes of the other proceeding that the term referred to in paragraph (b) is unfair, unless another party to the other proceeding proves that it is not unfair.

Note: See sections 12GJ to 12GL for provisions about courts exercising jurisdiction in matters arising under this Division.

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1 **Part 4—Determining what is a standard form**
2 **contract**

3 **Division 1—Amendment of the Competition and**
4 **Consumer Act 2010**

5 *Competition and Consumer Act 2010*

6 **39 Before paragraph 27(2)(b) of Schedule 2**

7 Insert:

- 8 (ba) whether one of the parties has entered into another contract,
9 in the same or substantially similar terms, prepared by that
10 party, and, if so, how many such contracts that party has
11 entered into;

12 **40 At the end of section 27 of Schedule 2**

13 Add:

- 14 (3) In considering the matters referred to in paragraphs (2)(c) and (d),
15 a court is not to take into account any of the following:
16 (a) an opportunity for a party to negotiate minor or insubstantial
17 changes to terms of the contract;
18 (b) an opportunity for a party to select a term from a range of
19 options determined by another party;
20 (c) the extent to which a party to another contract or proposed
21 contract was given an effective opportunity to negotiate
22 terms of the other contract or proposed contract.

23 **Division 2—Amendment of the Australian Securities and**
24 **Investments Commission Act 2001**

25 *Australian Securities and Investments Commission Act 2001*

26 **41 Before paragraph 12BK(2)(b)**

27 Insert:

- 28 (ba) whether one of the parties has entered into another contract,
29 in the same or substantially similar terms, prepared by that
30 party, and, if so, how many such contracts that party has
31 entered into;

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42 At the end of section 12BK

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Add:

- (3) In considering the matters referred to in paragraphs (2)(c) and (d), a court is not to take into account any of the following:
- (a) an opportunity for a party to negotiate minor or insubstantial changes to terms of the contract;
 - (b) an opportunity for a party to select a term from a range of options determined by another party;
 - (c) the extent to which a party to another contract or proposed contract was given an effective opportunity to negotiate terms of the other contract or proposed contract.

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1 Part 5—Contract thresholds

2 Division 1—Amendment of the Competition and 3 Consumer Act 2010

4 *Competition and Consumer Act 2010*

5 **43 Paragraph 139G(2)(aa)**

6 Omit “businesses employing fewer than 20 persons”, substitute
7 “persons who carry on a business and employ fewer than 100 persons”.

8 **44 Paragraph 139G(2A)(a)**

9 Omit “businesses employing fewer than 20 persons”, substitute
10 “persons who carry on a business and employ fewer than 100 persons”.

11 **45 Subsections 23(4) and (5) of Schedule 2**

12 Repeal the subsections, substitute:

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

- 14 (a) the contract is for a supply of goods or services, or a sale or
15 grant of an interest in land; and
16 (b) at least one party to the contract satisfies either or both of the
17 following conditions:
18 (i) the party enters into the contract in the course of
19 carrying on a business and at a time when the party
20 employs fewer than 100 persons;
21 (ii) the party’s turnover, worked out under subsection (6)
22 for the party’s last income year (within the meaning of
23 the *Income Tax Assessment Act 1997*) that ended at or
24 before the time when the contract is entered into, is less
25 than \$10,000,000.

26 (5) In counting for the purposes of subparagraph (4)(b)(i) the number
27 of persons that a person employs:

- 28 (a) a casual employee is not to be counted unless employed on a
29 regular and systematic basis; and
30 (b) a part-time employee (including a part-time casual employee
31 counted under paragraph (a) of this subsection) is to be
32 counted as an appropriate fraction of a full-time equivalent.

EXPOSURE DRAFT

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- 1 (6) For the purposes subparagraph (4)(b)(ii), a party's turnover for a
2 period is the sum of the values of all supplies the party made
3 during the period, other than:
4 (a) supplies that are input taxed; or
5 (b) supplies that are not for consideration (and are not taxable
6 supplies under section 72-5 of the *A New Tax System (Goods
7 and Services Tax) Act 1999*); or
8 (c) supplies that are not made in connection with an enterprise
9 that the party carries on; or
10 (d) supplies that are not connected with the indirect tax zone.
- 11 (7) Expressions used in subsection (6) that are also used in the *A New
12 Tax System (Goods and Services Tax) Act 1999* have the same
13 meaning as in that Act.

14 **46 Paragraph 250(2)(a) of Schedule 2**

15 Omit "a business of the kind referred to in", substitute "covered by".

16 **Division 2—Amendment of the Australian Securities and 17 Investments Commission Act 2001**

18 *Australian Securities and Investments Commission Act 2001*

19 **47 Subsections 12BF(4), (5) and (6)**

20 Repeal the subsections, substitute:

- 21 (4) A contract is a *small business contract* if at least one party to the
22 contract satisfies either or both of the following conditions at the
23 time when the contract is entered into:
24 (a) the party enters into the contract in the course of carrying on
25 a business and at a time when the party employs fewer than
26 100 persons;
27 (b) the party's turnover, worked out under subsection (6) for the
28 party's last income year (within the meaning of the *Income
29 Tax Assessment Act 1997*) that ended at or before the time
30 when the contract is entered into, is less than \$10,000,000.
- 31 (5) In counting for the purposes of paragraph (4)(a) the number of
32 persons that a person employs:
33 (a) a casual employee is not to be counted unless employed on a
34 regular and systematic basis; and

EXPOSURE DRAFT

1 (b) a part-time employee (including a part-time casual employee
2 counted under paragraph (a) of this subsection) is to be
3 counted as an appropriate fraction of a full-time equivalent.

4 (6) For the purposes paragraph (4)(b), a party's turnover for a period is
5 the sum of the values of all supplies the party made during the
6 period, other than:

7 (a) supplies that are input taxed; or

8 (b) supplies that are not for consideration (and are not taxable
9 supplies under section 72-5 of the *A New Tax System (Goods
10 and Services Tax) Act 1999*); or

11 (c) supplies that are not made in connection with an enterprise
12 that the party carries on; or

13 (d) supplies that are not connected with the indirect tax zone.

14 (7) Expressions used in subsection (6) that are also used in the *A New
15 Tax System (Goods and Services Tax) Act 1999* have the same
16 meaning as in that Act.

17 **48 Paragraph 12BH(2)(aa)**

18 Omit "businesses employing fewer than 20 persons", substitute
19 "persons who carry on a business and employ fewer than 100 persons".

20 **49 Paragraph 12BL(3)(a)**

21 Omit "businesses employing fewer than 20 persons", substitute
22 "persons who carry on a business and employ fewer than 100 persons".

23 **50 Paragraph 12GND(2)(a)**

24 Omit "a business of the kind referred to in paragraph 12BF(4)(a)",
25 substitute "covered by subsection 12BF(4)".
26

EXPOSURE DRAFT

1 **Part 6—Minimum standards provisions excluded**
2 **from being unfair terms**

3 **Division 1—Amendment of the Competition and**
4 **Consumer Act 2010**

5 *Competition and Consumer Act 2010*

6 **51 Subsection 26(1) of Schedule 2**

7 Repeal the subsection, substitute:

8 (1) Section 23 does not apply to a term of a contract to the extent, but
9 only to the extent, that:

10 (a) the term defines the main subject matter of the contract; or

11 (b) the term sets the upfront price payable under the contract; or

12 (c) the term is required, or expressly permitted, by a law of the
13 Commonwealth or of a State or Territory; or

14 (d) the term is included in the contract, or is taken to be so
15 included, by operation of a law of the Commonwealth, or of
16 a State or Territory, that regulates the contract; or

17 (e) inclusion of the term has either of both of the following
18 results:

19 (i) one or more other terms are included in the contract, or
20 are taken to be so included, by operation of a law of the
21 Commonwealth, or of a State or Territory, that regulates
22 the contract;

23 (ii) such a law requires one or more other terms to be
24 included in the contract.

25 Example: A State law provides that, if a retail lease contains a provision for
26 termination on the ground of proposed demolition of the building
27 containing the leased premises, then provisions set out in the State law
28 are taken to be included in the lease.

29 Paragraph (d) covers the provisions that are set out in the State law
30 and taken to be included in the lease. Paragraph (e) covers inclusion of
31 the provision for termination, since it has the result that the provisions
32 set out in the State law are taken to be included in the lease.

EXPOSURE DRAFT

Division 2—Amendment of the Australian Securities and Investments Commission Act 2001

Australian Securities and Investments Commission Act 2001

52 Subsection 12BI(1)

Repeal the subsection, substitute:

- (1) Section 12BF does not apply to a term of a contract to the extent, but only to the extent, that:
 - (a) the term defines the main subject matter of the contract; or
 - (b) the term sets the upfront price payable under the contract; or
 - (c) the term is required, or expressly permitted, by a law of the Commonwealth or of a State or Territory; or
 - (d) the term is included in the contract, or is taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract; or
 - (e) inclusion of the term has either of both of the following results:
 - (i) one or more other terms are included in the contract, or are taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract;
 - (ii) such a law requires one or more other terms to be included in the contract; or
 - (f) if the contract is an Insurance Contracts Act insurance contract—the term is a transparent term and:
 - (i) is disclosed at or before the time when the contract is entered into; and
 - (ii) sets an amount of excess or deductible under the contract.

EXPOSURE DRAFT

1 **Part 7—Provisions referring to non-party consumers**

2 **Division 1—Amendment of the Competition and**
3 **Consumer Act 2010**

4 *Competition and Consumer Act 2010*

5 **53 Subsection 2(1) (definition of *non-party consumer*) of**
6 **Schedule 2**

7 Repeal the definition.

8 **54 Subsection 2(1) of Schedule 2**

9 Insert:

10 *non-party* means:

11 (a) in relation to conduct—a person who is not, or has not been,
12 a party to an enforcement proceeding in relation to the
13 conduct; or

14 (b) in relation to a term of a contract—a person who is not, or
15 has not been, a party to an enforcement proceeding in relation
16 to the term.

17 **55 Division 4 of Part 5-2 of Schedule 2 (heading)**

18 Omit “non-party consumers”, substitute “non-parties”.

19 **56 Subdivision B of Division 4 of Part 5-2 of Schedule 2**
20 **(heading)**

21 Omit “non-party consumers”, substitute “non-parties”.

22 **57 Section 239 of Schedule 2 (heading)**

23 Omit “non-party consumers”, substitute “non-parties”.

24 **58 Section 239 of Schedule 2**

25 Omit “non-party consumers” (wherever occurring), substitute
26 “non-parties”.

27 **59 Section 240 of Schedule 2 (heading)**

28 Omit “non-party consumers”, substitute “non-parties”.

EXPOSURE DRAFT

1 **60 Section 240 of Schedule 2**

2 Omit “non-party consumers” (wherever occurring), substitute
3 “non-parties”.

4 **61 Section 241 of Schedule 2 (heading)**

5 Omit “consumer”.

6 **62 Section 241 of Schedule 2**

7 Omit “consumer” (wherever occurring).

8 **Division 2—Amendment of the Australian Securities and**
9 **Investments Commission Act 2001**

10 *Australian Securities and Investments Commission Act 2001*

11 **63 Subsection 12BA(1) (definition of *non-party consumer*)**

12 Repeal the definition, substitute:

13 *non-party* means:

- 14 (a) in relation to conduct—a person who is not, or has not been,
15 a party to an enforcement proceeding in relation to the
16 conduct; or
17 (b) in relation to a term of a contract—a person who is not, or
18 has not been, a party to an enforcement proceeding in relation
19 to the term.

20 **64 Section 12GNB (heading)**

21 Omit “non-party consumers”, substitute “non-parties”.

22 **65 Section 12GNB**

23 Omit “non-party consumers” (wherever occurring), substitute
24 “non-parties”.

25 **66 Subsection 12GNB(9) (heading)**

26 Omit “*consumer*”.

27 **67 Subsection 12GNB(9)**

28 Omit “consumer” (wherever occurring).

EXPOSURE DRAFT

1 **68 Section 12GNC (heading)**

2 Omit “non-party consumers”, substitute “non-parties”.

3 **69 Section 12GNC**

4 Omit “consumer” (wherever occurring).

5

EXPOSURE DRAFT

1 Part 8—Application

2 Division 1—Amendment of the Competition and 3 Consumer Act 2010

4 *Competition and Consumer Act 2010*

5 70 Subsection 303(2) of Schedule 2

6 Omit “a services”, substitute “services”.

7 71 In the appropriate position in Chapter 6 of Schedule 2

8 Insert:

9 Part 7—Application provisions relating to the 10 Treasury Laws Amendment (Measures for 11 a later sitting) Act 2021 12

13 304 Amendments relating to unfair contract terms

- 14 (1) The amendments of this Schedule made by Parts 1 to 6 of
15 Schedule 1 to the *Treasury Laws Amendment (Measures for a later*
16 *sitting) Act 2021* apply in relation to a contract entered into at or
17 after the commencement (the *relevant commencement*) of that
18 Schedule.
- 19 (2) The amendments do not apply to a contract (the *existing contract*)
20 entered into before the relevant commencement, except as
21 provided in this section.
- 22 (3) If the existing contract is renewed at or after the relevant
23 commencement, the amendments apply to the contract as renewed,
24 on and from the day (the *renewal day*) on which the renewal takes
25 effect, in relation to conduct that occurs on or after the renewal
26 day.
- 27 (4) If a term of the existing contract is varied at or after the relevant
28 commencement and subsection (3) has not already applied in
29 relation to the contract:
- 30 (a) the amendments apply to the term as varied, and so apply:
31 (i) on and from the day (the *variation day*) on which the
32 variation takes effect; and

EXPOSURE DRAFT

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- 1 (ii) as if the contract as varied had been entered into on the
2 variation day; and
3 (iii) in relation to conduct that occurs on and after the
4 variation day; and
5 (b) section 23(2A)(e) applies in relation to a person proposing
6 the term, whether before, at or after the relevant
7 commencement; and
8 (c) subsection 23(2), and section 27, as in force at and after the
9 relevant commencement, apply to the contract.
- 10 (5) If a contract is entered into or renewed at or after the relevant
11 commencement, section 23(2A)(e) applies in relation to a person
12 proposing a term of the contract, whether before, at or after the
13 relevant commencement.
- 14 (6) Section 24(5)(a) applies to:
15 (a) a contract, whether entered into before, at or after the
16 relevant commencement; and
17 (b) a proceeding, whether begun before, at or after the relevant
18 commencement.
- 19 (7) Despite subsections (3) to (6) of this section, the amendments do
20 not apply to a contract, or a term of a contract, to the extent that the
21 operation of the amendments would result in an acquisition of
22 property (within the meaning of paragraph 51(xxxi) of the
23 Constitution) from a person otherwise than on just terms (within
24 the meaning of that paragraph of the Constitution).

25 **Division 2—Amendment of the Australian Securities and** 26 **Investments Commission Act 2001**

27 *Australian Securities and Investments Commission Act 2001*

28 **72 At the end of the Act**

29 Add:

EXPOSURE DRAFT

Part 37—Application provisions relating to the Treasury Laws Amendment (Measures for a later sitting) Act 2021

350 Application—unfair contract terms

- (1) The amendments of this Act made by Parts 1 to 6 of Schedule 1 to the *Treasury Laws Amendment (Measures for a later sitting) Act 2021* apply in relation to a contract entered into at or after the commencement (the **relevant commencement**) of that Schedule.
- (2) The amendments do not apply to a contract (the **existing contract**) entered into before the relevant commencement, except as provided in this section.
- (3) If the existing contract is renewed at or after the relevant commencement, the amendments apply to the contract as renewed, on and from the day (the **renewal day**) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day.
- (4) If a term of the existing contract is varied at or after the relevant commencement and subsection (3) has not already applied in relation to the contract:
 - (a) the amendments apply to the term as varied, and so apply:
 - (i) on and from the day (the **variation day**) on which the variation takes effect; and
 - (ii) as if the contract as varied had been entered into on the variation day; and
 - (iii) in relation to conduct that occurs on and after the variation day; and
 - (b) paragraph 12BF(2A)(f) applies in relation to a person proposing the term, whether before, at or after the relevant commencement; and
 - (c) subsection 12BF(2), and section 12BK, as in force at and after the relevant commencement, apply to the contract.
- (5) If a contract is entered into or renewed at or after the relevant commencement, paragraph 12BF(2A)(f) applies in relation to a person proposing a term of the contract, whether before, at or after the relevant commencement.

EXPOSURE DRAFT

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- (6) Paragraph 12BG(5)(a) applies to:
- (a) a contract, whether entered into before, at or after the relevant commencement; and
 - (b) a proceeding, whether begun before, at or after the relevant commencement.
- (7) Despite subsections (3) to (6) of this section, the amendments do not apply to a contract, or a term of a contract, to the extent that the operation of the amendments would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).