



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

No. 147, 2015

**An Act to amend legislation to extend unfair
contract protections to small business contracts,
and for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title.....	2
2	Commencement.....	2
3	Schedules.....	2
Schedule 1—Amendments		3
	<i>Australian Securities and Investments Commission Act 2001</i>	3
	<i>Competition and Consumer Act 2010</i>	7



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

No. 147, 2015

**An Act to amend legislation to extend unfair
contract protections to small business contracts,
and for other purposes**

[Assented to 12 November 2015]

The Parliament of Australia enacts:

*No. 147, 2015 Treasury Legislation Amendment (Small Business and Unfair Contract
Terms) Act 2015 1*

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.	12 November 2015
2. Schedule 1	The day after the end of the period of 12 months beginning on the day this Act receives the Royal Assent.	12 November 2016

Note: This table relates only to the provisions of this Act as originally enacted.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.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

standard form contract has a meaning affected by section 12BK.

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:
- (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - (b) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.
- (5) In counting the persons employed by a business for the purposes of paragraph (4)(a), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.
- (6) For the purposes of subsection (4) and despite subsection 12BI(3), in working out the upfront price payable under a contract under which credit is or is to be provided, disregard any interest payable 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 businesses employing fewer than 20 persons; 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”.

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 to which a prescribed law of the Commonwealth, a State or a Territory applies.
- (3) Before the Governor-General makes a regulation prescribing a law for the purposes of subsection (2):
 - (a) the Minister must be satisfied that the law provides enforceable protections for businesses employing fewer than 20 persons that are equivalent to the protections provided by this Subdivision together with Subdivision G; and
 - (b) the Minister must take into consideration:
 - (i) any detriment to businesses of that kind resulting from prescribing the law; and
 - (ii) the impact on business generally resulting from prescribing 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”.

17 Section 12GND

Repeal the section, substitute:

12GND Declarations

- (1) The Court may declare that a term of a consumer contract is an unfair term, on application by:
 - (a) a party to the contract; or
 - (b) ASIC.
- (2) The Court may declare that a term of a small business contract is an unfair term, on application by:
 - (a) a party to the contract, if the party was a business of the kind referred to in paragraph 12BF(4)(a) at the time the contract was entered into; or
 - (b) ASIC.
- (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 22—Application provision relating to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015

301 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:
- (a) if the contract is renewed on or after that 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; or
 - (b) if a term of the contract is varied on or after that commencement and paragraph (a) has not already applied in relation to the contract—the amendments apply to the term as varied, on and from the day (the *variation day*) on which the variation takes effect, in relation to conduct that occurs on and after the variation day.
- (3) If paragraph (2)(b) of this section applies to a term of a contract, subsection 12BF(2) and section 12BK of this Act apply to the contract.
- (4) Despite paragraphs (2)(a) and (b) and subsection (3) 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).

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:

- (aa) the detriment that a term of that kind would cause to businesses employing fewer than 20 persons; and

23 After subsection 139G(2)

Insert:

- (2A) Before the Governor-General makes a regulation prescribing a law for the purposes of subsection 28(4) of Schedule 2:
 - (a) the Commonwealth Minister must be satisfied that the law provides enforceable protections for businesses employing fewer than 20 persons that are equivalent to the protections provided by Part 2-3, together with Parts 5-1 and 5-2, of Schedule 2; and
 - (b) the Commonwealth Minister must take into consideration:
 - (i) any detriment to businesses of that kind resulting from prescribing the law; and
 - (ii) the impact on business generally resulting from prescribing the law; and
 - (iii) the public interest.

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

Omit “consumer”.

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

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

26 Subsection 2(1) of Schedule 2

Insert:

small business contract: see subsection 23(4).

standard form contract has a meaning affected by section 27.

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

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

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

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

29 Section 23 of Schedule 2 (heading)

Repeal the heading, substitute:

23 Unfair terms of consumer contracts and small business contracts

30 Subsection 23(1) of Schedule 2

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

31 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 business that employs fewer than 20 persons; and
 - (c) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.
- (5) In counting the persons employed by a business for the purposes of paragraph (4)(b), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.

32 Subsection 24(1) of Schedule 2

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

33 Subsections 24(2) and (4) of Schedule 2

Omit “consumer”.

34 Subsection 25(1) of Schedule 2

Omit “(1)”.

35 Subsection 25(1) of Schedule 2

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

36 Subsection 25(2) of Schedule 2

Repeal the subsection.

37 Section 26 of Schedule 2 (heading)

Repeal the heading, substitute:

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

38 Subsection 26(1) of Schedule 2

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

39 Subsection 26(2) of Schedule 2

Omit “consumer”.

40 At the end of section 28 of Schedule 2

Add:

- (4) This Part does not apply to a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies.

41 Subsection 232(3) of Schedule 2

Omit “consumer”.

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

Omit “consumer”.

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

Omit “consumer”.

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

Omit “consumer”.

45 Subsection 242(1) of Schedule 2

Omit “consumer”.

46 Section 250 of Schedule 2

Repeal the section, substitute:

250 Declarations relating to consumer contracts and small business contracts

- (1) The Court may declare that a term of a consumer contract is an unfair term, on application by:
 - (a) a party to the contract; or
 - (b) the regulator.
- (2) The Court may declare that a term of a small business contract is an unfair term, on application by:
 - (a) a party to the contract, if the party was a business of the kind referred to in paragraph 23(4)(b) at the time the contract was entered into; or
 - (b) the regulator.
- (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.

47 After Part 1 of Chapter 6 of Schedule 2

Insert:

Part 1A—Application provision relating to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015

290A 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:
 - (a) if the contract is renewed on or after that 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; or
 - (b) if a term of the contract is varied on or after that commencement and paragraph (a) has not already applied in relation to the contract—the amendments apply to the term as varied, on and from the day (the **variation day**) on which the variation takes effect, in relation to conduct that occurs on and after the variation day.
- (3) If paragraph (2)(b) of this section applies to a term of a contract, subsection 23(2) and section 27 apply to the contract.
- (4) Despite paragraphs (2)(a) and (b) and subsection (3) 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).

*[Minister's second reading speech made in—
House of Representatives on 24 June 2015
Senate on 18 August 2015]*

(110/15)

*No. 147, 2015 Treasury Legislation Amendment (Small Business and Unfair Contract
Terms) Act 2015* 13