



12 May 2015

Consumer Policy Framework Unit
Small business Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKS ACT 2600

CPA Australia Ltd
ABN 64 008 392 452
Level 20, 28 Freshwater Place
Southbank VIC 3006
Australia
GPO Box 2820
Melbourne VIC 3001
Australia
Phone 1300 737 373
Outside Aust +613 9606 9677
Website cpaaustralia.com.au

By email: AustralianConsumerLaw@treasury.gov.au

Dear Sir/ Madam

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

CPA Australia represents the diverse interests of more than 150,000 members in 120 countries, including more than 25,000 members working in senior leadership positions. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. CPA Australia takes an active and positive interest in a wide range of regulatory and policy matters including business law, and the efficiency and fair conduct of markets.

Against this background we provide this submission in response to the above Bill.

CPA Australia acknowledges and agrees with the intent of the proposed legislation however we have a number of concerns.

As a general observation, we believe that there are risks of inefficiency and confusion arising from the use of the Australian Securities and Investment Commissions Act 2001 as a medium for redressing problems and issues around contractual dealing and competition policy. We acknowledge that that Act - in its preamble - contemplates "other purposes" beyond its original conception as a necessary adjunct to the Corporations Act 2001, thus creating the vital regulatory apparatus for the operation of corporate law and performance of the financial system. However, there is a risk that the coherence of this important legislation is being undermined over time, given the various additions that have been made to the Act.

CPA Australia therefore cautions against any advancement in scope beyond what is contained in the Bill to avoid further departure from the operating provisions of the ASIC Act, as set out in its objects in section 1.

Similarly, CPA Australia believes there are potential issues of indeterminacy and potential confusion between the various agencies charged with oversight of similar subject matter, and between which courts have jurisdiction. These risks are less apparent in relation to the corresponding draft amendments to the Competition and Consumer Act 2010.

We make the following specific comments concerning the language used in the Bill, particularly as it relates to extending rules affecting consumer contracts to small business contracts:

- Once translated to what ideally are arm's length commercial dealings, the notion of "unfair" potentially becomes confused and imprecise within a business context. By way of contrast, we would like to direct attention to the type of language used in acts such as the Contracts Review Act 1980 (NSW). This Act deals with contract law and well understood equitable concepts of "unjust" and "injustice" and addresses "unfair" with more precise meaning. Though not undermining the intent expressed in the Bill, consideration might be given to some elaboration of *unfair* within section 12BG.

- A further concern pertaining to section 12BG as it presently stands is the expression “cause detriment” in sub-section (1)(c). In its application to consumer contracts the notion of detriment is likely to be less problematic. This may not be as straight-forward with business contacts where detriment by some definitions is traditionally regarded as part of the reciprocity giving rise to valuable consideration within a binding contract. Again, the risk of confusion here could be addressed through some elaboration within section 12BG.

If you have any questions regarding this submission, please contact Dr John Purcell, Policy Advisor ESG on (03) 9606 9826 or via email at john.purcell@cpaaustralia.com.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Paul Drum', with a long horizontal flourish extending to the right.

Paul Drum FCPA
Head of Policy
CPA Australia