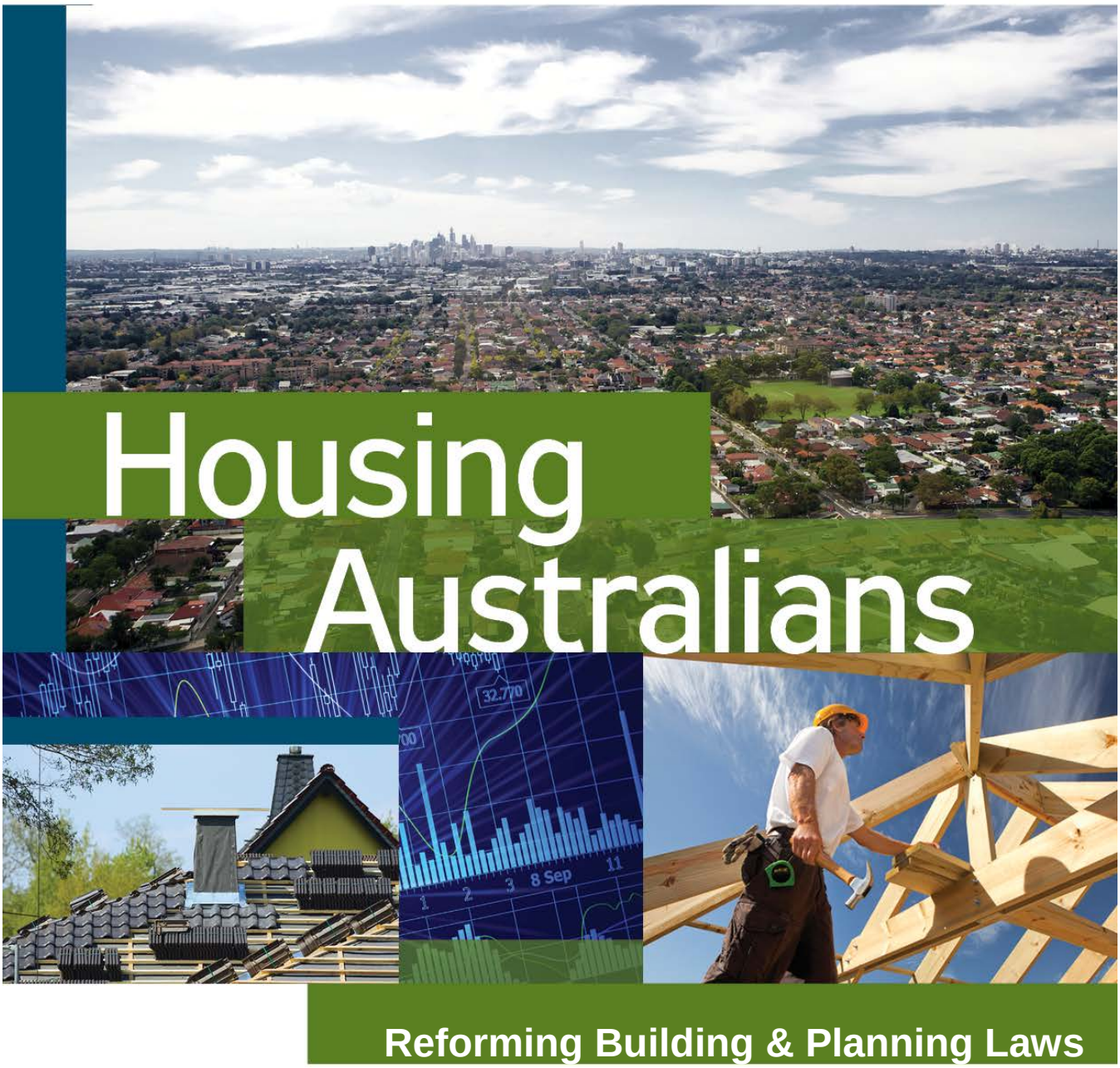
HOUSING INDUSTRY ASSOCIATION




## Reforming Building & Planning Laws

Submission to the
Senate Economics Legislation Committee

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

28 August 2015

HOUSING INDUSTRY ASSOCIATION

# contents



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# 1. EXECUTIVE SUMMARY

HIA welcomes the opportunity to provide a submission to the Committee on the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 ('the Bill").

As the leading industry association in the Australian residential building sector, HIA supports and represents the views and interests of over 40,000 members. HIA's members include builders, contractors, suppliers and manufacturers. Most HIA members are "small businesses".

At various points, HIA members will be both suppliers and recipients under standard form contract documentation.

## 1.1 STANDARD FORM CONTRACTS IN THE CONSTRUCTION INDUSTRY

Every year, several million contracts are entered into for construction work in Australia. Many of these transactions rely upon the use of standard form documentation. Standard form contracts reduce transaction costs for all parties involved and lead to greater efficiency in project delivery and management.

Many of the standard form contracts used in the Australian construction industry are developed through a process of negotiation and discussion. They are usually well understood by the parties and are often amended to reflect competing interests of the parties involved the project type and the contractual value.

HIA drafts and publishes a number of standard form building contracts and trade contract (sub contract) documents. The terms of these contracts reflect the unique needs of the residential building industry and in HIA's view they represent fair, reasonable and balanced conditions.

HIA acknowledges that the Bill reflects the Coalition's long standing policy to extend unfair contract consumer protections to standard form business-to-business transactions.

HIA notes that certain small business groups have welcomed the proposed measures on the basis that they will "level the playing field" between big and small business.

HIA does not support the Government's policy nor such sentiments.

The Bill, if passed, will reduce contractual certainty and will, in many practical respects, actually be contrary to the best interests of small business.

## 1.2 PREVIOUS SUBMISSIONS ON THE ISSUE

In August 2014, HIA provided submissions in response to the Treasury consultation paper "Extending Unfair Contract Term Protections to Small Businesses" and in May 2015 provided submissions to Treasury in response to the exposure draft copy of the Bill .

As set out in these two earlier submissions, HIA believes that the Bill represents an unwarranted and unnecessary interference in commercial contracting.

HIA's earlier submission to Treasury is **attached**.

## 1.3 RESIDENTIAL CONSTRUCTION AND THE IMPACT OF GOVERNMENT REGULATION ON PRODUCTIVITY

The construction sector is the major sources of economic growth, innovation and domestic output.

As investment in the mining and resource sectors continues to wane, Australia's housing construction industry is playing an increasingly more important role in Australia's economic performance. It is a significant generator of employment and work opportunities to hundreds of thousands of unskilled,

semi-skilled and skilled workers and also plays key role in generating income to manufacturers, construction material suppliers and engineering and architectural services.

Australian Bureau of Statistics (ABS) figures indicate that during the full 2014 calendar year, the value o dwelling construction – new home building as well alterations and additions – was $75.2 billion, equivalent to 4.9 per cent of GDP.

Despite its strong contribution to GDP the industry faces a number of productivity challenges.

Government regulation, in particular, plays a considerable role in shaping productivity outcomes. Poorly targeted and inefficient regulations impose costs, barriers and administrative constraints on firms that distract them from their principal objective of growing and running a profitable business.

The overwhelming burden of excessive red tape and regulation is often cited by HIA members as the number one reason they leave the industry.

The average small business builder/principal contractor spends significant hours each week attending to paperwork and compliance obligations arising from regulatory requirements including business, income and payroll tax compliance, training regulations that apply to apprentice employees, workplace health and safety management, occupational licensing and state-based home building laws and requirements.

Most recently, the contractor reporting tax regulations introduced in 2013 that require builders to separately report all payments made to contractors to the ATO have imposed additional red tape burdens on the building industry.

In their report "Small businesses, job creation and growth: Facts, obstacles and best practices", the OECD states:

> *Analysis suggests that, while some regulations may deliberately favour SMEs (many regulations exclude the smallest firms), in general the adverse impact of regulations on SMEs can be particularly harmful. This is because SMEs are less equipped to deal with problems arising from regulations since they have less capacity than larger firms to navigate through the complexities of regulatory and bureaucratic networks. SMEs are more likely to be hampered by regulations because their strength stems from their flexibility. Some regulations designed to prevent entry into the market by dynamic SMEs are particularly detrimental.*[1]

They go on to further identify that Government regulation and policies are seen by emerging firms as the main obstacles to the development of their businesses:

> *Entrepreneurs rate bureaucracy, social security contributions, company taxes, personal income taxes, fiscal policy and labour law, in that order, as representing the governmental interference with the most negative impact. In general, entrepreneurs indicate that indirect labour costs are a barrier to growth.*[2]

Although the Bill is motivated by a desire to "protect" small business and "level the playing field", most HIA members would simply prefer a reduction in existing regulation and red tape.

### 1.4 RECOMMENDED CHANGES

The Bill requires a number of significant amendments should it proceed.

Firstly, the Australian Consumer Law (ACL) should not apply to all small business transactions.

[1] Small businesses, job creation and growth: Facts, obstacles and best practices. OECD, 1997 at 21.
[2] Ibid at 37.

Rather, the statutory framework for protection for small businesses should be amended to reflect the commercial character of the parties.

HIA recommends the following key changes to improve the Bill and make it workable for business:

- Change the definition of “unfair”;
- Special conditions, amendments and any individually negotiated terms should be exempt;
- Delete the reverse onus of proof – the onus of proving a term is unfair should rest with the small business claimant;
- Delete the examples of unfair terms provisions;
- The monetary thresholds should amended to exempt multiple contracts which exceed $100,000 and the $250,000 multi-year threshold should be deleted;
- Small business should be defined by turnover not number of employees;
- The laws should not apply to contracts between two small businesses;
- Contracts covered by the Independent Contractors Act should be exempt;
- Broadening the Minister’s powers to exempt contracts under the "equivalent laws";
- Exempt contracts covered by existing industry-specific legislation;
- Transitional provisions should apply to varied terms only.

These recommendations are elaborated on and discussed in greater detail at section 3.

# 2. COMMENTS ON THE DRAFT BILL

## 2.1 POLICY INTENT

HIA has concerns with both the policy intent of the Bill and its likely practical effect.

The principles of freedom and sanctity of contract are basic legal norms which promote certainty in business transactions.

In HIA's view, it is wrong for the government, as it purports to do under this Bill, to be given such a decisive role in deciding what it considers to be in the best interests of two commercially contracting parties.

The problem of legislative and judicial interference in contract terms was identified by the Western Australian Ombudsman, Chris Field who stated that:

> "*some contractual terms, while unfair to lawyers, might be considered perfectly fair by consumers. Consumers might well understand that a harsh term is a trade-off for a good price. There is no rational mistake made by the consumer who chooses to benefit from a lower price that is the trade-off for a harsh term. As Ross Parish has noted:*
>
> *The economic rationale of these provisions is obvious: it is to reduce the costs and risks of doing business. Consumers benefit from them in lower prices."*[3]

As distinguished law professor Michael Trebilcock points out, if unfavourable terms are offered as a package in return for a reduction in price, then refusing to enforce the terms may not sufficiently compensate the supplier:

> *In such cases, the court, in effect, is re-making the bargain between the supplier and the consumer. There is little to suggest that the bargain made by a court is likely to be any more efficient than the bargain embodied in a standard form contract."*[4]

The existing laws of unconscionability and misleading and deceptive conduct are much better suited to dealing with so-called inefficient standard terms resulting from deficient consumer information, such as terms resulting from adverse selection. The courts are much better equipped to focus on issues such as the legibility of standard terms, or whether the terms are likely to mislead parties rather than difficult issues concerning whether the terms are somehow 'unfair'.

Finally, paternalism of this nature, not only interferes with contractual freedoms and certainty, it also adds red tape and cost. These higher costs are passed on to and ultimately borne by consumers.

## 2.2 PRACTICAL PROBLEMS

### 2.2.1 Automatic Extension of ACL

HIA notes that under the Bill the current ACL unfair contract provisions that apply to consumers will automatically extend to "small business contract" transactions, unamended.

This reflects the "third option" identified in Treasury's discussion paper from May 2014.

Under section 23(3) of the ACL, a "consumer contract" is a contract for:

*(a) a supply of goods or services; or*
*(b) a sale or grant of an interest in land;*

[3] Chris Field, "Having one's cake and eating it too – an analysis of behavioural economics from a consumer policy perspective" Productivity Commission 2008, Behavioural Economics and Public Policy, Roundtable
Proceedings, Productivity Commission, Canberra.
[4] Trebilcock referred to in David Lindsay, The law and economics of copyright, contract and mass market licences (Centre for Copyright Studies Ltd, Research Paper, 2002) at page 105.

*to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.*

However under the Bill, the unfair term protections will not just apply to "consumer goods" acquired by the small business, but to all types of goods and services, and where the small business is both a supplier and recipient of a good and service.

HIA disagrees with this approach.

The Bill will effectively enable a provider of a good and service, such as a disgruntled trade contractor, to litigate on the terms of a contract for engagement if they are unsatisfied with the commercial outcome.

This is inconsistent with a simple extension of the ACL to small business purchases.

It also creates an avenue for potential forum shopping. For instance, the *Independent Contractors Act 2006* also provides independent contractors with judicial review of alleged "harsh" or "unfair" contract terms.

While there may be a case for protection of small businesses, this should be limited to circumstances where, akin to the "mum and dad" consumer, the small business person is offered a product or service on a "take it or leave it" basis under a standard form contract.

### 2.2.2 Definition of small business

Item 29 of Schedule 1 defines a small business as such where it employs fewer than 20 persons.

According to the decision RIS and the explanatory memoranda this is consistent with the approach found by the Australian Bureau of Statistics.

HIA disagrees with this approach for several reasons.

Firstly, a clear objective of the Bill is to displace the perceived inequality of bargaining power between "big" and "small" business.

There may however be many businesses of 20 employees or less that are not and should not be, considered 'vulnerable'.

For instance, in the residential construction industry, it is not unusual for a relatively large building company to have relatively few employees as the majority of on-site construction activity is performed by independent trade subcontractors.

Further it is difficult, if not impracticable, for any business whether a "big business" supplier or otherwise, to know whether or not the business they are contracting with, is a "small business" for the purposes of this law.

The number of employees that a firm has is rarely common knowledge.

### 2.2.3 Application of the law to 2 small businesses

Under the Bill, the unfair term laws will equally apply even to two small business contracting with each other even where there is no evidence that the bargain struck was "one sided' or that there is preponderance of bargaining power with either party.

This measure appears to go beyond the Government's policy and is likely to impose additional legal costs on the small business to review their own standard contract terms for "unfairness".

Each circumstance of alleged unfairness is required to be assessed on a "case by case" basis, but there is no established jurisprudence on this new area of law. This will increase contractual uncertainty for many small businesses and is contrary to their best interests.

### 2.2.4 Existing laws in the building and construction industry

Over the past 16 years all states and territories have introduced legislation to deal with default payment terms in construction contracts and the processes required to resolve payment disputes.

Although these laws are not identical in form or content to those contained in the Bill, and are focused on unfair payment terms and practices, they still attempt to redress the perceived imbalance in bargaining power between two commercial parties.

For instance, Queensland's *Building and Construction Industry Payments Act 2003* (BCIPA) operates to provide greater "security of payment" for contractors.

It is perceived that because of the hierarchical chain of contracts, that there is an inherent imbalance in bargaining power for those lower down the contractual chain.

The BCIPA's object is ensure that a person is entitled to receive and able to recover progress payments, if they undertake to carry out construction work, or supply related goods and services, under a construction contract.

To achieve this objective, the BCIPA grants an entitlement to progress payments whether or not the relevant contract makes provision for progress payments, and also establishes a procedure for the making of, and responding to payment claims in set statutory timeframes and for the referral of disputed or unpaid claims to an adjudicator for a decision.

Under these laws:

- the subcontractor has a statutory right to a progress payment;
- the builder/principal is liable for claimed amounts irrespective of what the contract provides;
- the subcontractor may suspend work or supply without liability, and, if the principal removes any part of the work or supply from the contract as a result of the suspension, the principal is liable for any loss or expense the contractor suffers;
- the subcontractor can exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied;
- there is an expedited dispute resolution procedure (adjudication) by which disputes concerning payment are resolved, usually by way of written submission, within a very short period of time; and
- if a principal becomes liable for an amount under the Act, then, in addition to recovering the amount as a debt due to the contractor, the adjudication determination may be enforced as if it were a court judgment.

An adjudicator's decision is legally enforceable and there are limited grounds for review. However, the contractual rights of the parties are preserved, so that either party dissatisfied with an adjudication decision may take further action through the courts to enforce their contractual rights. The legislative scheme has been described as "pay now, argue later".[5]

The introduction of security of payment legislation also makes certain 'unfair' provisions void.

There are time limits for payments to subcontractors and a principal contractor/builder cannot require that payment to a subcontractor be withheld or delayed due to payment from the client not yet being received. This has codified the common law position that 'pay when paid' and 'pay if paid' clauses are

[5] See discussion in Andrew Wallace "Discussion Paper - Payment dispute resolution in the Queensland building and construction industry" (2013). Final Report. Queensland Government

void in respect of contracts for construction works performed or related goods and services supplied in Australia.

Each state and territory has their own version of such security of payment legislation.

In HIA's experience, the security of payment laws have provided an effective mechanism for payment for those subcontractors who have availed themselves of the laws.

Three states additionally have lien legislation in place to enable contractors to charge monies or obtain payment directly from the principal:

- *Contractors Debts Act 1997 (NSW)*
- *Subcontractors Charges Act 1974 (Qld)*
- *Workers Liens Act 1893 (SA).*

In effect, the building and construction industry has a jurisdiction in place to "protect" subcontractors from alleged contractual exploitation.

Additional regulation will simply fuel litigation (or the threat of litigation) with disgruntled parties seeking to unravel the bargain that was struck.

For instance, most standard form construction subcontracts provide that a subcontractor is liable for rectifying the defective work if they were responsible for the defect and a timeframe for rectifying same. Failure by the subcontractor to do so is likely to amount to a breach of the subcontract in which case the builder will need to engage another subcontractor.

There may be a retention sum held with respect to this obligation.

It is neither necessary nor appropriate for courts or other third parties to intervene and make subjective determinations on whether such a clause:

- causes a significant imbalance in the rights and obligations of the parties;
- is not reasonably necessary to protect the interests of the advantaged party; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

# 3. RECOMMENDED CHANGES TO THE BILL

## 3.1 CHANGE THE DEFINITION OF "UNFAIR"

### 3.1.1 Financial detriment only

Under the ACL, the onus is on the supplier of the contract to disprove that a particular term will have a "substantial likelihood of detriment (financial or otherwise)" to the consumer. This is overwhelmingly broad and reverses the ordinary burden of proof.

Given the commercial nature of the transaction, detriment should be limited to actual financial loss only.

**Recommendation**

Change the definition of unfair to require claimants to demonstrate actual financial loss.

### 3.1.2 The overall circumstances of the transaction should be considered

The ACL currently provides that in determining whether a contract term is unfair the Court must take into account the "contract as a whole".

For commercial transactions, the Court should also be required to specifically take into account broader considerations, such as the "overall circumstances of the transaction".

This would be defined to include any other legislated protections, such as the availability of the *Independent Contractors Act*, the overall allocation of risk between the parties to the contract and any individually negotiated or variable contract terms in considering whether a term is unfair.

**Recommendation**

Amend the Bill to require Courts to take into account the "overall circumstances of the transaction" in considering whether or not a term is unfair.

### 3.1.3 Special conditions, amendments and any individually negotiated terms should be exempt

Under the ACL, it is assumed that all standard form contracts are presented in a "take it or leave it" fashion and hence, with the exception of the "upfront price", all terms in a standard form contract are susceptible for judicial review.

Any terms that have been individually negotiated should not be subject to further scrutiny under the unfair contract provisions.

For many commercial building transactions, standard form contracts are simply used as a template document which the parties work off and use as a basis for further negotiation.

The terms produced during such negotiations should not be capable of being unravelled via threat of litigation.

**Recommendation**

Amend the Bill so that terms that are individually negotiated, whether or not in standard form, are exempt from review.

### 3.2 ONUS OF PROOF SHOULD REST WITH THE CLAIMANT

Under section 24(4) of the ACL for a term to be "unfair" it must not, amongst other things, be reasonably necessary in order to protect the interests of the party who would be advantaged by the term. The onus of proving that a term is not unfair and hence is reasonably necessary is on the supplier.

Given the commercial character of the transaction, ordinary standards of proof should apply - the onus and evidential burden should be on the business seeking to allege that a term is "unfair".

**Recommendation**

Amend the Bill to remove the reverse onus of proof provisions from the ACL for "small business' claimants.

### 3.3 DELETE THE EXAMPLE OF UNFAIR TERMS PROVISIONS

The list of "examples" of unfair terms in the ACL is quite expansive.

HIA recommends that these examples should be deleted insofar as the ACL applies to business-to business transaction.

Whilst in a business-to-consumer context this list might conveniently signpost commonplace unfair terms, in a business-to-business context each allegation of unfairness should be addressed on a case-by-case basis.

It is inappropriate to assume that if only one party holds a power to do or not do something, it is prima facie unfair unless the party seeking to rely on the term can prove it is reasonable necessary.

For example a term in the ACL that is prima facie unfair is:

> *"A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract"*

In most commercial building contracts, it has been longstanding and accepted practice, for the superintendent to hold a power to direct the contractor/builder to undertake a variation to the physical works.

Variations can be necessary for any number of reasons, including the fact the original scope of works was reflective of preliminary designs which have changed, unanticipated circumstances have arisen or statutory requirements have changed.

Subcontractors which follow the head building contract will similarly give the principal contractor/ builder the power to direct the subcontractor to undertake a varied scope of works.

It would be impractical and unworkable for all parties to hold this power – for instance for the subcontractor to unilaterally delete a portion of the scope of works because it is no longer convenient for them.

**Recommendation**

Amend the Bill to delete the examples of unfair contract terms insofar as they will apply to small business claimants.

## 3.4 THRESHOLDS AND APPLICATION OF THE LEGISLATION

### 3.4.1 Small business contracts

The proposed laws will apply to "small business contracts" where 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.

HIA supports a contract threshold that is based on the contract value, but it is not clear whether the laws are intended to apply to one contract or a series of transactions that are underpinned by a master contract.

For example, in residential construction, subcontracting parties are often engaged by a principal contractor/ builder on a "period" basis under which the same terms and conditions under a "master" contract may apply for multiple projects. Separate "work orders" are then used for each project reflecting the rates, scope of works and special conditions that might apply

In HIA's submission, the cumulative value of multiple contracts should be taken into account when calculating the threshold ie. if the contractor is engaged on 3 projects at a combined value that exceeds the $100,000 threshold then the ACL should not apply.

**Recommendation**

Amend the Bill to:

(a) only apply unfair contract term protections to contracts for the supply of goods or services to small business, not the acquisition of goods and services from small business;
(b) have the cumulative value of multiple contracts taken into account when calculating the $100,000 threshold;
(c) remove the $250,000 aggregation provisions.

### 3.4.2 Definition of small business

HIA also notes that consistent with the approach found by the Australian Bureau of Statistics, a "small business" is defined one with 20 employees or less, based on a head count of employee and excluding casuals employees who are not regularly or systematically engaged.

A clear objective of the legislation is to displace the perceived inequality of bargaining power based upon "big" and small business.

In the residential construction industry, it is not unusual for a relatively large building company to have relatively few employees as the majority of on-site construction activity is performed by independent trade subcontractors.

To this extent, HIA submits that turnover would be a better indicator of a businesses' financial and bargaining capacity rather than the number of employees. This would also better reflect the intent of the government's policy.

As an example, HIA notes that the ATO defines a small business as one with an annual turnover less than $2 million.

Further, the Bill is silent on how a business is to identify whether the business they are proposing to contract with, is a 'small business'.

**Recommendation**

Amend the Bill to:

(a) Define "small business" by reference to turnover rather than the number of employees;
(b) Require a small businesses to disclose that they are a "small business" and hence covered by the ACL.

### 3.4.3 Laws should not apply to two small business transactions

The laws will apply even when the contract is between two small businesses and there is no evidence of a preponderance of bargaining power either way.

It is not the Government's role to interfere in commercial contracts between two small businesses, even if one of the parties alleges the negotiations were "one-sided".

**Recommendation**

Amend the Bill to exclude contracts between two small businesses from coverage under the ACL.

## 3.5 EXCLUSION OF CONTRACTS COVERED BY OTHER LAWS IN THE BUILDING AND CONSTRUCTION INDUSTRY

A number of existing laws provide protections to participants in the building and construction industry.

For instance, the *Independent Contractors Act* (ICA) already establishes an unfair contracts jurisdiction. The Federal Court has jurisdiction to review a "services contract" if that contract is alleged to be "unfair" or "harsh".

According to the Decision Regulation Impact Statement, the ICA "provides a substantial level of protection".

The Court's very broad discretion in determining whether a contract is unfair or harsh, includes looking at:

- the terms of the contract when it was made;
- the relative strengths of the parties to the contract;
- whether any undue influence or pressure was exerted upon, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration; and
- any other matters the Court considers relevant.

The Court may make an order setting aside in whole or in part the contract or may make orders varying the contract. The Court may also make interim orders to preserve the positions of the parties while the matter is being determined.

Although there have been relatively few cases under the Act, this does not mean they are ineffective.

Consistent with the Government's policy to avoid duplication of legislative protection, the Bill should be amended to specifically exclude contracts covered by the ICA from coverage under the ACL.

Further, whilst the Bill enables the Minister to exempt from the ACL any matters covered under an industry specific law –provided that law includes protections against unfair contract terms.

As noted at section 2.2.4 above, all states and territories have introduced security of payment laws to protect payees (builders, suppliers, contractors) in commercial building transactions.

Security of payment laws and other industry specific legislation whilst not having necessarily equivalent protections to those provided under the ACL still provides a significant safety net for industry participants.

Such matters should be taken into account by the Minister when exercising their discretion.

**Recommendation**

Amend the Bill to specifically exclude contracts already covered by the ICA from coverage under the ACL.

Amend the Bill to enable the Minster to take into account existing laws, regulations and statutory protections when exercising discretion to exempt entire sectors from the coverage of the laws.

### 3.6 TRANSITIONAL PROVISIONS TO APPLY TO VARIED TERMS ONLY

Contract variations are commonplace under building and construction contracts.

Under section 294(2)(b) it is proposed that the laws would apply to varied terms of a contract that is in place before the commencement of the legislation.

Confining the application of the ACL to varied terms rather than the entire contract (as varied) is a significant improvement on the transitional provisions that were in *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.

However the term 'variation' in the context of construction contracts can mean two things, namely:

- a 'variation', amendment or change to the contract terms; or
- a physical 'variation' or change to the work (quantity or quality) required to be carried out under the contract.

**Recommendation**

The transitional provisions of the ACL should not apply to variations made in in accordance with contractual provisions contained within the pre-existing contract.

SUBMISSION BY THE

Housing Industry Association

to the

**Treasury**

on the

# "Extending Unfair Contract Term Protections to Small Businesses" Consultation Paper

**1 August 2014**

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

# 1 Executive Summary

1.1 HIA welcomes the opportunity to respond to the "Extending Unfair Contract Term Protections to Small Businesses" Consultation Paper (**Consultation Paper**).

1.2 HIA is Australia's largest building industry organisation with over 40,000 members. HIA members include builders, trade contractors, manufacturers and suppliers and building industry professionals.

1.3 The housing industry is made up of over 85 per cent small business. The small family owned contracting business is the backbone of Australia's residential building industry and is internationally renowned for its productivity. This model is characterised by businesses that are responsible for their own work, set their own hours and move flexibly from site to site.

1.4 Compliance with excessive red tape and regulation is a critical issue for these small businesses. They must comply with a legislative framework that spans a multitude of Commonwealth, State and Local laws and regulations including industrial relations, tax, workers compensation, workplace health and safety, licensing, planning, environment, dispute resolution, builders warranty obligations, and consumer protection contractual requirements.

1.5 The overwhelming burden of excessive red tape and regulation is often cited by HIA members as the number one reason they leave the industry.

1.6 HIA supports the Commonwealth Government's overall focus and agenda on better representing the interests of the small business community.

1.7 However, HIA **does not support** the Government's policy to regulate business-to-business contracting arrangements as set out in the Consultation Paper.

1.8 As HIA has previously articulated[1] HIA does not consider it the Government's role to intrude in contracting arrangements between two commercial parties, particularly when the outcome is merely motivated to redress alleged disparities in bargaining power or 'level the playing field' for small business without accompanying evidence of compelling market failure across industries.

**Background to these submissions**

1.9 This Consultation Paper is triggered by the Commonwealth Government's Small Business Policy which includes the extension of "the unfair contract protections currently available to consumers to cover the small business sector".

1.10 HIA acknowledges that in some cases businesses, and in particular small business, are exposed to similar imbalances in bargaining power to those that consumers face when contracting with suppliers of goods and services and will be presented with standard form contracts on a 'take it or leave it' basis.

[1] See HIA submissions to Competition Policy Review http://hia.com.au/~/media/HIA%20Website/Files/Media%20Centre/Submissions/2014/Competition%20Policy%20Review.ashx and in response to the Small Business and Family Enterprise Ombudsman Discussion Paper http://hia.com.au/~/media/HIA%20Website/Files/Media%20Centre/Submissions/2014/Small%20Business%20and%20Family%20Enterprise%20Ombudsman%20Discussion%20Paper.ashx

1.11 To this extent, HIA further acknowledges the arguments that small businesses can be exploited in lease negotiations, franchising arrangements or by financial institutions.

1.12 However for the reasons set out in these submissions, HIA does not support the Government's policy or the introduction of generic unfair contract term laws into business-to-business transactions in the residential building industry.

1.13 One of the great advantages of running your own business in the home building industry is that you can choose who you work for and are able to negotiate the terms and conditions of an agreement including the payment terms.

1.14 Most HIA small business members simply would rather have less regulation and red tape rather than misguided government intervention.

**Standard form commercial (business to business) contracts in the building industry**

1.15 HIA supports the use of clear and intelligible contracts for both business-to-business and business-to-consumer transactions.

1.16 HIA has for many published building contracts for use in residential and commercial construction.

1.17 For construction contracts, HIA supports the adoption of "the Abrahamson principles". Namely, a party to a contract should bear a risk where:

- the risk is within the party's control;
- the party can transfer the risk, e.g. through insurance, and it is most economically beneficial to deal with the risk in this fashion;
- the preponderant economic benefit of controlling the risk lies with the party in question;
- to place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation efficiency; and
- if the risk eventuates, the loss falls on that party in the first instance and it is not practicable, or there is no reason under the above four principles to cause expense and uncertainty by attempting to transfer the loss to another.

1.18 Ultimately, however, the terms of the contract should left to the agreement of the parties.

# 2 Why the Laws are Unnecessary and should not apply in the Residential Building Industry

2.1 There are several key elements to HIA's opposition to the extension of these laws to the residential building industry:

(1) Existing legal protections are adequate;
(2) The policy offends the principles of freedom of contract and limited government intervention;
(3) It is inappropriate to regulate businesses via a consumer orientated law;
(4) HIA does not support further laws or regulations that impose further unnecessary and inappropriate costs in business-to-business transactions; and
(5) The policy will cause uncertainty for contracting and subcontracting arrangements in the residential building industry.

## (1) Existing legal protections are adequate

2.2 In HIA's submission, the current competition, independent contractor and stated based security of payment laws are adequate to protect small businesses in the residential construction industry.

Protection for small business under competition laws

2.3 HIA considers that current provisions in the Australian Consumer Law and *Competition and Consumer Act 2010* provide strong protections for small and medium businesses.

2.4 The Act comprehensively regulates business dealings and provides protection for businesses with prohibitions on misleading conduct, anti-competitive conduct and unconscionable conduct.

2.5 There are additional protections at common law.

2.6 The unconscionability protections, in particular, provide understated protection for small business 'exploited' in commercial negotiation.

2.7 Section 21 provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law of the Australian States and Territories - that the general non-statutory or common law as it has evolved through decisions of the courts.

2.8 The Australian Consumer Law equally applies the unconscionability provisions to both business-to-consumer and business-to-business transactions, providing:

***21 Unconscionable conduct in connection with goods or services***
*(1) A person must not, in trade or commerce, in connection with:*
*(a) the supply or possible supply of goods or services to a person (other than a listed public company); or*
*(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);*
*engage in conduct that is, in all the circumstances, unconscionable.*
*…*
*(4) It is the intention of the Parliament that:*
*(a) this section is not limited by the unwritten law relating to unconscionable conduct; and*

*(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and*

*(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:*

*(i) the terms of the contract; and*

*(ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.*

2.9 According to Justice Finn, the listed indicators of statutory unconscionability that expressly refer to substantively unconscionable outcomes as heading 'in the direction of proscribing unfair dealing and unfair trading', especially 'unfair dealing in relational contracts'.

2.10 HIA notes at the time when this section was introduced into Parliament, it was said that it was designed to protect small business, such as franchisees or small shopkeepers in large shopping malls when dealing with big business. A number of factors are listed as to what may amount to unconscionable conduct:

- the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- the requirements of any applicable industry code (for example, the code applying to franchise contracts);
- the extent to which the supplier unreasonably failed to disclose to the business consumer;
- any intended conduct of the supplier that might affect the interests of the business consumer;
- any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;
- whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
- the extent to which the supplier and the business consumer acted in good faith.

2.11 Whilst statutory unconscionability had been historically difficult to prove, recent amendments to the legislation together with an expanding jurisprudence have enhanced the capacity of small businesses to rely on these protections.

2.12 Last year in the Lux case in a significant development in the law, the Full Federal Court confirmed that unconscionable conduct should be given a broad interpretation.[2]

2.13 The case involved an ACCC prosecution against door to door vacuum salespersons. In upholding the ACCC, the Full Bench provided important clarity regarding the scope and operation of the unconscionable conduct provisions finding the conduct that is 'unconscionable' or 'against conscience' is a test of the norms and standards of today rather than moral judgment.

2.14 The implication of this decision is that it may not be necessary to show the conduct revealed a high degree of moral turpitude or moral tainting to prove unconscionability, elements that have been notoriously difficult to prove.

[2] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90

2.15 Unconscionability must be applied and understood in context. This significantly assists businesses seeking to rely on these protections.

2.16 In the same week as the Lux decision was handed down, the Federal Court in a case involving a business-to-business claim of unconscionable conduct granted an interlocutory injunction where there was a termination of a large commercial contract which, it was argued, amounted to unconscionable conduct, pursuant to clause 21 of Schedule 2 of the Australian Consumer Law.[3]

2.17 HIA notes the ACCC has recently instituted proceedings in the Federal Court of Australia against Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd alleging that Coles engaged in unconscionable conduct as part of its Active Retail Collaboration (ARC) program, in contravention of the ACL.

2.18 Given the recent case law and current development it is clear that the current unconscionability provisions are working well to protect the interests of small business. Any further extension of these protections risks destabilising markets through the inherent uncertainty they create in commercial relationships.

## Independent Contractors Act

2.19 Further the *Independent Contractors Act 2006* already regulates unfair contract terms for subcontractors in the building and construction industry establishing an unfair contracts jurisdiction.

2.20 Under the Act, the Federal Court has jurisdiction to review a services contract if that contract is alleged to be unfair or harsh. When determining whether a contract is unfair or harsh, the Court may have regard to:

- the terms of the contract when it was made;
- the relative strengths of the parties to the contract;
- whether any undue influence or pressure was exerted upon, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration; and
- any other matters the Court considers relevant.

2.21 There is an expansive power for the Court to set aside in whole or in part the contract or make orders varying the contract. An order may only be made for the purpose of placing the parties as nearly as practicable on such footing that the ground on which the Court's opinion is based no longer applies. The Court may make interim orders to preserve the positions of the parties while the matter is being determined.

## Security of payment laws

2.22 Security of payment legislation for the construction industry has been progressively introduced into all Australian jurisdictions.

2.23 The common objective of this legislation has been to improve cashflow down the contractual chain. It effectively establishes a default entitlement to payment.

[3] *One Pty Limited v Telstra Corporation Limited* [2013] FCA 23 the Federal Court (Justice Pagone) referred to in Professor Bob Baxt, *"Unconscionable conduct after the Lux decision", Company Director Magazine,* October 2013 accessed at http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2013-back-editions/October/Directors-Counsel-Unconscionable-conduct-after-the-Lux-decision .

2.24 It directly addresses the perceived inequality of bargaining power to aggressively favour the 'small business' contractor.

2.25 For instance:

- the contractor has a statutory right to a progress payment;
- the builder/principal is liable for claimed amounts irrespective of what the contract provides;
- the contractor may suspend work or supply without liability, and, if the principal removes any part of the work or supply from the contract as a result of the suspension, the principal is liable for any loss or expense the contractor suffers;
- the contractor can exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied;
- there is an expedited dispute resolution procedure (adjudication) by which disputes concerning payment are resolved, usually by way of written submission, within a very short period of time;
- if a principal becomes liable for an amount under the Act, then, in addition to recovering the amount as a debt due to the contractor the adjudication determination may be enforced as if it were a court judgment; and
- there are very limited appeal rights or rights of judicial review in respect of an adjudication decision materials supplied by the contractor for use in connection with carrying out construction work.

2.26 Clauses in building contracts that offend the security of payment legislation are void – contracting out is prohibited.

2.27 The remedy of rapid adjudication is also not available to a principal contractor or builder for disputes with contractors over issues such as defective work.

2.28 Irrespective of the merits or otherwise of the laws, they represent a significant interference in the ability of commercial parties to determine for themselves the terms of their business relationship.

2.29 Additionally the introduction of security of payment legislation makes certain 'unfair' provisions void. There are time limits for payment to subcontractors and a principal contractor/builder cannot require that payment to a subcontractor be withheld or delayed due to payment from the client not yet received. This has codified the common law position that 'pay when paid' and 'pay if paid' clauses are void in respect of contracts for construction works performed or related goods and services supplied in Australia[4].

[4] See eg *Ward v Eltherington* [1982] QdR 561; *Sabemo (WA) Pty Limited v O'Donnell Griffin Pty Limited* (1983) (unreported, Court of Western Australia); *Crestlite Glass & Aluminium Pty Ltd. v. White Industries (QLD) Pty Ltd* (Unreported, Federal Court of Australia).

2.30 Below is a table setting out the security of payment protections:

| State | Legislation | Maximum time period for payment of progress claims | Paid when paid clauses |
|---|---|---|---|
| ACT | *Building and Construction Industry (Security of Payment) Act 2009 (ACT)* | *10 days after a payment claim* | Void |
| NSW | *Building and Construction Industry Security of Payment Act 1999 (NSW)* | *30 days to a subcontractor, 15 days by a principal to a head contractor.* | Void |
| SA | *Building and Construction Industry Security of Payment Act 2009 (SA)* | *15 days after a payment claim* | Void |
| NT | *Construction Contracts (Security of Payments) Act 2004 (NT)* | *28 days* | Void |
| Qld | *Building and Construction Industry Payments Act 2004 (Qld)* | *25 business days after submission of a payment claim for construction management trade contract or subcontracts.*<br>*For commercial building contracts, 15 business days after submission of a payment claim.* | Void |
| Tas | *Building and Construction Industry Security of Payment Act 2009 (Tas)* | *10 days* | Void |
| Vic | *Building and Construction Industry Security of Payment Act 2002 (Vic)* | *20 days* | Void |
| WA | *Constructions Contracts Act 2004* | *50 days* | Void |

## (2) The policy offends the principles of freedom of contract and limited government intervention

2.31 HIA supports the general principle that parties should be free to contract and agree upon their own terms and conditions.

2.32 This principle ensures the efficient operation of the market for all businesses operating in the residential construction industry.

2.33 Businesses are established as part of the market economy, and with the expectation of their dealings being subject to the principles of 'buyer-beware'. Businesses, big and small, recognise there are risks involved with all commercial activities and that it is up to them to assess these risks before proceeding.

2.34 HIA understands one of the alleged disadvantages of standard form contracts is that parties did not have an opportunity to fully agree to the terms because they are presented on a 'take it or leave it' basis. Accordingly it alleged that the enforcement of form terms is unfair.

2.35 HIA does not see the solution to this as government imposed default terms invoked to fill gaps in the contract the parties negotiate.

2.36 Paternalistic restrictions on conduct, such as those proposed in the Government's policy raise a number of problems, particularly as it undermines the sanctity of the contract.

2.37 Only where there is an overwhelming case for regulation, such as clear evidence of market failure, should governments interfere in commercial arrangements between contracting parties.

2.38 HIA is not aware of any evidence of mass exploitation of small businesses in the residential building sector. In fact, the Consultation Paper at paragraphs 20 concedes there is little empirical evidence justifying the policy.

## (3) It is inappropriate to regulate businesses via a consumer orientated law

2.39 Small business owners have many unique challenges including access to business finance, increasing sales in a challenging economic environment, managing employees under onerous Fair Work laws and operating under onerous taxes and government regulations.

2.40 Ultimately however business owners are not 'consumers'. They are running their enterprise with a view to make a profit and reward.

2.41 Businesses are or at least should be more aware of their legal rights, understand the consequences of entering into contracts and are generally more sophisticated than consumers.

2.42 Business have the capacity to make an informed decision based an assessment of risks, including trading risk against return. Business owners may rationally decide not to obtain legal advice or not properly reviewing the terms of a contract to assess the risk. Business owners may decide to not negotiate or review so called 'unsalient terms' on the understanding that, on the whole, the entire commercial relationship benefits them.

2.43 Not only are small business persons not 'consumers', they also should not be considered defacto employees requiring government protection.

2.44 The inclusion of unfair contract protections for small business as proposed in the Consultation Paper wrongly assumes that all small businesses individually lack bargaining power. Such an approach is flawed and risks promoting anticompetitive conduct, collectivism and third party (including industrial) interference in arm's length commercial transactions.

## (4) HIA does not support further laws or regulations that impose further unnecessary and inappropriate costs in business-to-business transactions

2.45 HIA supports the Government's commitment to a $21billion reduction in red tape. This recognises that governments can create impediments to productivity growth by imposing onerous regulations.

2.46 At the same time the commitment to extend the unfair contracts protections for consumers to 'small business, to ensure that big and small businesses get a 'fair go' and do the right thing by each other in their respective marketplaces' will increase the compliance burden on businesses.

2.47 More particularly if the laws are introduced the direct costs of doing business will naturally increase as a result of having to review existing standard form contracts for compliance, potential reallocation of risk and a consequent repricing of goods and services.

2.48 Any regulation of business to business transaction will have an ongoing cost in education and advising businesses.

2.49 It is not simply a 'one off' cost of amending contracts to comply with the new laws.

2.50 Transaction costs will change and businesses also will factor the allocation of risk and uncertainty when pricing their contracts.

2.51 This risk premium will significantly increase if further uncertainty is added to subcontracts through the application of the proposed laws. This entire risk premium is ultimately paid by new home owners.

## (5) The policy will cause uncertainty for contracting and subcontracting arrangements in the residential building industry

2.52 The potential impact of the Coalition's proposed extension of unfair contract terms to business-to-business transactions in the residential building industry is significant.

2.53 Any additional regulation of standard form subcontracting and building supply contracts will cause unnecessary confusion and uncertainty.

2.54 Construction contracts usually contain terms to manage unique risks such as :

- Land acquisition and planning risks;
- Project delays;
- Industrial disputation;
- Increase in costs e.g. eg increase in costs of labour or materials;
- Design and construction defects ;
- Third party infrastructure or services on which the completion of the project relies; e.g. access roads are not constructed;
- Market risk; and
- Regulatory changes.

2.55 The imposition of unfair contract term legislation will create uncertainty in the application of such terms in construction contracts, potentially disturbing longstanding industry practice. Such uncertainty is likely to lead to further disputes, increase inconvenience and delay for consumers and increase costs.

2.56 For instance under the standard form residential building contract, a homeowner client is empowered to require rectification of defective work.

2.57 A builder's failure to comply with such a direction amounts to a breach of contract. This may entitle a client to take over or suspend the work, to determine a contract for breach or in some instances to undertake the rectification work themselves at the expense of the builder.

2.58 The risk associated with rectifying defective work in the head contract/building contract will then be accommodated in subsequent contracts in the contracting chain. Most standard subcontracts provide that a subcontractor is liable for rectifying the defective work if they were responsible for the defect and a timeframe for rectifying same. Failure by the subcontractor to do so is likely to amount to a breach of the subcontract in which case the builder will need to engage another subcontractor.

2.59 Some parties notwithstanding their breach of contract may allege the time allowed to rectify was deficient or unfair.

2.60 Especially in cases that involve rectification work that involving defective plumbing, which might involve substantial rectification works over and above the initial trade work such as replacing expensive tiles, fitting and partial demolition of walls and replacement of pipework, this is likely to be an expensive exercise .

2.61 Potentially the laws will impact not just on subcontracting and supply agreements but on all commercial construction contract arrangements.

2.62 Most commercial building transactions and major infrastructure projects are undertaken using standard form building contracts. Most of these contracts are let by tender where there is upfront acknowledgement of the terms of the project by the tenders. The whole tendering process can potentially be undermined if tender terms are able to be subsequently revised through an unfair contract mechanism.

# 3 Specific Response to Questions in the Discussion Paper

**1. How widespread is the use of standard form contracts for small business and what are their benefits and disadvantages?**

3.1 Standard form contracts are widely used by businesses small and large in the residential construction industry for a variety of transactions.

3.2 In HIA's experience, whilst the terms of unique or very large commercial transactions are drafted one at a time, nearly all commercial and consumer sales contracts are form driven.

3.3 Many commercial building projects are constructed using the suite of Australian Standard Building Contracts.

3.4 In addition to residential building contracts, HIA also publish standard form commercial building contracts and subcontracting contracts.

3.5 The advantages of using industry-accepted standard form contracts in the building industry are significant.

3.6 In the building industry the use of standard form contracts can be used to promote standards in commercial dealings, to increase efficiency and reduce transaction costs.

3.7 HIA contracts, for instance, have been prepared, drafted and amended over a number of years, must comply with specific and detailed legislative regulation, and are developed after significant consultation and collaboration with government and industry with a view to ensuring an equitable balance of risks and responsibilities and an appropriate baseline for the parties' legal relationship.

3.8 They reflect accepted building practices and methods of working and contain machinery to manage the interaction of the two variables of time and cost in the building process as well as the intervention of externalities such as weather and other delays.

3.9 In the recent report *"Standard Forms of the Contract in the Australian Construction Industry – Research Report"* a number of reasons for the use and advantages of standard form contracts in the construction industry are identified:

- The most prominent reason identified for their use is their familiarity, and their perception as an important benchmark of reasonableness;
- suitability of the standard form to the risk profile;
- ease of contract administration through the use of the form;
- minimising transaction and legal costs;
- best reflecting the 'deal';
- well-drafted form;
- form was recommended or mandated by a party's organisation, such as government tendering requirements; and
- gaining a commercial advantage for the party procuring the work. [5]

[5] *Standard Forms of Contract in the Australian Construction Industry - Research Report*, University of Melbourne, June 2014.

## 2. What considerations influence the design of terms and conditions in standard form contracts?

3.10 In the construction industry, the terms and conditions of standard form contracts are drafted to reflect the peculiar risks and challenges of the industry to provide project certainty.

3.11 HIA template subcontractor/trade contract agreement sets out the terms and conditions to:
(a) site management;
(b) variations;
(c) insurance;
(d) indemnities;
(e) responsibility for rectifying defective works;
(f) default and termination;
(g) suspension; and
(h) dispute resolution.

## 3. To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?

3.12 Although the theory of bounded rationality referred to in the Consultation Paper suggests that small businesses will only consider those terms of a standard form (or other contract) they think is important to them and hence will not really consider less salient terms, HIA does not agree with the resulting presumption that it is then the role of government to intervene with so-called 'fair' terms to redress the lack of information or understanding on the part of one party to the contract.

3.13 Standard form industry contracts such as HIA's have evolved to appropriately balance obligations and risks.

3.14 HIA is routinely advising members on the intended operation of a number of standard form contracts but does not know the nature or extent to which all businesses are reviewing standard form contracts or engaging legal services.

3.15 Whether or not a business obtains advice on legal documentation they are required to execute ultimately is a commercial decision for that business.

## 4. To what degree do small businesses try to negotiate standard form contracts?

3.16 This is a generalised question and may depend on the nature and size of the transaction.

3.17 Whilst many standard form contracts by their very nature are rarely negotiated, in the construction industry, standard form building contracts are routinely tailored to suit the needs of the project or interests of the parties. The types of clauses that can be changed include:

- Extensions of time clauses
- Delay damages
- Site conditions
- Payment clauses
- Variations
- Warranties as to quality
- Claims
- Dispute resolution procedures.

**5. Is it terms or the process by which some contracts are negotiated that is the main concern for small businesses?**

3.18 HIA supports the view that the focus on addressing any issues of perceived unfairness should be on procedural fairness or exploitation in the negotiation process rather that the ultimate content of the contract itself.

3.19 To this extent the unconscionability laws are those most appropriate to redress any concerns for small business.

**6. How should small businesses differ from consumers in relation to their interaction with standard form contracts?**

3.20 Businesses are not consumers.

3.21 Unlike consumers there are often broader commercial considerations surrounding a business transaction. Businesses, large and small, enter into commercial transactions based on assessment of the commercial risk with an ultimate objective of profit.

3.22 Additionally businesses should have a greater expertise to understand the terms of legal documentation, have greater resources to seek legal advice and may have access to insurance.

3.23 Many businesses are also members of business chambers and association. HIA members, for instance, are able to call upon HIA for advice and assistance on understanding, using and managing standard form contracts.

**7. What terms are businesses encountering that might be considered 'unfair'?**

3.24 For a business a term that is 'unfair' may be as broadly construed as something that is against their commercial interests. It is a matter of subjective opinion. Small business persons ultimately are after the commercial outcomes that best serves their interest.

3.25 In the construction industry, there is a significant difference in the perceptions of principals and contractors as to whether risk is allocated in construction contracts on a fair/principled/ efficient basis.

3.26 Depending on whether the party is client, builder, subcontractor or consultant they will view the allocation of risk in categories such as time, design, scope and site conditions in a different way.

3.27 Usually the most important factor influencing risk allocations are the requirements of the client/principal.

3.28 It does not matter if they are 'big business' or 'small business'.

**8. What detriment have businesses suffered from unfair contract terms?**

3.29 HIA refers to Section 2 of these Submissions.

**9. What protections do businesses currently have when they encounter unfair contract terms and are they sufficient?**

3.30 HIA refers to Section 2 of these Submissions.

10. What regulatory responses are already in place that aim to protect small business from unfair contract terms and how effective are these mechanisms?

3.31 HIA refers to Section 2 of these Submissions.

11. What responses (including by government or industry) could be implemented to help businesses with ensuring contract terms respect the legitimate business objectives and interest of both big and small contracting parties?

3.32 As articulated earlier in Sections 1 and 2 of these Submissions, HIA is of the view no policy response is required in the residential building industry.

12. Would information disclosure requirements impact on the decision to review standard form contracts and/or consider the terms included in them?

3.33 HIA notes that the Government has committed to substantial reductions in red tape and regulation, amounting to a $1billion per year.

3.34 However if every single commercial transaction using standard form documentation needed to be supplemented with some type of warning statement, information package or summary sheet this would be an unworkable red tape minefield.

3.35 Whilst disclosure rules might serve some broader social in the context of unique transactions such as home loans and consumer credit tens of thousands of transactions across every industry and every sector are entered into every day using standard form documentation.

3.36 The costs of compliance would far exceed any benefit obtained.

3.37 It remains HIA's view that it is up to each contracting party to look after their interests and obtain advice and information in relation to the terms of the contract they are proposing to enter.

13. Given the Commonwealth Government's commitment to extend existing unfair contract term provisions to small businesses, what should be the scope of the protections?

3.38 HIA oppose a blanket imposition of new unfair contract regulation on the residential building industry.

3.39 Any extension of the consumer protection laws should be done on a sectoral basis where there is evidence of endemic market failure and exploitation of small business.

3.40 Further, and if the Government proceeds with its policy commitment then there must be a number of modifications to the current UCT provisions as it applies to business to business transactions, as businesses should not be treated as consumers:

- Contracts covered by the Independent Contractors Act and any state based security of payment legislation should be exempt.

- Evidence of procedural unfairness must be a necessary requirement

3.41 HIA does not believe that clauses in business-to-business contracts should ever be treated as automatically ineffective. Rather the party alleging unfairness must prove there was some element of procedural irregularity of unfairness as an initial step.

- The reverse onus of proof should be deleted and 'substantial likelihood of detriment' should be removed as a consideration of whether a contract term is unfair

3.42 Under the current UCT provisions the onus is on the supplier to disprove that a particular term will have a 'substantial likelihood of detriment (financial or otherwise)' to the consumer.

3.43 This reverses the ordinary rules of proof and is overwhelmingly broad and subjective. The person seeking protection from laws should be required to show how the allegedly unfair term affects them.

3.44 Further and in the case of commercial transactions it is essential detriment should be limited to actual and proven financial loss only.

- The factors the Court must take into account in determining whether a contract term is unfair must include 'the entire circumstances of the transaction'.

3.45 The current legislation provides that in determining a contract term is unfair the Court must take into account the 'contract as a whole'.

3.46 HIA submits that the Court should be required to specifically take into account broader considerations such as the 'overall circumstances of the transaction'. This would be defined to include any other legislated protections for small businesses, the overall allocation of risk between the parties to the contract, the overall commerciality of the 'deal' and any individually negotiated or variable contract terms.

3.47 This will enable the court to take in account the various trade-offs in the benefits and burdens between the parties in their overall commercial relationship.

- The term 'standard form contract' should be expressly defined.

- Providing that any individually negotiated terms should be unaffected by the operation of the unfair contract provisions.

3.48 With the exception of the 'upfront price' the current legislation has a blanket approach to all terms in a standard form contract; it is wrongfully assumed that all standard form contracts are presented in a 'take it or leave it' fashion and are therefore inherently unfair.

3.49 In many instances, standard form industry contracts provide an important benchmark against which contracting parties can compare requests to vary terms or changes to risk allocation.

3.50 Standard form building and construction contracts are routinely amended to insert further terms or to reflect the different risk profile required for a particular transaction.

**14. Should the Australian Consumer Law UCT provisions be extended to cover small businesses defined using contracting party characteristics or transactions size? Should small business to small business contracts be included?**

**15. Should the extension of the UCT provisions provide protection for small business when they both acquire and supply goods or services?**

3.51 In the event the UCT provisions are extended it is imperative the industry and contracting parties have certainty on who is covered and who is not covered.

3.52 The characteristics of the contracting parties may not always be clear and may change over time – i.e. a small business employer for the purposes of the *Fair Work Act 2009* may over time employ additional people and no longer meet the threshold.

3.53 Regardless HIA submits that all government entities (including state and local government entities) should be subject to the unfair contract laws in the same way as other businesses may be.