Australian Institute of Architects

The Australian Consumer Law - unfair contract terms

Submission to Senate Economics Committee

31 July 2009

SUBMISSION BY

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PURPOSE

- This submission is made by the Australian Institute of Architects (the Institute) to the Senate Economics Committee in response to the invitation of submissions on *The Australian Consumer Law* amendments to the *Trade Practices Act 1974*.
- At the time of this submission the Executive of the Institute is: Melinda Dodson (National President), Karl Fender (President-Elect), Howard Tanner (Immediate Past President), Rod Mollett and Shelley Penn.
- The Chief Executive Officer is David Parken.

INFORMATION

Who is making this submission?

- The Australian Institute of Architects (the Institute) is an independent voluntary subscription-based member organization with approximately 9,500 members, of which approximately 6,200 are architect members (registered or registrable under State and Territory Architects Acts).
- The Institute, incorporated in 1929, is one of the 96 member associations of the International Union of Architects (UIA).
- The Institute represents the largest group of non-engineer design professionals in Australia.

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1.0 INTRODUCTION

1.1 Purpose of submission

1.1.1 The Institute is pleased to provide comment to the Senate Economics Committee on the unfair contract terms incorporated in The Australian Consumer Law.

1.2 Expertise of the Institute

1.2.1 The Institute seeks to advance the professional development of the architectural profession and highlight the positive benefits of good design in addressing the concerns of the community in relation to sustainability, quality of life and protection of the environment.

1.2.2 The Institute promotes responsible and environmentally sustainable design, and vigorously lobbies to maintain and improve the quality of design standards in cities, urban areas, commercial and residential buildings.

1.2.3 The Institute has established high professional standards. Members must undertake ongoing professional development, and are obliged to operate according to the Institute's Code of Professional Conduct. The Institute's Professional Development Unit offers an extensive program at national and state level, continuing to keep members informed of the latest ideas, technology and trends in architecture and the construction industry.

1.2.4 The Institute represents the profession on numerous national and state industry and government bodies, advising on issues of interest to the architectural profession, other building professionals and the construction industry.

1.2.5 Particular areas of expertise include:

- quality assurance and continuous improvement
- industry indicators and outcomes
- market analysis
- risk management and insurance
- marketing and communication
- policy development and review
- technical standards
- environmental sustainability.

2.0 EXECUTIVE SUMMARY

2.1 The Institute rejects the view pervading the Australian Consumer Law (ACL) that standard form contracts, as opposed to contracts of adhesion, are subject to the ACL's regime as inherently unfair to the parties unless established otherwise. The Institute is particularly concerned that no basis for this view is apparent in this presumption, especially without analysis of industry to industry differences. While the Institute is acutely aware of inequality in bargaining power, such that its members are often disadvantaged, as are consumers in some situations, the attempt to regulate this for consumers by reference to a contract not drafted from scratch as being inherently unfair, is misdirected.

2.2 The ACL applies a broad brush without consideration of industries, such as the building industry, which is heavily regulated for consumer protection. The notion that a consumer can apply another overlay of potential avoidance of full payment, or send an architect into potential legal costs, can only drive up costs that will be passed back to the consumer.

2.3 Upfront price needs to specifically incorporate the notion of percentage based commissions which depend for adjustment on foreseeable contingencies. These are intended to protect both consumer and service provider from respectively, overpayment and under-compensation. A service provider having to compensate for the possibility of contingencies, without certainty of compensation for them, will drive up charges to consumers.

2.4 The risk that any individual or sole trader business will retrospectively be able to challenge the validity of a contractual term, individually or as part of a representative action, when applied to the building industry in particular, will do nothing but escalate costs of doing business which will be passed on to consumers, directly or indirectly.

2.5 In an industry which regularly uses prepared contracts to deal with complex procedures in a complex legal environment, that nevertheless are subject to the negotiation of special conditions to suit the individual needs of the parties presented with the contract, the imposition of legal uncertainty through risk of contractual challenge is an undue burden, particularly where the market is deflated and likely to be for some time.

3.0 COMMENTARY

3.1 Standard forms not always inherently unfair

3.1.1 The Institute considers the Act's lack of adequate distinction in the definitional functions of section 7, between what are commonly known as standard form contracts and those of adhesion on which the unfair contracts provisions of the ACL appear to be premised, is a grave omission.

3.1.2 The Institute rejects the view pervading the Australian Consumer Law, that any pre-prepared form of contract presented by one party to the other ought to be presumed to be a standard form and per se, inherently unfair to the other, unless proved otherwise, (or not challenged).

3.1.3 Architects are mandated by the various Architects Acts in almost every state and territory to enter into written contracts of engagement before beginning to provide services. This position is supported by the Institute. In some instances, the same state and territory legislation, whose entire basis is consumer protection, contemplates the relevant regulatory authority providing model contracts, or mandating the use of, standard form contracts for engagement.

It can only be presumed that such regulatory authorities have not exercised that option because the standard form contracts in use by industry are adequate in protecting consumers. The ACL would now allow individual consumers to challenge such contracts, unless directly produced by government bodies.

3.1.4 To subject business to the uncertainty of a court decision on such matters leaves individual businesses in an invidious position. The ACCC has previously accepted the positive public benefit in standard forms[1], yet this benefit is discounted by this proposed law. The Institute submits that the uncertainty of whether or not the ACL will apply to a contract will drive the building industry, among others, into 'start from scratch' negotiations, inevitably involving the expense of lawyers and which will ultimately be passed to the consumers (individuals or otherwise). This flies in the face of the known advantages of standard forms to business efficiency.

3.1.5 In prior Treasury discussion papers on the ACL, the premise that the Victorian experience, where unfair contracts legislation exists, points to minimal impost on business, is simply unconvincing.

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1 ACCC Authorisation A90946 at paragraph 4.12

The more likely explanation is that the responsible authority for the legislation is dramatically under-resourced. The Institute was requested to submit its published contracts for review in 2007, but not even acknowledgement of receipt has been received in reply.

3.1.5 The assumption seems to be that after a time, a business will have been through enough court proceedings to establish what it can and cannot include. This is simply unrealistic for a small business environment, with the most likely effect of the legal cost burden being the withdrawal of such businesses from the market.

3.2 Application should be industry specific

3.2.1 Consequently, the Institute regards as too wide, the application of the ACL across all business to consumer transactions where the particular characteristics of industries are not taken into account. Its application is likely to have detrimental effect on the contractual arrangements made by the Institute's architect members in an industry already heavily regulated for consumer protection.

3.2.2 The Institute considers the existing regulation of the Building Industry in each State and Territory is more than adequate. Such existing legislation does not distinguish between individual consumers and businesses, but is related to the type of building project, i.e., housing or otherwise[2]. This, along with the existing protections of the *Trade Practices Act* and various Fair Trading Acts against misleading and deceptive conduct, is largely adequate without another overarching layer of protection.

3.3 Clarification of 'upfront price needed

3.3.1 The usual terms for payment of an architect, as a proportion of the cost of a building project, do not, without further clarification, fit neatly into the proposed definition of terms which:

- *"Concern the main subject matter of a standard form contract; or*
- *Set the 'upfront price' payable under the contract; or*
- *Is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory."* [3]

because the usual payment terms, as a pre-disclosed percentage of the upfront price of the separate building contract between builder and client (itself potentially uncertain for the same reasons as follow) do not fall readily into the limited description of the upfront price presently given in the ACL.

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2 The submission by Master Builders Australia to the Senate Economics Committee explains the operation of the existing legislation for consumers in considerable detail.

3 "The Australian Consumer Law consultation on draft unfair contract terms provisions 11 May 2009" p 15

Such events in a building contract might be the existence or otherwise of contract variations that alter its upfront price in a significant way, and which then affect the upfront price payable to the architect by the client.

3.3.2 However, the presently defined upfront price:

> *"does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event."* [4]

In other words, the current definition of upfront price does not seem to provide any exclusion from challenge as unfair contract terms, those terms varying payment of commissions that depend on other events.

3.3.3 There is little doubt of the ACL's intention that upfront price is to be narrowly defined, for as the discussion text points out:

> *"The unfair contract terms provisions cover fees and charges levied as a consequence of something happening, or not happening, at some point in the life of the contract,.... are not payments that are necessary for the provision of the supply.....but are additional to the upfront price."* [5]

The Institute maintains that payment terms based on a percentage of the separate building contract provide protection to the consumer because the amount payable to the architect is subject to positive or negative variances in the building tender market due to economic cycles, as well as savings during the contract's performance, or escalations

The basis of the payment to the architect is equitable as an established method of reflecting the work the architect is required to carry out in providing its services to the client over the life of the building contract, and ought to be considered within the definition of the upfront price. However, as the ACL is presently drafted, such payment arrangements could well be subject to challenge.

Significantly, other standard industry clauses that provide for price compensation for unforeseen or even anticipated but unquantifiable delays, acts of prevention by the client, and many other contingencies, would also be subject to challenge under the ACL regime which in particular has not addressed the complexities of the building industry.

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4 Op Cit p 16

5 "The Australian Consumer Law consultation on draft unfair contract terms provisions 11 May 2009" p 17

3.4 Uncertainty will drive up costs

3.4.1 The risk for a relatively small business such as an architectural practice, that any individual client, or one who is part of a representative action, will (after initially agreeing to the contract terms) retrospectively claim that a challengeable contractual term is invalid due to unfairness, can only drive up costs to the detriment of all concerned, except the legal profession. Architects, like any business entity in the building industry are particularly susceptible to margins and uncertainty, particularly in a deflated market such as presently exists in Australia.

3.4.2 The nature of architectural practice, and many small businesses, is not like those businesses to whom 'contracts of adhesion' may apply involving many customers individually responsible for a minor proportion of their business revenue. Because clients are relatively few and the proportion of revenue from each is critical to the business, one of the most important "assets" for an architect in an engagement for a project is the certainty of a signed engagement contract.

This engagement contract is the most significant protection against not being paid in the face of the high costs of legal action to recover fees, compared to fees charged. The idea that a consumer client can at time of tax invoice challenge the validity of significant contract terms which provide the basis for the invoice, even if those terms in accepted practice go to the heart of the upfront price, but may not be considered so under the ACL, is of great concern.

3.5 An undue burden on business

3.5.1 A legislative policy that:

> *"recognizes that there may be circumstances where the question about whether a contract is in standard form is the subject of dispute"* [7]

is an undue burden on an industry which regularly uses pre-prepared contracts dealing with complex procedures that nevertheless are subject to the negotiation of special conditions to suit the individual needs of the party presented with the contract.

3.5.2 To place the burden of proving (under an overlay of legal costs) that a contract term is reasonably necessary to protect the interests of the architect is unwarranted, as, we submit, it is for any small business.

Consequently, consumers are then at risk that individual architects will only contract on fixed price arrangements which load the fee up to anticipate all possible contingencies, at a considerably higher service fee level than would

7 "The Australian Consumer Law consultation on draft unfair contract terms provisions 11 May 2009" p 19

otherwise be likely to apply, in order to remain within the definition of inviolable, upfront price definitions under the ACL.

3.5.2 The Institute's concern here relates to both the engagement of its members for projects and the role of its members in administering contracts between their client and the entity constructing the project.

3.5.3 In the first, there is the threat of uncertainty in the contract terms of engagement on which the architect depends for payment, as we have noted above. The second is the uncertainty of the building contract terms the architect is engaged to administer, between the architect's client and a builder, which may well be subject to challenge at any time.

3.5.4 We consider the notion that a building contract, whether a Standard Form contract such as marketed by Standards Australia or another tailored to the domestic building market and the proscriptive consumer protection legislation regimes that apply to them, (as comprehensively outlined in the Master Builders Australia submission[8]) will be subject to challenge retrospectively on the basis that it contains unfair terms, is an unacceptable onus on the industry that can only drive up costs to consumers.

3.5.5 While the Institute appreciates that the proposed subsection 5(1) excludes from the terms subject to a claim of unfairness:

> *"... a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory."*[9]

which will include all the specific provisions of the comprehensive building legislation that protects consumers, there remain many usual contract terms, which do not fall into that category.

3.5.6 Uncertainty over the validity of contract terms the architect is charged with administering can only increase the complexity and therefore the cost of administration to the architect, the consumer, or both.

3.5.7 Lest it be thought that the uncertainty will be largely resolved through the precedent of case law, with that burden borne by the unlucky few (a relative term), the proposed legislation in fact deals with individual detrimental circumstances for which precedent will not readily apply. The Institute submits that any uncertainty will not resolve itself, at least quickly.

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8 "Submission to Senate Economics Committee on Trade Practices Amendment (Australian Consumer Law) Bill 2009" – Master Builders Australia Inc. July 2009, p 22-27

9 "The Australian Consumer Law consultation on draft unfair contract terms provisions 11 May 2009" p 27

3.5.8 It is a well known fact that construction industry litigation rates rise dramatically in tough economic times, and it must be recognized that consumers, business and individuals, are also under pressure. The ACL will provide another avenue for potential escape from obligations to pay, a very counterproductive venture at this time.

3.5.9 The proposed protection afforded by excluding express legislative rights from the bounds of reviewable contract clauses is welcome, but does not sufficiently protect accepted contractual arrangements from scrutiny and the burden of challenge in individual cases.

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