



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<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup>

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.

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<sup>2</sup> *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.<sup>3</sup>
- 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.

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<sup>3</sup> *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.companymagazine.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2013-back-issues/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<sup>4</sup>.

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<sup>4</sup> 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	<i>Building and Construction Industry (Security of Payment) Act 2009 (ACT)</i>	<i>10 days after a payment claim</i>	Void
NSW	<i>Building and Construction Industry Security of Payment Act 1999 (NSW)</i>	<i>30 days to a subcontractor, 15 days by a principal to a head contractor.</i>	Void
SA	<i>Building and Construction Industry Security of Payment Act 2009 (SA)</i>	<i>15 days after a payment claim</i>	Void
NT	<i>Construction Contracts (Security of Payments) Act 2004 (NT)</i>	<i>28 days</i>	Void
Qld	<i>Building and Construction Industry Payments Act 2004 (Qld)</i>	<i>25 business days after submission of a payment claim for construction management trade contract or subcontracts.</i>  <i>For commercial building contracts, 15 business days after submission of a payment claim.</i>	Void
Tas	<i>Building and Construction Industry Security of Payment Act 2009 (Tas)</i>	<i>10 days</i>	Void
Vic	<i>Building and Construction Industry Security of Payment Act 2002 (Vic)</i>	<i>20 days</i>	Void
WA	<i>Constructions Contracts Act 2004</i>	<i>50 days</i>	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.<sup>5</sup>

<sup>5</sup> *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:
- site management;
  - variations;
  - insurance;
  - indemnities;
  - responsibility for rectifying defective works;
  - default and termination;
  - suspension; and
  - 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 than 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 \$1 billion 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.