



HOUSING INDUSTRY ASSOCIATION



# Housing Australians

Submission to the  
Director – Consumer Policy and Currency Unit, Market Conduct Division  
Treasury

## **Strengthening Protections Against Unfair Contract Terms Submission**

20 September 2021

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Housing Industry Association

## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over \$100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



## 1. INTRODUCTION

On 13 December 2019, the Treasury released the Consultation Regulation Impact Statement titled 'Enhancements to Unfair Contract Term Protects' (Consultation RIS).

In November 2020, Commonwealth, state and territory consumer ministers agreed to proceed with reforms to the unfair contract term protections.

On 23 August 2021, the Treasury sought industry feedback in relation to the Exposure Draft Legislation (Legislation) and Explanatory Materials (EM) regarding the Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Unfair Contract Terms Reforms (Consultation).

HIA takes this opportunity to respond to the Consultation.

## 2. OBJECTIONS TO THE EXPOSURE DRAFT LEGISLATION

As outlined in our previous submissions in response to the Consultation RIS, HIA does not support the extension of the Unfair Contract Terms (UCT) regime to small businesses or the scope proposed by this Consultation. HIA opposes the extension of the UCT laws on the basis that:

- The existing legal protections are adequate;
- The policy offends the principles of freedom of contract and limited government intervention;
- Laws or regulations that impose further unnecessary and inappropriate costs in business-to-business transactions should be avoided; and
- Any change to the current arrangements will cause uncertainty for contracting and subcontracting arrangements in the residential building industry.

HIA's specific objections to the Legislation include:

- HIA objects to the proposed drafting of section 27(3) of Schedule 2 of the Legislation as the nature of negotiations deemed to be 'minor or insubstantial' is unclear.
- HIA objects to the rebuttable presumption as this will create a compliance and administrative issue for businesses, and in particular small businesses. HIA requests that the Treasury provide further explanatory material in response to the questions raised in these submissions.
- HIA objects to the increase to the small business definition threshold and the removal of the contract value threshold as this will now capture the vast majority of businesses in the residential building industry and will create additional compliance and regulatory burdens with limited advantages.

HIA submits that the proposed changes represent a regulatory overreach which will simply cause more harm to small businesses than good.

## 3. EXPOSURE DRAFT LEGISLATION

### 3.1 COMMENCEMENT

HIA objects to the 6 month commencement period on the basis that this does not afford parties adequate time to review their contracts to ensure compliance with the changes.

HIA submits that a 12 month period would be more appropriate.



### **3.2 PROHIBITING USE, APPLICATION OR RELIANCE ON UNFAIR CONTRACT TERMS**

HIA objects to the proposed prohibitions which could see a party receive multiple penalties as a result of breaches for provisions contained in one contract<sup>1</sup>. This approach is unreasonable. Parties should have the opportunity to vary any clauses which are potentially unfair before being subject to multiple penalties.

HIA does not support the introduction of penalties or making unfair contract terms illegal. It is inappropriate to impose civil penalties on commercial parties and may result in undesirable results, including:

- Encouraging parties to move away from the use of standard form contracts which ultimately results in increases in costs for all parties;
- Enticing bigger business to not contract with small businesses;
- Creating more uncertainty as to what terms may be caught by the UCT framework;
- The imposition of penalties may jeopardise a business's ability to trade and may even impact the small businesses ability to be paid.

### **3.3 REMEDIES**

HIA opposes the proposed pecuniary penalties which could see individuals fined up to \$500,000 or corporations fined up to \$10 million for the proposal, application or reliance on an UCT. These proposed penalties are exorbitant and arguably unfair.

HIA notes that the EM states that these orders can only be made in circumstances where a party has, or is likely to, suffer because of the conduct. HIA does not support the proposal that the regulator and other parties who have not yet suffered loss, but 'are likely to' could bring proceedings before a court. It is dangerous to allow parties who have not suffered a loss to bring proceedings.

Additionally, HIA does not support the proposal which would allow court's to issue public warning notices or to make orders disqualifying a person from managing a corporation. These proposed powers are extreme and are not suitable for actions arising from unfair contract terms.

In relation to the adverse publicity orders, whilst HIA does not support this proposal, HIA submits that such orders should only occur if parties have either continuously contravened the unfair contract laws or have willingly and knowingly used a previously deemed unfair contract term (for example). To publicly reprimand small businesses may cause more harm than is necessary.

### **3.4 REBUTTABLE PRESUMPTIONS**

HIA objects to the inclusion of rebuttable presumption regarding a contract term subject to a proceeding which is either proposed by the same party or the contract term occurs in a contract within the same industry as the contract that contained the unfair term.

From a practical perspective, the rebuttable presumption creates a compliance issue, even before a UCT becomes subject to court proceedings. This will be an issue for small businesses (and potentially all businesses) whom it will appear will have to keep appraised of all industry contracts

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<sup>1</sup> Paragraphs 1.15 to 1.19 of Exposure Draft Explanatory Materials



and case law to avoid contract terms being deemed unfair. Whilst larger companies may be able to keep up to date in relation to case law changes, this may be more difficult for small businesses to keep on top of. Whilst parties do have the opportunity to prove that the term is not unfair in the particular circumstances or case, this will undoubtedly increase the costs of contract management and general business.

HIA submits that it may be appropriate for provisions found to be unfair to be published on a public register or similar for ease of access and in an easily understood format to allow small businesses to update their contracts accordingly. Accordingly, HIA requests that the Treasury consider and answer the following:

- How will UCT be publicised?
- How does the Treasury expect parties to be able to update executed contracts which may include UCT subject to the rebuttable presumption?
- Will there be any grace periods between a contract term being deemed an UCT and parties being able to update their contracts without being penalised or subject to proceedings?

### **3.5 STANDARD FORM CONTRACTS**

Standard form contracts are a long standing feature of the residential building industry. Many 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 in the project type and the contractual value.

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

#### ***Minimum standard provisions***

HIA notes that minimum standard provisions in compliance with relevant Commonwealth, State or Territory legislation is excluded from being subject to an UCT claim. HIA seeks confirmation that all clauses required by relevant building and construction legislation are exempt from the unfair contract laws provisions.

#### ***Effective opportunity to negotiate***

The Legislation seeks to introduce a requirement that the parties' ability to negotiate a contract be a relevant factor when considering if a term was unfair or not. The Legislation states that courts are not permitted to take into account parties negotiating "minor or insubstantial changes" or the option to "select a term from a range of options".

HIA notes that contracts for residential building work are, in some jurisdictions, bound to legislation and accordingly do not afford the parties the same level of flexibility and freedom to negotiate as other standard commercial contracts may. For example, in Queensland, commercial building contracts are heavily regulated by the *Queensland Building and Construction Commission Act 1991* (Qld) which prescribes various contractual requirements. This limits the parties abilities to negotiate a variety of contract terms.



Accordingly, HIA objects to the drafting of section 27(3) of Schedule 2 of the ACL as it is unclear whether the form of negotiations that would take place in relation to a contract for residential building work would be deemed to be 'minor or insubstantial'. Alternatively, HIA submits that the Treasury include an exemption for building contracts related to the carrying out of residential building work so that all forms of negotiations can be considered by a court.

### **3.6 CONTRACT AND SMALL BUSINESS DEFINITION THRESHOLDS**

HIA does not support the removal of the contract value thresholds under section 23 of Schedule 2 of the ACL or the changes to the definition of small business.

The removal of these value threshold fails to account for:

- Changes in economic conditions that will impact the expansion or contraction of a business;
- The way a business may structure themselves in order to either be (or not be) considered a 'small business'; and
- Incentives (or disincentives) for business growth.

As a consequence of these changes, it is likely that a substantial number of businesses in the residential building industry will be bound by the unfair contract laws as the vast majority of residential builders and independent contractors in the residential building industry will fall into the definition of small business. Accordingly, these businesses face an additional compliance burden which is unlikely to assist them.

## **3. CONCLUSION**

HIA does not support the Exposure Draft Legislation or the Exposure Draft Explanatory Materials on the basis that the changes proposed represent a regulatory overreach and creates more complexities and compliance issues for small businesses.

The Legislation goes well beyond the perceived original intention of the laws which was principally to redress any vulnerability experienced by small businesses when contracting with large businesses. It was not to allow the regulator to bring class actions against large businesses on the basis of unfair contract terms.

HIA submits that the changes proposed will only create more uncertainty, lead to an increase in cost and additional regulatory burden. HIA requests that the Treasury reconsider the Draft Legislation for the reasons set out in this submission.

