Submission
No 8

# INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS


**Organisation**: Master Builders Australia Inc

**Name**: Mr Richard Calver

**Position**: Nation Director, Industrial Relations and Legal Counsel

**Telephone**: 6202 8888



**Date Received**: 11/10/2006

MASTER BUILDERS
AUSTRALIA

# Submission to the

# Standing Committee on Law and Justice of the New South Wales Legislative Council

# on

# Unfair Contract Terms in Consumer Contracts

October 2006

Master Builders Australia Inc ABN 701 3422 100

## 1.0 Introduction

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 28,000 members. Master Builders Association of New South Wales is a significant member with over 7,000 members. The terms of reference of the Committee raise national issues and hence this submission is made by Master Builders.

1.3 Jointly with The Royal Australian Institute of Architects (RAIA), Master Builders prepares standard form contracts for sale. These contracts form the Australian Building Industry Contract (ABIC) Suite. The ABIC Suite of contracts is a new generation of standard form, plain English building contracts for use in all market sectors, domestic and commercial, which were first published in 2001, refined and added to in 2002 and updated and republished in 2003. Further changes will be made for release of a new version of the contracts in 2007.

1.4 ABIC is the latest in a range of joint building industry contracts with which Master Builders has been associated, as has the RAIA. These contracts reflect a balanced approach to risk allocation and do not contain any bias for or against consumers. Master Builders is well placed, therefore, to provide comment on issues surrounding the nature and incidence of allegedly unfair contract terms in standard form contracts.

## 2.0 Purpose of this Submission

2.1 In 2004 a discussion paper[1] that canvassed the issues currently before the Committee was published by the Standing Committee of Officials of Consumer Affairs. It dealt with the issues currently set out in the terms of reference to which this submission responds. The discussion paper covered so-called unfair contract terms which were broadly defined to be those terms in a contract which are to the disadvantage of one party (usually the purchaser of goods or services) but which are not reasonably necessary for the protection of the legitimate interests of the other party (usually the supplier). Standard form contracts, in particular, were said to be of concern because they were labelled as having a “non-negotiated character” akin to the types of provision articulated in paragraph (a) of the Committee’s terms of reference. This submission therefore weaves a discussion of the issues raised in the discussion paper into its terms, as it appears that New South Wales was involved in the authorship of the discussion paper and because of the parallels between the issues there raised and the Committee’s terms of reference.

2.2 We believe that a generalised categorisation of standard form contracts in the manner set out in the discussion paper is fundamentally flawed and some of the specific assumptions underlying the discussion paper were also flawed, particularly that standard form contracts cannot be renegotiated especially in the building and construction industry. To the contrary, our experience is that special conditions are frequently added to the ABIC pro forma documents and the ABIC contracts permit that to occur within their structure.

[1] Unfair Contract Terms Discussion Paper http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/AllDocs/CD456F7C38F523684A256E240014EF7C/$File/Unfair%20Contract%20Terms%20Discussion%20Paper%20pt1.pdf

2.3 Master Builders principal contention is that there should be no additional regulation along the lines of Part 2B *Fair Trading Act, 1999 (Vic)* referred to in paragraph (d) of the Committee's terms of reference. The Victorian legislation is touched upon in Part 3 of this submission. A modern economy requires the free flow of goods, services and ideas. Constraints on economic freedoms should be closely scrutinised and be the subject of regulatory impact statements and, in the view of Master Builders a "relevant matter" as per paragraph (e) of the terms of reference should be the necessity for a comprehensive Regulatory Impact Statement to be prepared before any legislation along the lines sought to be studied by the Committee is contemplated.

2.4 If there is to be regulation to protect ordinary consumers, however, Master Builders believes that there should be a sector by sector approach, not one size fits all regulation. This latter point is especially the case given the consumer protection orientation of current domestic building legislation throughout Australia (see box) and the generally rigorous protection afforded to building industry consumers by that legislation in New South Wales.

**Australian Domestic Building Legislation – Principal Acts (Chronological Order)**

*Home Building Act* 1989 (NSW)
*Home Building Contracts Act* 1991 (WA)
Building Work Contractors Act 1995 (SA)
*Domestic Buildings Contract Act* 1995 (Vic)
*Domestic Buildings Contract Act 2000* (QLD)
*Building Act 2000 (Tas)*
*Building Act* 2004 (ACT)

2.5 We also note that the discussion paper tends to confuse contracts of adhesion[2], (i.e. contracts where the consumer in effect agrees to pay the asking price for goods or services by virtue of an act of availing of those goods and services) with standard form contracts. The assumption of the discussion paper is that where a standard form contract is published, terms and conditions relating to that contract cannot be negotiated. This is certainly incorrect in relation to the ABIC suite and as a broad contention that is not the case for other building and construction industry standard form contracts or, in our experience, industry contracts more generally. The Committee, in Master Builders' view, should be clear in its recommendations about standard form contracts and contracts of adhesion, as differential regulations governing these classes of contract are clearly warranted.

2.6 In addition, the discussion paper says that, in relation to standard form contracts, they involve the purchaser having "no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as a supplier."[3] This is certainly not the case with domestic building contracts where the ability of a consumer to get advice on a contract that will often involve the largest single expenditure in a consumer's life, is not constrained by timing pressures. In addition, under the Victorian model for domestic building legislation and followed in several other jurisdictions, consumers are urged to read the contract and there are built in protections for consumers including cooling off periods which render the quoted statement inapplicable to the building and construction sector.

[2] http://insurance.cch.com/rupps/contract-of-adhesion.htm
A contract drafted by one party and offered on a take-it-or-leave-it basis or with little opportunity for the offeree to bargain or alter the provisions. Contracts of adhesion typically contain long boilerplate provisions in small type, written in language difficult for ordinary consumers to understand. Insurance policies are usually considered contracts of adhesion because they are drafted by the insurer and offered without the consumer being able to make material changes. As a result, courts generally rule in favour of an insured if there is an ambiguity in policy provisions.

[3] Discussion Paper, p.16.

2.7 Further, under the Victorian Act, it is a pre-condition to the entering of a valid contract that:

- the builder supplies the owners with a draft contract; and
- the owners familiarize themselves with the contract – including the seeking of advice if necessary; and
- the owners complete a questionnaire bound into the contract; and
- they can and do truthfully answer “yes” to each question.

The relevant questionnaire also contains a mandatory warning that the owner is not ready to sign the contract if he or she cannot truthfully answer yes to all questions. A cooling-off period is additional to these provisions.

2.8 In New South Wales the legislation also invokes mandatory contract provisions that must be contained in residential building contracts. As well as a mandatory cooling off period of 5 days, foundational consumer protection provisions include:

- all plans and specifications for work to be done under the contract including variations form part of the contract by operation of law;
- any agreement to vary the contract, plans or specifications must be in writing and signed by each party; and
- all work under the building contract must comply with the Building Code of Australia and all other relevant codes, standards and specifications that the work is required to comply with under any law.
- Section 18B of the Act incorporates mandatory warranties into every contract within jurisdiction.

2.9 In addition, a compulsory questionnaire has been incorporated into all NSW domestic building contracts. There are a series of questions posed which prompt the party entering into the contract to consider various procedural and job specific matters for their protection. Questions range from recognising whether or not the builder has a

licence to cover the work under the contract to an acknowledgement by the consumer that certain provisions may change the price. Consumers are also notified about the requirement for home warranty insurance to be effected by a builder where the cost of the works exceeds $12,000 and there is a requirement that consumers receive a booklet prepared by the Office of Fair Trading, Department of Commerce New South Wales setting out advice in an approved form.

2.10 Section 89D *Home Building Act* relating to jurisdiction concerning unjust contracts provides to the relevant Tribunal, the Consumer Trader and Tenancy Tribunal, the jurisdiction of the Supreme Court under the *Contracts Review Act* 1980 (NSW) with regard to contracts for residential building work, building consultancy work, or specialist work. The only restriction on the power available to the Tribunal under the Act is a prohibition from exercising power under s.10 *Contracts Review Act* 1980.[4]

2.11 It is clear therefore that in NSW a large number of consumer protections are in place. These measures arise from the provisions of the *Home Building Act* and from the attendant low cost dispute resolution provisions that consumers can utilise. There is no need to add to the existing body of regulation that provides more than adequate protection. Most building contracts are executed following prolonged negotiations and the transparency of the obligations that the consumer is to become bound to is palpable under the current legislative model. The cooling off period then permits a final opportunity for the consumer to decide to cancel the contract without adverse commercial repercussions, an opportunity the builder does not get. This obligation flows only one way and therefore sophisticated consumers may take advantage of builders as if the builder, for example, makes a mistake no cooling off period is available to relieve that burden.

[4] Section 10 is as follows: Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

## 3.0 Making Theory Explicit

3.1 The theoretical framework within which the discussion paper was published and its motivation was not explicitly stated and that question is also not clear in the context of the rationale for the Committee's inquiry. The theory that underlies the need for the analysis is, however, one that runs counter to the general notion of freedom of contract. The role of courts in upholding freedom of contract remains an essential component of the efficient working of the market especially as the doctrine has been severely curtailed by consumer protection laws in particular. The discussion paper[5] acknowledges this notion but then tends to dismiss it on the basis that this philosophy implies that the parties are able to negotiate on an equal footing, have equal bargaining power, are equally able to look after their own interests and have a full understanding of the consequences of their actions and the terms of the contract. The discussion paper states that "in reality, this may not always be the case". This is also implied in the manner in which the Committee's terms of reference are constructed.

3.2 The tension between the free-bargaining principle that underlines freedom of contract and the requirement of recognition of a socially normative view of fairness in exchange is a constant in the development of the law of contract. We believe that Australian law is currently more than sufficient in that there exist consumer protection laws and remedies to rectify grossly unfair transactions (paragraph c terms of reference) but, save in Victoria, there is no legislation that founds upon the notion of specific provisions being per se unfair. The private law of contract has increasingly become regulated by principles imported from the public law of consumer protection, already discussed above in section 2 of this submission.

[5] Ibid

3.3 Furthermore, the literal language of a contract can be overridden if it is unconscionable to so apply it or the duty of good faith can be used to require each party to act consistently with the real purpose of a contract even if the written detail of the contract appears to offer one of the parties an escape from that purpose[6]. Against this background, the discussion paper laments that the courts have not utilised the new statutory concept of unconscionability to examine the substance of a particular contract.

3.4 We contend that this legal stance of the courts correctly emanates from the underlying premise that courts do not examine the idea of contractual equivalence once free consent (an essentially procedural process) is present. Most consumer protection legislation is designed to ensure that such free consent has occurred by providing consumers with the opportunity to be properly advised and, in the case of domestic building legislation, by prescribing the minimum content of domestic building contracts with extensive additional requirements in New South Wales, such as those set out in paragraphs 2.6 -2.9 of this submission. What already exists for domestic building contracts and is now duplicated in Victoria, and what the discussion paper proposes, is introduction of a new and radical form of jurisprudence that would allow contracts to be deconstructed and rewritten after their completion by reference to their allegedly unfair terms. The duplicated function of the legislation in Victoria is all the more surprising since it emanates from the same Department at different times, and appears to have been introduced to operate in the residential building market without due consideration of the interrelationship between the two sets of consumer protection arms.

3.5 As the broad provisions of the building legislation are replicated in several States, introduction of the Victorian unfair contract provisions model will similarly compound the confusion elsewhere. The gist of the problem of confusion in Victoria is that a readily accessible Tribunal has the power under the building legislation to negate the effect of any builder/consumer contract on the ground of unfairness.

[6] For an overview of the duty of good faith in contract law, see J W Carter and E Peden "Good Faith in Australian Contract Law" Australian Construction Law Newsletter, Issue No. 94, January/February 2004 at p.6.

Application to the Tribunal requires no lawyer and a minimal fee. Further, Consumer Affairs in Victoria provides a reportedly underutilised free advice service to consumers for assistance in building matters. Application of the new legislation to an already over-regulated industry sector is contradictory and simply not justified. An overlay of the new unfair contracts provisions is both unnecessary and potentially disastrous if it is able to interpret contractual "fairness" with the benefit of hindsight. The magnitude of this step and the blow to economic freedom, especially entrepreneurship that it represents, should not be underestimated, especially as the courts have no history or recognised legal structure for assessing contractual equivalence.

3.6 The nub of this issue is found in the discussion paper where it is stated that "common law unconscionability does not address substantive issues. Therefore the doctrine has no impact where terms are unfair in themselves but there is no associated procedural unfairness."[7] Master Builders is of the view that the idea of focussing upon terms which are unfair in themselves is fundamentally at odds with the history of the development of contract law and will not advance competition or the certainty necessary to found business planning. The notion of when, as is currently legislated in the *Fair Trading Act* of Victoria, a contract "causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer" is extraordinarily subjective, especially as this criterion covers issues of price. When does a consumer pay too much and why should the law transfer the risk of the consumer paying say more than a market price at a fixed period to a supplier? Is the answer to these questions a matter that should be regulated via the courts with the benefit of hindsight in different economic circumstances to those when the contract is formed?

[7] Discussion Paper p.23

3.7 We note from the discussion paper that the UK regulations do not cover price setting so long as those provisions are in plain, intelligible language. We have urged the Victorian government to so change the legislation in that State. Manipulation of price by any external agency that interferes with this potent signal in the market economy[8] should be the subject of thorough study for its effect on each market that is sought to be regulated; hence our call for an extensive Regulatory Impact Statement if the Committee recommends to legislate along the lines of the Victorian legislation.

3.8 The discussion paper would have Australia embrace a new jurisprudence. The evidence for such a manifest alteration in the foundations of the law is not present. Whilst reference is made to overseas evidence, there is little or no current evidence of a problem in Australia. In our view, current legal remedies to protect consumers are more than sufficient in the segment of the building industry involving "unsophisticated" consumers. We believe that the reluctance of the courts to find unfairness on purely substantive grounds is to be applauded because the idea of unfairness on the basis that the actual terms of the contract lead to an injustice is too amorphous a concept upon which to base a fair, objective system of contract analysis or jurisprudence. In any event, in respect to the residential market sufficient remedies already exist.

3.9 One of the virtues of the rule of law is that it provides certainty to properly found the resolution of disputes:

"(L)aw in our society serves an essential *practical* function--that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures.

[8] As Friedman notes:
"Prices perform three functions in organizing economic activity: first, they transmit information; second, they provide an incentive to adopt those methods of production that are least costly and thereby use available resources for the most highly valued purposes; third, they determine who gets how much of the product – the distribution of income." M Friedman, R Friedman "Free to Choose" 1980, p.33.

That is, the most important function of the law is to lower *the risks of uncertainty in making long term plans*."[9]

The issue of certainty of contracts should not therefore be dismissed as of no concern given that it is a fundamental of the current legal system underpinned by the system of contract law already in place. It allows entrepreneurs who take risks to advance the interests of society as well as their own economic interests.

## 4.0 The Primary Response

4.1 Master Builders believes that any identified problem is not causing sufficient detriment in the residential building market place to justify intervention. If there are difficulties in other particular sectors, such as in the car rental market with contracts of adhesion, then sectoral specific legislation should be investigated once the relevant problems have been sufficiently identified. This identification process should include consultation with the industry sector to be regulated and should include a comprehensive study of the problem in economic terms through a Regulatory Impact Statement, given the magnitude of the intervention in the marketplace. The discussion paper asks a number of questions about the costs of various models. These costs cannot be ascertained without investing resources in economic modelling that would properly show costs and benefits – these costs and benefits should be fully weighed before the law is changed.

4.2 The discussion paper asserts that "consumers also find themselves in a position that they may not have fair and reasonable access to goods and services in the marketplace because, unless they are prepared to agree to the terms which are significantly to their disadvantage, the supplier will not provide them[10]." This problem (to the extent that it might be said to be manifest, which is not conceded) is not one that should be addressed having regard to so-called unfair contract terms. It is a problem of the market and seems typical of a monopolistic supply situation. There are other means to attack this problem

---

[9] Master Builders' submission to the Senate Employment, Workplace Relations and Education References Committee on the Building and Construction Industry Improvement Bill 2003 and Related Matters, December 2003, p.4.
[10] Discussion Paper p.41

through the *Trade Practices Act* and consumer protection legislation. Although the law does not come to the aid of those who take advantage of a superior bargaining position in a strictly commercial sense[11], there are many remedies available that protect consumers from unacceptable commercial conduct e.g. s.52 Trade Practices Act relating to misleading and deceptive conduct[12].

## 5.0 Domestic Building Legislation

5.1 The current law recognises that consumers may be vulnerable. It recognises that suppliers may have a superior bargaining position to consumers. The law has more than overcome the problem of a supplier taking advantage of a domestic consumer through a superior bargaining position. It has swung the pendulum in favour of consumers, even where the consumer has greater marketplace power than, say, a small builder. Generally, the statutes protecting consumers in the building and construction industry fulfil this function by ensuring they have sufficient information about the contract in a readily accessible form and that they have an opportunity to "cool off" after entering into the contract.

5.2 On the basis of the summary of the laws protecting domestic building consumers, we advocate no further changes to effect greater levels of protection.

## 6.0 Conclusion

6.1 Australian contract law currently requires parties to act honestly.[13] There is, in addition, a great deal of consumer and trade practices legislation that currently protects, in particular, domestic consumers by requiring domestic building contracts to be in a form regulated by statute with the legislation specifying mandatory contractual requirements for the consumer's protection.

[11] ACCC v Berbatis Holdings Pty Ltd [2003] HCA 18.
[12] For an analysis of the development of the use of s.52 in the construction industry see J Mulcahy "Who's Afraid of the TPA? A Construction Perspective" – Legalwise Seminars Pty Ltd, Building and Construction, Victoria 2003, p10.
[13] Meehan v Jones (1982) 149 CLR 571.

6.2 In the absence of cost/benefit analysis set out in a Regulatory Impact Statement, the introduction of a new form of legislation based upon the idea of per se substantive unfairness, in the view of Master Builders, cannot be justified, especially against the background of the sufficiency of current law. There is no problem that requires a solution to be applied: the consumer protection orientation of the current legislation provides more than adequate protection against unfair treatment.

∞∞∞∞∞∞∞∞∞∞∞∞∞