

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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Submission by the
Housing Industry Association

Inquiry into Unfair Terms in Consumer Contracts

**By the Standing Committee on Law and Justice,
Legislative Council of New South Wales**

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1. Executive Summary

Housing Industry Association Limited (HIA) supports the use of clear and intelligible contracts that have terms appropriate to the risk and which are reasonably necessary for the protection of each party's interests.

HIA does not support the introduction of unfair contract term laws in NSW. It is our experience that these laws lead to virtual regulation of contracts by imposing requirements at the regulator's opinion and without public consultation or consideration of net public benefit.

Unfair contract term laws have the potential to add considerable red tape and costs as, once enacted, the regulator feels compelled to use them.

If unfair contract term laws are enacted they should be strictly limited in application and not be used to interfere in contracts which are already subject to discrete regulation.

The duplication of domestic building contract regulation will only add to the complexity and compliance costs to construction businesses. Domestic building work is already the subject of significant regulation in New South Wales.

All regulation has an ongoing cost in education and advising businesses. It is not a "one off" cost when amending contracts to comply with new regulation. It is HIA's experience that once a power is enacted, it is reviewed on a regular basis and amended. There is always an ongoing cost.

HIA opposes the ability of a Government agency to prescribe a contract clause as unfair (as is the present case in Victoria). This unwarranted contractual interference leaves the affected person without a right to challenge or review.

HIA also queries how a prescription of a contract clause as unfair will operate when contracts use a vast array of different terminology and the subject matter of contract clauses differ from contract to contract. A prescribed clause would only pertain to a particular contract. HIA does not believe that there has been any prescription made under the current Victorian provisions.

If there is to be unfair contract term regulation, HIA submits that there is the need for a review mechanism to enable the Courts to determine if a contract term can be described as unfair. It will always remain open for Parliament to enact specific legislation regarding certain contract terms if Parliament is of the opinion that certain contracting behavior requires regulation.

2. Background

HIA is the largest building industry organisation in Australia with over 42,000 members. HIA members include builders and building contractors (both residential and commercial), consultants, developers, manufacturers and suppliers.

HIA's members are mainly small businesses. Approximately 20% of all small businesses are in the construction industry. HIA's members rely on it for the provision of advice, information and documentation to support their businesses.

HIA is also the producer of various standard form contracts for the use of its members. HIA building contracts are the most common form of building contract used for domestic building work in Australia. These forms of contract are produced primarily for the use of members but are available for purchase and use by the general public in all States and Territories.

3. Current Regulation

Domestic building contracts have, for a considerable period of time, been the subject of significant regulation in New South Wales via the *Home Building Act 1989* (NSW) (the Act). The Act directly affects the terms and conditions of domestic building contracts.

The Act sets in place a highly regulated contracting environment including:

- placing limits on deposits
- requiring the consumer to be given information before the contract is signed
- giving the consumer a cooling off period to obtain legal advice
- requiring the contract to be set out in a certain manner and have certain things
- similar legislation exists in the other States and Territories

In addition consumers have added protection in the form of contractor licensing, and building approval and certification regimes.

The Act is also regularly reviewed and updated to refine and enhance the desired level of consumer protection. All reviews have consequent cost imposts to HIA and to its members.

It should be noted that HIA members are already subject to the following provision in the Act aimed at regulating unfair terms and conditions:

Section 7E Regulations concerning contracts:

- 1) *The regulations may make provision for or with respect to:*
 - (a) *Clauses or matter that must be included in a contract or a class of contracts, or*
 - (b) *Clauses or matter that must not be included in a contract or a class of contracts.*
- (2) *If the regulations require a contract or class of contracts to contain a clause in prescribed terms, a contract of the kind to which the prescription relates is taken to include the clause in the terms prescribed. A contract that contains a term that is inconsistent with any such clause is unenforceable to the extent of the inconsistency.*
- (3) *If the regulations provide that any matter must not be included in a contract or a class of contracts any contract that contains that matter is unenforceable to the extent that it includes or applies to that matter.*
- (4) *Any regulations made under this section do not apply to a contract in force at the time that the regulations commence.*
- (5) *This section does not limit section 7 (3).*

There are no guidelines in the Act as to what kinds of matters are to be the subject of regulation under this very broad power. The Government has already determined that certain clauses relating to variations to the building works must be included in every contract.

The Contracts Review Act (CR Act) also applies to domestic building contracts. HIA is not aware of any order being made under the CR Act in relation to domestic building contracts.

4. Regulation by Regulation Opposed

HIA strongly opposes any general unfair contract term laws.

HIA has a long experience with legislation that prescribes the content of building contracts. While HIA normally supports most aspects of such legislation, it often requires significant consultation with Government to ensure that the outcome is practical and intended. As a point of principle, contractual relations freely and lawfully entered into should not be subject to third party interference unless there is clear evidence of some abuse on the part of one or both of the parties.

It is HIA's experience that often regulators do not understand the nature of a particular contract provision or the full and consequential effect that it may have to regulate a contract term in a particular manner. As a consequence of HIA consulting with Governments, such legislation is often refined to better achieve the intended result.

The regulation of the contents of a contract is a very serious issue and not one that should be left to a broad regulatory power. If a contract provision is considered to be unfair, HIA submits that it should be either:

- tested by the Courts and found to be unfair; or
- undergo public consultation with a view to a legislated response

HIA also has serious concerns as to how a prescription of an unfair term will operate as it appears that the regulation would relate to a specific contract term. Contracts have a wide array of drafting styles and infinitely variable content and risk allocation that would make prescription of a term difficult unless it was contract and term specific.

HIA believes that contract drafting should not be by Parliamentary Counsel. HIA supports rules describing permissible contract terms being set out in an Act and compliance being left to the person writing the contract.

5. Further Comments

HIA believes that the highly regulated environment for domestic building contracts has shown that there are frameworks in place that do not only curb what may be considered as unfair contract terms but also require contracts to adopt industry best practice.

Victorian Experience

It is HIA's experience that the Victorian Unfair Contracts Taskforce is applying a broad interpretation of the meaning of 'unfair'. It seems if a right is not reciprocal it is prima facie considered as unfair irrespective of the circumstances. The onus is then placed on the supplier or business to demonstrate why it is not unfair.

The whole of the circumstances are not being considered and the transaction based on a HIA contract is being treated in a similar manner to a large corporation using one of its own 'in-house' contracts with one of its own customers.

The issues regarding the protection given by the approval process, certification inspections, licensing regime, contract laws, warranty insurance, lending body supervision and fast cheap dispute resolution are matters not taken into account.

UK Approach

If there is to be uniform unfair contract term regulation then HIA supports the UK approach (see *Unfair Contract Terms Act 1977* (UK) and *Unfair Terms in Consumer Contracts Regulations 1999* (UK)) over the Victorian approach. The key point which HIA believes should be put forward for discussion is that the UK legislation still requires the assessment of the contract as a whole, including individually negotiated terms, to determine if the contract is a contract that could be described as a pre-formulated standard form contract.

HIA submits that the UK approach is preferable whereby only a Court can determine if a contract term is unfair. This approach provides for the parties affected to be notified and to be able to make submissions in relation to any declaration that is being sought e.g. by the Government.

All Circumstances

HIA supports the need to review the contract in all the circumstances and in its entirety. The consideration of all the circumstances does not necessarily mean that the procedural issues is the focus as it also requires the entire contracting environment to be considered and not simply the words on the particular piece of paper.

In domestic construction, there is the impact of specific contract regulation, the inspection regime, licensing systems and home owners warranty insurance.

Under the UK approach, assessing the fairness of a contract term involves taking into account:

1. the nature of the goods and services
2. all the circumstances surrounding the making of the contract
3. the other terms in the contract
4. the content of any other contract that is linked to the one under review.

Private Contracts Not Covered

HIA believes that “private” or “individually negotiated” contracts should be excluded from the ambit of any unfair contract term legislation. In this regard, any definition of “standard form contracts” should not apply to a contract which, while based on a standard form, has had amendments to it.

If unfair contract term legislation was to be introduced in New South Wales, HIA would support the inclusion of a reference to a “particular supplier” in the definition of “standard form contract”. The focus of “standard form contracts” should be contracts produced by an individual supplier rather than those that are available for purchase by the public.

Housing Industry Association

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