SUBMISSION BY THE

Housing Industry Association

to the

Senate Standing Committee on Economics on Trade Practices Amendment (Australian Consumer Law) Bill 2009

JULY 2009

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David Humphrey Executive Director IR and Legal Services d.humphrey@hia.com.au	**Housing Industry Association** 14 Edmonstone Street Sth Brisbane Qld 4101 Ph: 07 3846 1298 Fax: 07 3846 3794

1. Introduction

1.1 HIA thanks the Senate Committee for the opportunity to comment on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* ("the Bill").

1.2 HIA is Australia's largest building industry organisation with over 42,000 members. HIA's members are mainly small businesses operating in the residential construction industry, many of whom directly contract with the public. HIA building contracts are the most common form of building contract used for housing and residential construction in Australia.

1.3 Under HIA's National Code of Ethics, HIA's members agree to provide products and services with competence, fairness, value, honesty and integrity.

1.4 Consistent with our Code of Ethics, HIA supports the use of clear and intelligible contracts for businesses and consumers that have clear terms appropriate to the risk and which are reasonably necessary for the protection of each party's interests.

Background to these submissions

1.5 HIA acknowledges that COAG have established an agenda for reform and national consistency in consumer protection laws. In certain situations, legislated protection for consumers from the unjust operation of a contract of adhesion may be warranted.

1.6 However, HIA does not support the introduction of generic unfair contract term laws into the domestic building and renovation sector.

1.7 In February and May, we made submissions to the Standing Committee respectively in response to the Discussion paper and the Exposure Draft unfair contract provisions.

1.8 We do not propose to repeat at length all our earlier comments. Copies of these papers are **annexed** to these Submissions and we refer the Committee to these documents.

1.9 These Submissions are divided into 2 parts: The first part focuses on the unique nature of contracting for domestic building work and why it should be exempt from the legislation. The second part contains HIA's suggested amendments to the Bill.

Why domestic building contracting should be exempt from the Bill

1.10 There are several key elements to HIA's position:

(a) Further regulation of the use of standard form contracts in the housing industry is unnecessary as current regulation of contracting in this sector is satisfactory.

(b) Standard form contracting in the domestic building industry is not of a 'non negotiable" or "take it or leave it" nature.

(c) The transaction process for contracting in the house building industry is unique.

(d) There are intrinsic benefits to both businesses and consumers offered through the use of standard form contracts for house building contracts.

Summary of HIA's recommended amendments

1.11 HIA believes that the Bill before Parliament can be improved in the following respects:

(1) Contracting for domestic building contracting should be the subject of a specific exemption under the legislation.

(2) Removing substantial likelihood of detriment as a consideration of whether a contract term is unfair.

(3) Broadening the factors the Court must take into account in determining whether a contract term is unfair to include "the entire circumstances of the transaction".

(4) Expressly defining the term "standard form contract".

(5) Deleting the provisions that enable the government to add prohibited terms and further examples of unfair terms via regulation.

(6) Providing that any individually negotiated terms should be unaffected by the operation of the unfair contract provisions.

(7) Amending the transitional provisions.

1.12 If the Bill is passed, HIA consider that businesses should be given until 1July 2009 to amend their contracts to comply with the new laws.

Business to business contracts

1.13 HIA notes and welcomes the fact that business-to- business transactions are no longer covered under the unfair contract provisions.

2. Contracting in the domestic building industry

Current regulation of domestic building contracts

2.1 Contracting for domestic building work is the subject of extensive consumer protection. There are sector-specific laws in most State and Territory jurisdictions dealing with home building contracts:

NSW	*The Home Building Act 1989*
Western Australia	*The Home Building Contracts Act 1992*
South Australia	*The Building Work Contractors Act 1995*
Victoria	*The Domestic Building Contracts Act 1999*
Queensland	*The Domestic Building Contracts Act 2000*

2.2 The expressed intention of domestic building contract laws is to redress the perceived inequality in bargaining power between the home owner and builder. For instance, the explanatory memoranda to the *Domestic Building Contracts Bill 1999* describes the objective of the Queensland legislation in the following terms:

> "The legislation is designed to help consumers avoid pitfalls in procuring building services.
>
> For most consumers, signing a large building contract for a new home, extensions or renovations will be something experienced once or twice in a lifetime. For building contractors, it is an everyday occurrence. This disparity in knowledge and understanding of contractual principles between the parties frequently disadvantages consumers. This Bill seeks to address these market inequalities by:
>
> - requiring building contractors to obtain and provide all necessary information about the building work and domestic building contracts generally;
> - mandating fair standard contractual provisions;
> - implying standard warranties into all domestic building contracts regulated by the Bill ;
> - outlawing and/or voiding unconscionable contractual provisions; and
> - providing a cooling-off period during which a consumer may withdraw from a domestic building contract without significant penalty".[1]

2.3 Domestic building contracting is currently regulated in Tasmania via the *Housing Indemnity Act*. In 2008, the Tasmanian Government announced an intention to introduce legislation in similar terms to Queensland and Victoria.[2]

[1] *Domestic Building Contracts Bill 1999 (QLD)* Explanatory Notes, p1.
[2] *Consultation Paper – 'A New Consumer Building Framework', February 2008*, Department of Justice, Consumer Affairs and Fair Trading Tasmania, 2008.

2.4 For convenience purposes we have attached at **Appendix A**, a state by state comparison of Australian domestic building contracts laws and consumer protection provisions.

Mandatory conditions

2.5 Although there are significant variations in the regulation of domestic building contracts across the various jurisdictions, one of the key features is a requirement that a builder enters into a written contract before commencing building work.

2.6 In addition to this requirement, compliant contracts for domestic building work must also contain certain other elements:

- the full names and addresses of the parties;
- the licence number of the builder;
- a description of the works;
- the contract price and payment schedule;
- a completion date
- a consumer notice/guide and/or checklist and have certain information and warnings.

2.7 Most states also provide for additional consumer protection provisions although these may not necessarily be mandatory terms of the contract. These include:

- Statutory limits on deposits;
- restrictions on the use of cost plus contracts and rise and fall clauses;
- rules requiring variations to be in writing;
- rules on the use of prime costs and provisional sum allowances;
- rules requiring the contract to be set out in a certain manner, at a certain font size;
- requiring the consumer to be given information before the contract is signed;
- giving the consumer a cooling off period to obtain legal advice;
- Copies of any relevant plans and specifications must also be appended to the contract.

2.8 It will be an offence to commence building work without having a compliant contract and penalties apply, including licensing demerits.

Regulation of unfair or unjust terms

2.9 There are already a range of statutory provisions specifically regulating unfair terms and conditions in domestic building contracts.

2.10 In most jurisdictions a very broad power is afforded to the Court or tribunal to determine a term of a domestic building contract as “unfair” or “unjust”.

HIA is not aware of any orders made in any jurisdiction in relation to an unfair term in a standard form building contract:

2.11 Queensland

Section 77 of the *Queensland Building Services Authority Act* empowers the Commercial and Consumer Tribunal to declare any misleading, deceptive or otherwise unjust contractual term to be of no effect, or to otherwise vary a contact to avoid injustice.

2.12 New South Wales

The *Contract Review Act* applies to domestic building contracts. Under this legislation, the Court has the power to declare a particular contractual term unjust and make orders it considers appropriate including the rendering of the particular term unenforceable. Section 89D of the *Home Building Act* enables the Consumer Trader and Tenancy Tribunal to exercise all the powers the Supreme Court has in relation to unjust contracts for domestic building powers under section 10.

2.13 Victoria

Section 53(2)(e) of the *Domestic Building Contracts Act* 1995 enables the Victorian Civil and Administrative Tribunal (VCAT) to "declare void any unjust term of a domestic building contract, or otherwise vary a domestic building contract to avoid injustice".

Subsection 4 sets out the extensive matters the Tribunal may have regard to in determining whether a term of a contract is unjust under subsection (2)(e), including -

(a) the intelligibility of the contract generally, and of the term in particular;
(b) the extent to which the term, and its legal and practical effect, was accurately explained to the building owner before the term was agreed to and the extent to which the building owner understood the term and its effect;
(c) the relative bargaining power of the parties to the contract;
(d) the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
(e) whether or not it was reasonably practicable for the building owner to reject, or negotiate for a change in, the term before it was agreed to;
(f) the relationship of the term to the other terms of the contract;
(g) whether the building owner obtained independent legal or other expert advice before agreeing to the term;
(h) whether unfair pressure, undue influence or unfair tactics were used to obtain the building owner's consent to the contract or the term;

(i) whether at the time the term was agreed to the builder knew, or could probably have found out by asking, that the term would cause the building owner hardship;
(j) the conduct of the parties to the contract after the term was agreed to;
(k) whether the term is usually found in domestic building contracts;
(l) the justification for the term;
(m) whether the term is unconscionable, harsh or oppressive;
(n) any other factor the Tribunal thinks is relevant.

These provisions overlap with Part 2B of the *Fair Trading Act 1999* which:

- make unfair terms in consumer contracts void;
- enable the making of regulations prescribing certain terms to be unfair;
- make it an offence to use a prescribed term in a standard form contract;
- empower Consumer Affairs Victoria to apply to VCAT for declarations that particular terms are unfair and injunctions preventing further use of those terms.

2.14 South Australia

By Section 38 of the *Building Work Contractors Act*, the Court including the Magistrates Court can grant relief if a term of condition of a domestic building work contract that is “harsh or unconscionable”.

2.15 Western Australia

Under Section 15 (2) (b) of the H*ome Building Contracts Act*, a builder must not enter into a contract that contains any provision that is “unconscionable, harsh or oppressive”. Section 21 gives the Building Disputes Tribunal considerable powers to enforce breaches of section 15 and declare the offending term unenforceable.

Other regulation

2.16 As well as sector-specific domestic building contract laws, consumers are afforded a raft of protective measures when dealing with building contractors:

- In all state and territories, except Tasmania, builders must take compulsory home owners warranty insurance.
- Consumers have access to fast and cost with dispute resolution systems for workmanship and contractual complaints.
- Consumers have protection in the form of contractor licensing, and building approval and certification regimes.

House building is unique

2.17 The house construction process is complex and unique.

2.18 Each building project differs. Even project homes which are based on standard designs and plans are routinely altered to suit the needs of owners or the particular site.

2.19 A particular building transaction may not only be a significant transaction for the owner but can also be one for the builder as well. In many circumstances, each house is the builder's major undertaking at that time.

2.20 A builder/ contractor adds significant value (tens of thousands of dollars) to the owner's property prior to being able to claim or be paid for the materials supplied and work performed. In the meantime the builder must meet commitments to their employees, suppliers and trade contractors.

2.21 This can leave many building businesses vulnerable to collapse in the event a single progress claim is not paid.

Standard form contracts in the domestic building industry are not "non-negotiated" contracts of adhesion

2.22 The focus of the Bill is on standard form contracts where the terms have not been and are incapable of being negotiated by the consumer.

2.23 Although this may be a feature of contracting for certain subscription services such as mobile telephone contracts and gym memberships, there is a misconception that contractor and builders do not give consumers an opportunity to negotiate the terms of the contract.

2.24 The majority of HIA's members are small businesses. Contracts are often executed after a lengthy negotiation period with savvy owners who are determined to build or renovate their home at the best possible price.

2.25 Standard form documentation within the domestic building industry provides a template for parties to work off. The builder and owner are required to specifically agree to a number "variable" terms, such as:

- Contact price;
- the duration of the building period;
- the start/commencement date and the completion date;
- allocation for allowance for various delays and breaks in building work;
- connection and service costs payable to third parties;
- the amount of deposit(subject to statutory limits);
- progress payment stage amounts;
- who is responsible for the costs of planning or building approval;
- a margin applicable for variations;

- agreed damages for late completion;
- agreed damages for owner delays;
- percentage applicable for certain additional works;
- prime cost and provisional sum items;
- methods of progress payments, (including stages, intervals, percentages and amounts); and
- provision for excluded items.

2.26 The general conditions of contract are supplemented with other contract documents including the plans, specifications and schedules of finishes.

2.27 Additionally, the standard terms are routinely modified and supplanted with special conditions.

The benefits of standard form domestic building contracts

2.28 There is an assumption in the Bill that use of standard form contracts has left consumers worse off. However the advantages of using industry-accepted standard form building contracts are significant. The main home building contracts in use are the HIA and the Master Builders contracts. In addition, consumer affairs agencies in a number of states publish their own home building contracts. Consumers may choose which contract they wish to use, but all share many common features such as progress payments, provisional sums and prime cost items. What is said below about HIA contracts also applies to a greater or lesser extent in relation to these other well recognized housing industry standard form contracts.

2.29 HIA contracts 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.

2.30 As the contracts rely on many boilerplate clauses that have been considered over the years in case law, HIA contracts have the benefit of certainty. Solicitors, builders, government agencies and industry organizations have built up a high degree of expertise in administering these contracts and resolving disputes.

2.31 HIA contracts are regularly updated to keep pace with changes in the legislation and in the industry. They are inexpensive for both members and the general public who want to purchase and are readily available in printed and, in many instances, electronic format.

2.32 On the other hand, any further regulation will have an ongoing cost in education and advising businesses. It is not a “one off” cost when amending contracts to comply with the new laws. Transaction costs will escalate as

builders and owners alike are forced to engage lawyers to ensure continuing compliance with the new provisions. It will take many years and a considerable amount of litigation before the industry is able to be sure that particular provisions will satisfy the new test of 'no unfairness' as applied by the ACCC. HIA notes that there will be no 'deemed to satisfy' provisions so every clause in every contract will be under review.

2.33 Businesses also factor the allocation of risk and uncertainty in pricing their contracts. This risk premium will significantly increase if further uncertainty is added to home building contracts through the application of the proposed laws, and all of this risk premium is ultimately paid by new home owners.

Victorian experience

2.34 The application of generic unfair contract laws to domestic building contracting in Victory has created an overlapping of the sector specific building laws and general fair trading laws and a blurring of the roles and responsibilities of Consumer Affairs Victoria and the Building Commission.

2.35 It is HIA's experience that CAV apply a very broad interpretation of the meaning of 'unfair'. If a right in a contract is not reciprocal it is prima facie considered as unfair or imbalanced irrespective of the circumstances. The onus is then placed on the supplier or business to demonstrate why it is not unfair.

2.36 This is a fairly subjective approach and in the course of consultations with CAV, HIA has had to justify the legitimacy of certain clauses which have been acceptable and established terms in building contracts for decades, such as:

- The entitlement of a builder to suspend works when the owner fails to make payment of progress payment stage;
- The entitlement of a builder to refuse to hand over the works if the owner fails to attend to payment of the final progress payment claim.

2.37 HIA is concerned if a similarly intrusive approach being taken by the ACCC to standard form building contracts without an appreciation of the broader background and context in which building contracts are prepared. It is the building regulators in each State which have this knowledge and which are in the best position to deal with unfairness issues through their existing legislation. Superimposing scrutiny by a Federal consumer affairs agency can only add cost and confusion without materially benefiting consumers.

3. HIA's suggested amendments to the Bill

3.1 HIA believes the Bill can be improved by the following amendments:

Amendment 1 - Domestic building contracts to be exempt

3.2 HIA's principal submission is that domestic building work (as defined in respective State legislation) should be exempt from unfair contract provisions.

3.3 HIA proposes an amendment to the Bill in the following terms:

> Schedule 1, Part 1, Division 3, Item 8, page 9 (after line 23), at the end of the clause, insert:
>
> (4) This Part does not apply to a building contract made under or covered by the following State or territory laws:
>
> *(a) the Domestic Building Contracts Act 2000 (Qld);*
> *(b) the Home Building Contracts Act 1991 (Western Australia);*
> *(c) the Domestic Building Contracts Act 1995 (Victoria);*
> *(d) the Home Building Act 1989 (NSW);*
> *(e) the Building Act 2004 (ACT);*
> *(f) the Building Work Contractors Act 1995 (SA);*
> *(g) the Building Act 2000 (Tas);*
> *(h) the Building Act (Northern Territory).*

Amendment 2 – definition of unfair – *delete "substantial likelihood of detriment."*

3.4 Under the current criteria in the Bill, 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. This is overwhelmingly broad and reverses the ordinary rules of proof. Detriment should be limited to actual financial loss only.

3.5 Further the criteria as drafted will require a subjective assessment of how the clause will affect that particular consumer. The consumer is the person best position to show how an allegedly "unfair" term will affect them.

3.6 The clause should be amended as follows:

> Schedule 1, part 1, Item 2, page 6 omit the text of subsection (2)(a) and replace with:

(a) the extent to which the term if applied or relied on would cause actual and material financial detriment to a party

Amendment 3 –definition of unfair – the overall circumstances of the transaction should be considered

3.7 The Bill provides that in determining whether a contract term is unfair the Court must take into account the "contract as a whole". This expression is open to judicial sentiment.

3.8 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 consumer protection provisions, the overall allocation of risk between the parties to the contract and any individually negotiated or variable contract terms in considering whether a term is unfair.

3.9 This will enable the court to take in account the various trade-offs in the benefits and burdens between the parties that take place throughout the contract:

Schedule 1, part 1, Item 2, page 6, after the end of subsection (2)(c) add:

; and
(d) the overall circumstances of the transaction.

Schedule 1, part 1, Item 2, page 6, after the end of subsection 4 add:

(5) The overall circumstances of the transaction includes any other legislated consumer protection provisions, the overall allocation of risk between the parties to the contract and any individually negotiated or variable contract terms.

Amendment 4 - Any individually negotiated terms should be unaffected

3.10 With the exception of the "upfront price" the Bill has a blanket approach to all terms in a standard form contract; it is assumed that all standard form contracts are presented in a "take it or leave it" fashion. In fact, many standard form building contracts are simply used as a template document which the parties work off and use as a basis for further negotiation.

3.11 In this regard, notwithstanding the use of a pre-printed contract, any terms that have been individually negotiated should not be subject to further scrutiny under the unfair contract provisions:

Schedule 1, part 1, Item 5, page 7, add:

(3) Section 3 does not apply to any terms of a consumer contract that have been individually negotiated.

Amendment 5 – Express definition of standard form contract

3.12 To avoid opportunities for avoidance which might be occasioned by the use of an express definition, "standard form contract' has not been defined. Instead the Bill refers to presumptions that must be rebutted by the supplier.

3.13 The deliberately vague and open ended drafting of the standard form contract provisions will inevitably capture many contracts that on a common sense approach are not standard form. It deprives business of certainty. It is not appropriate that businesses need to wait until they are the subject of a claim under the Act before they know whether or not their contracts are covered by these provisions.

3.14 Whilst the existing factors listed in item 7 of the Bill are subjective, they can provide the base for an express definition:

Schedule 1, part 1, page 8 delete Item 7 and substitute with

"7. A standard form contract is a contract in which:

(a) the party supplying the goods or services to the consumer has all or most of the bargaining power relating to the transaction;
(b) the contract was prepared by that party before any discussions relating to the transaction occurred between the parties;
(c) the consumer was required to accept of reject the contract (other than the terms referred to in section 5(1)) in form they were presented;
(d) the consumer was not given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 5(1); and
(e) the terms of the contract (other than the terms referred to in section 5(1))take into account the specific characteristics of another party or the particular transaction.

Amendment 6 – Example of unfair terms provisions

3.15 The current list of examples in the Bill is quite expansive. The power to introduce further examples of unfair terms should vest with Parliament not through the use of Regulations:

Schedule 1, Part 1, Item 4

Delete subsection (n)

Amendment 7 – Deletion of prohibited terms provisions

3.16 If particular contractual terms are to be banned outright they should be included in the text of the Bill. The power to introduce banned terms through Regulation is inappropriate and should be removed:

Delete Division 2 – Prohibited terms provisions

Amendment 8 – Transitional provisions to apply to varied terms only

3.17 Contract variations can have 2 connotations in the context of building and construction contracts:

3.18 Firstly a variation can signify an amendment to a particular contractual term, such as agreement by the parties to extend the date for practical completion. More commonly, it refers to an alteration, whether by addition or omission, to the builder's scope of works. This "variation" occurs through the use of an existing contractual mechanism and could be as a result of the owner changing his or her mind or by reason of an external event such as the lack of availability of suitable materials.

3.19 The transitional provisions refer to the "contract as varied". Arguably this will capture the entire building contract if it is subject to a change to the scope of works after the commencement of the unfair contract provisions. The transitional provisions should only apply to "varied terms" and those terms which are not varied in accordance with the contract:

3.1 Schedule 1, part 1, Item 2, page 10, substitute subparagraph 2(b) with: (b) if a term of the contract is varied on or after that commencement, and paragraph (a) has not already applied in relation to the contract – that Part applies to the term of the contract as varied, on and from the date (the variation day) on which the variation takes effect, in relation to conduct that occurs on or after the variation day. Part A will not apply to variations, where the contract provides for the method or means of making such variations.

Final comment

3.20 Standard form contracts have been in existence for hundreds of years. If the Bill is passed, businesses will need an appropriate amount of time to update and replace their existing contracts. HIA has over 35 contracts that will need to be reviewed against the new laws. In this regard, there is simply not enough mischief created by the current arrangements to justify a commencement date as early as 1 January 2010. The unfair contract provisions should not take affect until 1 July 2010 at the earliest.

4. Appendix A – State by State comparison

State by state comparison of Australian domestic building contracts laws and consumer protection provisions

	NSW	Vic	Qld	SA	WA	Tas	ACT	NT
Building contract legislation	Home Building Act	Domestic Buildings Contracts Act 1995	Domestic Buildings Contracts Act 2000	Building Contracts Act 1995	Home Building Contracts Act 1991	Housing Indemnity Act	Building Act	Building Regulations
Builders must warrant their work	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Builders must enter into formal building contracts in addition to warranting their work	Yes	Yes	Yes	Yes	Yes	No	No	No
Builders warranty insurance covered by legislation	Home Building Act 1989	Building Act 1993 and Domestic Contracts Act 1995	Building Services Authority Act 1991	Building Contracts Act 1995	Home Building Contracts Act 1991	Warranty insurance is optional	Building Act	Building Act 1993

Agency for administering insurance legislation	Fair Trading	Infrastructure	Housing	Consumer and Business Affairs	Builders' Registration Board	Consumer Affairs and Fair Trading	Planning and Land Mgt	Infrastructure, Planning and Environment
Agency for administering building licensing laws	Fair Trading	Building Commission	Building Services Authority	Consumer Affairs	Builders' Registration Board	Not applicable	Planning and Land Management	Not applicable
Building contract must state fixed price	Yes, and/or warning	Yes	Yes	Yes	Yes, with special conditions for 'cost plus' contracts	Not applicable	No	No
Building work must be in accordance with contract standards	Yes	Yes	Yes	Yes	Not applicable	Not applicable	No	No

Rise and fall price clause banned in building contracts	No	Restricted warning	Yes, banned under $200,000	No, Unless work is completed outside contract period	Yes	No But Consultation paper released February 2008 recommends they be banned	No	No
Builders must be licensed or registered	Yes	Yes	Yes	Yes	Yes, except in certain country areas	No	Yes	No
Other building trade contractors must be licensed	Yes	Yes	Yes	Yes	No	No	No	No
Agency responsible for licensing/ registering building practitioners	Fair Trading	Building Commission	Building Services Authority	Consumer Affairs	Builders' Registration Board	Not applicable	Planning and Land Management	Not applicable

Builder must satisfy minimum technical qualifications and good character standards to be licensed	Yes	Yes	Yes	Yes	Yes	Not applicable	No	Not applicable
Builders must satisfy minimum financial criteria to be licensed	No	No	Yes, same as for insurance	Yes, but low threshold	No	Not applicable	No	Not applicable
Agency for handling building licences complaint enquiries	Fair Trading	Consumer Affairs Victoria	BSA	Consumer and Business Affairs	Building Disputes Tribunal	Consumer Affairs and Fair Trading	Planning and Land Mgt	Consumer Affairs
A dedicated appeals tribunal hears building disputes	Yes, Consumer, Trader and Tenancy Tribunal	Yes, Victorian Civil and Administrative Tribunal.	Yes, Commercial and Consumer Tribunal	No	Yes, Building Disputes Tribunal	No	No	No

5. Appendix B - HIA's submissions dated 17 March 2009

79 Constitution Avenue
Canberra ACT 2612
Tel: (02) 6245 1300
Fax: (02) 6257 5658
www.hia.com.au

17 March 2009

SCOCA Australian Consumer Law Consultation,
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: australianconsumerlaw@treasury.gov.au

'An Australian Consumer Law: Fair markets - Confident consumers'

We would like to thank the Committee for the opportunity to comment on the proposed new consumer law framework.

HIA is the largest building industry organisation in Australia with over 42,000 members. The majority of HIA's members are small businesses operating exclusively within the domestic construction market.

HIA building contracts are the most common form of building contract used for domestic building work in Australia. HIA advocate the use of clear and intelligible consumer contracts that have terms appropriate to the risk and which are reasonably necessary for the protection of each party's interests.

In principle, we support a new national consumer law regime built on the provisions of the *Trade Practices Act*. However we have some concerns with a number of aspects of the current proposal:

Chapter 6 - Unfair Contracts

HIA does not believe that either consumers or business would benefit from the introduction of unfair contract term laws into the domestic building and renovation sector.

- **Current regulation is satisfactory**

  Contracting for domestic building work is the subject of extensive consumer protection regulation throughout Australia at a state by state level. Consumers are afforded are range of protective measures ranging from contractor licensing, building approval and certification regimes, compulsory warranty insurance and access to fast, inexpensive dispute resolution.

  Most states have introduced sector specific domestic building contract laws to redress the perceived inequality in bargaining power between the home owner and builder. Common features of these laws include:

  - *mandatory terms and conditions;*
  - *warning statements and checklists;*

- *implied warranties of materials and workmanship;*
- *limits on deposits and bans on up front progress payment;*
- *limits on cost escalation clauses;*
- *outlawing and/or voiding unconscionable contractual provisions; and*
- *cooling-off periods during which a consumer may withdraw from a contract without penalty*

HIA is not aware of orders made in any jurisdiction in relation to an "unfair" term in a standard form building contract.

- **Domestic building is unlike the other industries**

Contracts for domestic building work are executed often after a lengthy negotiation period, including discussions on the design and type of house and materials to be used in construction.

Most standard form contracts have a number of variable terms. These include, the contact price, provisional allowances, the start date and building period, who is responsible for the costs of planning approval and liquidated damages. Parties frequently insert their own special conditions.

- **No evidence of market failure**

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

Unfortunately, the Productivity Commission has relied heavily on a Consumer Affairs Victoria (CAV) telephone survey which found that a very small percentage of respondents in Victoria, perceived that they had encountered a building contract that may have contained an "unfair" term.

Our experience does not give evidence to consumer dissatisfaction or perceptions of unfairness with HIA's standard terms and conditions or contracts for domestic building contracts generally.

- **All the Circumstances**

In *Director of Consumer Affairs v AAPT Ltd [2006] VCAT 1493*, VCAT found that terms may be unfair even if they were individually negotiated or brought to the consumer's attention. HIA would be concerned if this approach is adopted nationally.

If a unfair contract regime is introduced, then individual contracts should be reviewed in its entirety and in all the circumstances, including any other legislated consumer protection provisions, the overall allocation of risk between the parties in the contract, and any individually negotiated or variable contract terms.

- **Onus of proof (page 12)**

  A party making an allegation that a provision of a contract is unfair or that the particular contract in question is "standard form" contract ought to bear the onus of proving their allegations. There is great risk of frivolous and vexatious litigation in the current approach.

- **Proposed list of banned terms (pages 35 and 37)**

  In our view the categorisation of certain terms as generically "unfair" in isolation is inappropriate. Rather, when judging whether a clause is unfair, care needs to be exercised to consider the clause in its context and in the context of the product, service and conduct of all of the parties.

  We refer the Committee to **Attachment A** for our comments on some of the specific clauses proposed to be banned.

Chapter 11 – Suggested reform to definitions

HIA does not support the extension of the "consumer contract' provisions to business-to- business transactions.

Whilst on some occasions, small businesses such as trade contractors might not have equal bargaining power vis-à-vis the principal contractor or builder, in recent years with industry wide trade skills shortage this has often not been the case.

Additionally there are often broader commercial considerations surrounding a business transaction. It is not uncommon for a business owner to simply make a commercial decision to proceed with a contract that may contains several less favourable conditions but when viewed in its entirety the contract treats the business favourably.

Your sincerely
HOUSING INDUSTRY ASSOCIATION LTD

Chris Lamont
Chief Executive - Association

Attachment A

Although most of the terms listed at pages 35 and 37 do not affect domestic building contracts, the following terms as listed below require amendment were they to have any application to the housing industry:

- *Clauses that let the supplier supply goods or services that are not those contracted and paid for by the consumer*

  In domestic construction, it is not unusual that colour and grain of natural materials such as timber and granite can vary. It is necessary in these circumstances to include clauses enabling the builder to provide substitute materials if necessary.

- *Clauses that permit the supplier to change the price of the goods or services contracted for without allowing the consumer to terminate the contract*

  A builder's ability to unilaterally increase the price under a fixed price contract is limited and is only triggered if the due to the introduction of new taxes or charges after the contract is entered into. Such a right needs to be preserved.

- *Terms retaining title for suppliers in goods that cannot be removed from consumer's premises without damage; terms allowing suppliers to repossess such goods*

  If the builder has supplied items and materials have simply been attached to something else, but have not lost their identity and can be easily removed, they may be recoverable and should not be subject to ban.

- *Terms denying pre and post contractual representations/ entire agreement clauses*

  These clauses reflect the general contract law understanding that a document is executed with the object of crystallizing the bargain and superseding all prior negotiations.

  HIA considers that there is nothing inherently fair or unfair about the inclusion of properly drafted "entire agreement" boilerplate clauses. The *Trade Practices Act* prevents reliance on entire agreement clauses when it is inconsistent with a representation made during negotiations in relation to the document.

6. Appendix C - HIA's submissions dated 21 May 2009

79 Constitution Avenue
Canberra ACT 2612
Tel: (02) 6245 1300
Fax: (02) 6257 5658
www.hia.com.au

21 May 2009

The Australian Consumer Law:
Consultation on draft unfair contract terms provisions
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: australianconsumerlaw@treasury.gov.au

The Australian Consumer Law: Consultation on draft unfair contract terms provisions

We would like to thank the Committee for the opportunity to make submissions on the exposure draft unfair contract terms

The Housing Industry Association (HIA) is Australia's largest building association. HIA contracts are the most common form of building contract used for the construction of houses and domestic building work in Australia.

Any change in the laws for standard contract will impact upon almost all of HIA's membership and importantly all businesses in the residential construction industry, including more than 300,000 small businesses.

BACKGROUND

On 17 February 2009 the Government released the discussion paper 'An Australian Consumer Law: Fair Markets – Confident Consumers'.

In our submissions dated 17 March 2009, we confirmed HIA's "in principle" support for a new national consumer law regime built on the provisions of the *Trade Practices Act* but expressed reservations as to potentially negative impact national regulation of unfair contract terms will have on HIA members and their clients.

We do not propose to repeat this material in detail except to confirm that there are cogent reasons why we consider that neither consumers nor business will benefit the introduction of generic unfair contract term laws into the domestic building sector:

- **Current regulation is satisfactory**

  Contracting for domestic building work is already the subject of extensive consumer protection regulation, with most States having introduced highly detailed sector-specific domestic building contract laws to redress the perceived inequality in bargaining power between the home owner and builder. This comprehensive regulation covers unjust or unfair contract terms. Many states have mandatory warning statements and cooling off periods. Industry Standard form contracts are drafted to comply with this legislation, (and the Trade Practices Act), and essentially provide a structure for further negotiation rather than prescriptively setting each and every element of the contract.

- **Domestic building is unlike the other industries**

  Unlike other industries such as the telecommunications and finance industry, standard form contracting in the domestic building industry is not of a 'non-negotiable nature".

  Most "standard form" contracts have a number of variable terms. These include the contact price, prime cost items and provisional sum allowances, the start date and building period, which party is responsible for the costs of obtaining planning approval, and the amount of agreed liquidated damages for late completion. Parties frequently insert their own special conditions to reflect their own circumstances.

  Due to the amount of money involved in building contracts, consumers often take legal advice before signing and have special conditions drafted by their solicitors. The contrast between such contracts and those in the telecommunications and finance industry is marked.

- **No evidence of market failure –**

  There is no evidence or evaluation of market failure justifying the need for further regulation of building contracts. Further, the current regulation requires industry participants such as HIA to adopt industry best practice in their standard form contract drafting.

- **Benefits of Standard Form contracts**

  Building projects are complex, and all parts of the building contract must work harmoniously together if the project is to be successfully completed. There is benefit to consumers in using contracts which cover all necessary issues, whose standard terms have been the subject of court consideration over the years and whose meaning has been well settled and understood. Boilerplate clauses in building contracts are over time the subject of litigation and a large body of precedent has been built up. The value of this body would be lost if courts had to constantly consider new and unique 'home-made' contract terms covering essential elements of building contracts.

  Further, standard form contracts deliver cost efficiencies and low transaction costs. Building companies simply do not have the time or resources to engage legal counsel every time they want to enter into a new transaction with a client.

  There is a strong probability that further regulation in the form proposed will increase compliance costs, which ultimately will be borne by the consumer. These additional compliance costs imposed on all housing consumers will far outweigh any benefits accruing to particular consumers through relief from unfairness. HIA considers that it is unnecessary to impose these additional compliance costs on all housing consumers when potential contractual unfairness has already been addressed through the existing detailed Federal and State regulation outlined above

THE EXPOSURE DRAFT LEGISLATION

Our specific comments on the exposure draft legislation follow:

1. The definition of "standard form contract"

We note that a deliberate decision has been made to not define 'standard form contract'. However, the way the proposed legislation is drafted leaves it unclear whether HIA or related residential building contracts would or would not be covered by the Act.

On one view, the proposed criteria identifying an unfair contract to which the Act applies arguably would not catch HIA contracts at all, but because of the reversal of the onus of proof, this would need to be argued. This presents an unreasonably risk of uncertainty to builders.

We note that the criteria are -

- 'one of the parties has all or most of the bargaining power relating to the transaction'; - this depends on the economic circumstances and is not inherent in every housing contract;
- 'the contract was prepared by one party before any discussion relating to the transaction commenced'; but this depends on what you view as 'the contract'. The signed contract will have been prepared with the particular client's input and requirements as its essence –the normal HIA pre-printed contract contains some boiler plate clauses but is just a structure into which the parties then inject their particular terms relating to the particular work that is the subject matter and essence of the contract. It is usual for issues such as access, liquidated damages, responsibility for obtaining and/or paying for plans and approvals to be matters of agreement between the parties. ;
- 'the party other than the supplier was required to accept or reject the terms on a 'take it or leave it' basis; and' – under the HIA contracts, all terms are negotiable and the contracts are deliberately designed to be modified by the parties. The fact that a particular supplier was not willing to include particular terms does not necessarily mean that a residential building contract form is a standard form contract caught by the Act;

- 'the terms of the contract as offered by one party take into account the specific characteristics of the other party or the particular transaction' – this will always be the case with a building contract.

2. Test for unfairness

The exposure draft bill deems a term to be '**unfair**' when:

- it causes a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary to protect the legitimate interests of the person relying on the term.

The following factors **must** be taken into account:

- the extent to which it would cause, or there is substantial likelihood that it would cause, detriment (financial or otherwise) to a party if the term were to be relied on
- the extent to which the term is transparent
- the contract as a whole.

There is a reverse onus of proof on the party who would be advantaged by the term to prove that the use of the term in the standard form contract was reasonably necessary to protect their legitimate business interests.

In the consultation paper it is posited that a respondent would be able to adduce any evidence that could be relevant to satisfying the Court the clause is "was reasonably necessary".

However not requiring a consumer to suffer an actual detriment would seem to mean that Courts will assess the term on the basis of its inherent fairness/ unfairness.

Having such an open-ended and subjective test will lead to uncertainty for businesses required to utilise standard form documents.

Whilst "**the contract as a whole**" provision will enable the Court to look at the entire contract, HIA submits that the *"full circumstances of the transaction"* must also be included as an express

consideration together with examples such as any other legislated consumer protection provisions. Examples of such circumstances include the allocation of risk between the parties in the contract, and the circumstances surrounding any individually negotiated terms.

3. Terms that may be considered unfair

The draft legislation sets out a non-exhaustive list of terms that may considered to be unfair. In HIA's experience many of the terms listed do not affect contracts for domestic building.

This being said, HIA is concerned with the overriding assumption that because a right is not reciprocal, it is unfair.

For instance, it may in certain circumstances be entirely appropiate for a builder to have the sole power to unilaterally (but subject to express constraints) impose a variation.

Variations in building contracts are usually made in 2 circumstances:

- At the request of the owner who wants to change the plans or scope of works or substitute materials or finishes. For such a variation to be effective the builder must (but is not required to) agree to the request. Often an owner will request a variation without appropriate understanding of the cost consequences.
- At the request of the builder to comply with a lawful requirement such as a planning condition imposed by a local council in the course of granting development approval, or as a result of an unforeseen circumstance such as striking rock when excavating for foundations. It is not appropriate for an owner to refuse such a request since to do so would prevent the works being constructed at all and would amount to a repudiation of the contract by the owner. In order to ensure fairness, HIA contracts contain provisions to allow the contract to be terminated by the owner where the cost of such forced variations would be excessive or would result in a substantially different building to what the client and the builder originally contemplated.

4. Prohibited terms

Whilst we note at this time no banned terms are listed, in the earlier consultation paper a number of terms were proposed to be banned. HIA is concerned with potential for the piecemeal introduction of "prohibited terms' via regulations, particularly when this is retrospective in application to contracts already on foot. Given that a party who relies on a purported prohibited term may suffer a pecuniary penalty, any prohibited terms should be subject to appropriate scrutiny and public consultation, prospective in operation, and enacted through substantive legislation in the Parliament.

5. Application

Several aspects of the application of the proposed legislation concern HIA:

- **Commencement date**

  We are concerned that the proposed commencement date of 1 January 2009 will not businesses or organisations utilising standard form contracts sufficient time to review their existing contracts for compliance. HIA has long experience of implementing contractual changes arising out of amendments from time to time of State home building Acts, and it is a difficult and time consuming exercise. HIA submits that if the legislation is enacted, a lead in period of 12 to 18 months is more appropriate. Builders hold stocks of existing printed contract forms which will need amendment, and these days many contracts are made available in electronic format, which will require alteration and testing of existing software.

- **business-to- business transactions**

  We repeat our previous submissions that it is inappropriate to extend unfair contracting laws to commercial contracts.

  The law of contract is based upon the freedom of contract principle. It is true that many businesses might not have equal bargaining power, but there are often broader commercial considerations surrounding a business transaction. Many contracts are let

by tender, and the whole tendering process will be undermined if tender terms can be subsequently revised through an unfair contract mechanism.

In the context of commercial building transactions, often it is the client who is in a better contractual position than the principal contractor/ builder, via the appointment of a contract superintendent or architect with the ability to certify payment claims and authorise the release of retention monies.

The simplistic extension of unfair contracting to such commercial transactions will cause unnecessary confusion and uncertainty for multi-million building projects (including government contracts) utilising a standard form contract template.

- **Transitional provisions**

  We note that Section 7 (2)(B) bring "contracts as varied" after the commencement date under the coverage of the legislation.

  Building contracts are routinely the subject of multiple variations. As noted above, most building contracts have mechanisms for administering variations. Any transitional coverage should be limited to "variations" not otherwise provided for in the existing contract.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LTD

Chris Lamont
Chief Executive - Association