

MASTER BUILDERS
A U S T R A L I A

24 July 2009

M J Hawkins
Secretary
Senate Economics Committee
Parliament House
CANBERRA ACT 2600

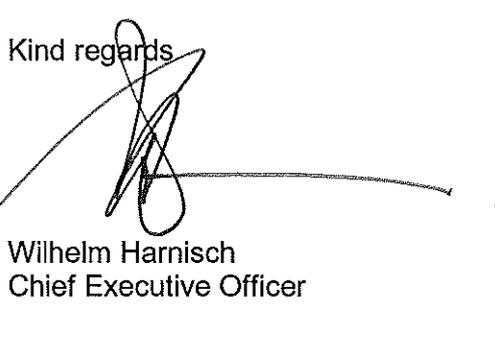
Dear Mr Hawkins,

Trade Practices Amendment (Australian Consumer Law) Bill 2009

Please find attached in duplicate a copy of Master Builders Australia's submission on the Trade Practices Amendment (Australian Consumer Law) Bill 2009.

We are seeking exemption from the legislation for domestic building contracts

Kind regards



Wilhelm Harnisch
Chief Executive Officer



MASTER BUILDERS
AUSTRALIA

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

July 2009

Master Builders Australia Inc ABN 70 134 221 001

building australia



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[Submission to Senate Economics Committee](#)
Trade Practices Amendment (Australian Consumer Law) Bill 2009

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1 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 31,000 members.

2 PURPOSE OF SUBMISSION

- 2.1 On 24 June 2009, the Federal Minister for Competition Policy and Consumer Affairs introduced the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the Bill) into Parliament. The Bill amends the *Trade Practices Act 1974* (Cth) (TPA) and the *Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act) to introduce a national unfair contract terms law, new civil penalty provisions and a series of new enforcement tools for the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) (including substantiation notices and infringement notices).
- 2.2 Master Builders has very real concerns about the introduction of the Bill as it affects building contracts, particularly domestic building contracts. This is because its provisions would introduce a high degree of uncertainty into the residential building sector where the large majority of transactions are undertaken using standard form contracts. This uncertainty will be to the detriment of both business and consumers and will bring into effect a dual level of regulation if the Bill's provisions are passed. Master Builders has articulated this view at length in two prior submissions to Government. Most of the basis for those concerns remains when considering the provisions of the Bill.
- 2.3 On 17 February 2009, the Government released a Discussion Paper *An Australian Consumer Law: Fair Markets – Confident Consumer*. That Discussion Paper sought views on the model for a new National Consumer Law, including provisions regulating unfair contract terms. In response to that Discussion Paper, Master Builders lodged a detailed submission with Treasury in March 2009 (the First Submission). The Government then announced that it

planned to 'fast track' legislation based on the unfair contract provisions proposed in that Discussion Paper.¹ On 11 May 2009 it released a Consultation Paper *The Australian Consumer Law – Consultation on draft unfair contract terms provisions*.² The related Press Release indicated that the Government was likely to introduce legislation to Parliament in June 2009³ and the Bill is the result. Master Builders also then made a submission (the Second Submission) in which Master Builders continued to advocate that the building and construction industry should be exempt from the national unfair contracts regime, as industry specific legislation provides sufficient regulation of the building and construction industry as well as strong protection for consumers. Master Builders then commented on the proposal for the new Australian Consumer Law set out in an Exposure Draft Bill.

- 2.4 The Government has provided only a very limited time to comment upon proposals that will markedly affect Australian jurisprudence. Most of the substance of the Exposure Draft Bill has been carried over into the Bill. Accordingly, we attach as Attachment 1 the First Submission and as Attachment 2, the Second Submission. The concerns outlined in the attachments remain.
- 2.5 Rather than entirely traverse the range of arguments set out in the First and Second Submissions, we ask the Committee to take account of the matters set out in the Attachments. **This submission emphasises a number of key points that we submit should lead to exemption for those standard form contracts which are subject to domestic building contract legislation.** This submission is limited to the Australian Consumer Law (ACL) and does not cover the provisions of the Bill which relate to changes proposed to the ASIC Act.

¹ "Australian consumers to receive protection from unfair contract terms", Press Release No. 9 at: <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/009.htm&pageID=003&min=ceb&Year=&DocType=> accessed on 18/5/09.

² 'The Australian Consumer Law – Consultation on draft unfair contract terms provisions' available at <http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1537> accessed on 14/5/2009.

³ 'Consultation on Unfair Contract Terms' Media Release dated 11 May 2009 at: <http://www.alp.org.au/media/0509/msat111.php> accessed on 14/5/2009.

3 CONSUMER CONTRACTS – EXCLUSION OF DOMESTIC BUILDING CONTRACTS

- 3.1 Master Builders advocated in the Second Submission that any legislation in this subject area should be limited to consumer contracts. We thank the Government for listening to those representations. The Bill's unfair contract terms provisions apply to consumer contracts only. This is Master Builders' preferred policy position adopted for the reasons set out in the Attachments.
- 3.2 However, whilst this step is welcomed, it does not go far enough. The question must be asked as to what is the mischief that the legislature seeks to remedy. As the Minister said in his Second Reading speech, it is the Government's intention that: "This Bill will introduce changes that will make life easier for all consumers."⁴ With that intention in mind, Master Builders notes that standard form contracts in the domestic sector of the building and construction industry are for the benefit of consumers and are backed up by legislation that provides substantial protections, set out in detail in the Attachments.
- 3.3 Every building or structure will have unique characteristics, even if it is a project home. This fact is reflected in the drawings, specifications and individual building schedules created for a specific project on the particular site. However, the fundamental legal rights and obligations of the parties, the owner, builder, subcontractor, rarely change from project to project. It is in this context that standard form contracts fulfil the function of applying these rights and obligations in a consistent and uniform manner. They also provide a number of other practical benefits summarised by one law firm as follows:

*The use of standard form construction contracts has a number of advantages for the various parties that participate in the construction process, including the speed at which tender documents can be produced, familiarity for contract administrators and tendering contractors and, in relation to the more popular and long standing forms in use, an established body of case law which can assist in the construction and interpretation of contracts.*⁵

⁴<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber%2Fhansard%2F2009-06-24%2F0078%22>

⁵Kevin Owen, Johnson, Stokes and Master *The Amendment of Standard Form Construction Contracts* <http://www.mcmullan.net/ecj/amend.html> accessed 30 June 2009

- 3.4 The standard form contracts used in the building industry are intended and designed to have their principal terms negotiated and inserted by the parties in each instance. These terms include:
- the contract price and payment terms;
 - the start and completion dates (or the duration) of the works of the contract;
 - post-completion provisions for rectification of defects at no cost to the consumer (defects liability period);
 - details of the security for the builder's performance of its obligations (cash retention or bank guarantee, to be held by the consumer);
 - amounts payable to the consumer in respect of late completion (liquidated damages);
 - the builder's allowable margin on variation costs;
 - types and details of satisfactory insurance policies for the protection of the consumer's property and other interests during the works;
 - the nomination of an (expert) agent, superintendent or administrator to assist the consumer;
 - any special conditions that the parties may agree upon.

These terms are, in fact, negotiated for each contract.

- 3.5 The type of standard form contract that creates the problem that the legislation is designed to address is the contract of adhesion, able to be defined as:

A contract that heavily restricts one party while leaving the other free (as some standard form printed contracts).⁶

⁶ <http://wordnetweb.princeton.edu/perl/webwn?s=contract%20of%20adhesion>

A contract of adhesion is a contract that is in standard form but which is offered on a “take it or leave it” basis and which is drafted with the drafter’s interests solely in mind and which the consumer has no ability to re-negotiate. This contrasts with contracts in the building and construction industry where negotiation is undertaken as a matter of course and, because of the size of the transaction, consumers are offered a range of statutory protections as well as frequently seeking legal advice about the relevant terms and conditions. Most of the standard contracts now on the market – for example the ABIC and the Standards Australia contracts - are drafted on a consensus basis by committees of experts drawn from organisations that represent the interests of consumers and builders, respectively. This ensures that those contracts are reasonably even-handed – much more so than the type of contracts justifiably seen as requiring intervention.

- 3.6 The ACL should be targeted at contracts of adhesion where the consumer has no opportunity to negotiate and must take or leave the contract in order to be provided with the relevant goods or services. Whilst this intent is manifested in the Bill, the manner in which the Bill is drafted so as to catch all standard form contracts will bring uncertainty and greater levels of risk into the building of homes. The problem is compounded because of the reverse onus of proof as to the protection of a legitimate interest (proposed subsection 3(4) of proposed Schedule 2 of the Bill) once a standard form contract is used. The Bill’s scope is wide and will catch domestic building contracts. The Bill will become another burden of regulation, the cost of which will ultimately be borne by consumers. This is the opposite effect to that proposed in the Regulatory Impact Statement for the Bill which states that, amongst other things, the Bill will bring “greater clarity and certainty in relation to consumer law.”
- 3.7 The Minister in his Second Reading speech said that the Bill would assist to rationalise the current “tangle of consumer laws.”⁷ From the building and construction industry’s point of view, the laws will add a further twist to this tangle. Domestic building contracts are already highly regulated so that to add the ex post facto component of challenge where an unfair contract term exists will add immeasurably to the risk associated with entering into

⁷ Supra note 4

domestic building contracts. An exemption for contracts regulated by domestic building contract laws is urged for the reasons set out in the Attachments and as shortly revisited now.

- 3.8 The need for an exemption from the legislation is reinforced when the nature of the building contract is considered. Under the Bill, consumer contracts are able to be challenged when they contain an unfair term. The meaning of unfair is set out in section 3 of proposed Schedule 2. Then, in section 4, examples of unfair contract terms are set out. One example that will apply to the vast majority of building contracts is contained in paragraph 4(f) as follows:

a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract.

- 3.9 Building contracts are frequently varied as consumer's choices are clarified or changed or a builder is required to meet conditions that may be externally imposed e.g. to meet a council by-law. In the building process, variations are inevitable:

The words "variation" is generally employed in the context of building and construction contracts to denote one of two types of change. First, it may signify a change in the contractual terms upon which the relevant work is be carried out, such as occurs where, for example, the parties agree that the date for practical completion is to be some date later than that specified in the contract. Secondly, and more commonly, the word is used to signify an alteration, whether by addition or omission, to the work which the contractor is required by the contract documents to perform.⁸

- 3.10 Of course, it is possible that parties to a particular contract give their own special meaning to the word "variation" but each standard form building contract deals with the subject. Domestic building contract laws often regulate the basis upon which variations may be made and, in this context, consumers are extended statutory protections. The Queensland domestic building legislation provides an example of where there are substantial consumer protections in place, including substantial fines that may be incurred by a contractor – see Attachment 3 to this submission.

⁸ John B Darter & John J A Sharkey, Building and Construction Contracts In Australia Law and Practice, Lawbook Co. 1990 para 8.10

3.11 Sections 79-84 comprising Part 7 of the *Domestic Building Contracts Act, 2000 (Qld)* contain provisions that protect consumers by requiring variations to be in writing, with a number of formal requirements including a description of the variation, and, for example, setting out the change in the contract price for fixed price contracts. Failure to meet any of the following requirements results in the application of substantial penalties:

- has to be in writing
- has to clearly describe the work the subject of the variation
- the price has to be agreed
- has to be signed by the Owner before the work proceeds
- has to state at what payment stage the variation will be claimed for payment
- a copy of the variation has to be provided to the Owner within 5 days of signing the Variation otherwise the contractor is not entitled to be paid.

3.12 Despite the existence of these sorts of detailed consumer protections, the fact that the variation process may permit the builder to vary the contract (e.g. to meet a planning requirement imposed by a local authority) without the consequent right of a consumer to terminate it, will mean that standard form building contracts contain a term that is indicated by the legislation as unfair and which will cause disputation. At the least, there will be the ability to challenge the cost of variations with an increase in the risks associated with undertaking what are everyday changes to domestic building works and the opportunity for vexatious litigators to threaten a case in order to obtain leverage over builders who may not be in a financial position to undertake litigation.

3.13 This problem is compounded by the fact that there will be other clauses which are able to be labelled as unfair through Regulations: proposed paragraph 4(n) of the Bill. The uncertainty that this will create, especially for housing contracts, should not be imposed on an industry which is foundational for the national economy. The lack of transparency associated with such a mechanism is also likely to cause difficulties as there will be an information gap between the content of the Regulations and those who undertake building work and who rely on the certainty of a contract where consumers already have substantial protections. The intent of bringing regulatory consistency and certainty to consumer law will not be met. The opposite is the likely outcome.

- 3.14 Master Builders urges the Committee to recommend that domestic building contracts are excluded from the scope of the Bill. This could be achieved by a simple addition of that class of contract to the list of excluded contracts in proposed section 8 of the Bill.

4 CONCLUSION

- 4.1 Master Builders has made a comprehensive analysis of the difficulties with the introduction of the law in this area as now formalised in the Bill which is set out in the Attachments.
- 4.2 The main issue is that, without exemption of domestic building contracts from the scope of the Bill the potential for the ACL to undermine certainty of contract and for it to increase the likelihood of litigation to the detriment of all parties is very real. This is the reverse of what the Government hopes to achieve through the passage of the Bill. Accordingly, Master Builders calls for the exemption of domestic building contracts from the scope of the Bill.



**MASTER BUILDERS
AUSTRALIA**

**Submission to the Treasury on the Consultation
Paper 'An Australian Consumer Law'**

**Master Builders Australia Inc
March 2009**

Master Builders Australia Inc ABN 701 134 221 001

building australia



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RECOMMENDATIONS

Recommendation 1	The Productivity Commission’s recommendations should guide the content of the proposed unfair contract provisions. (Paragraph 2.3)
Recommendation 2	Domestic building contracts should be <i>exempt</i> from the national unfair contracts regime, as sector specific domestic building contract legislation provides sufficient protection for consumers. This exemption should be explicit in the national consumer legislation. (Paragraph 4.4 & 4.7)
Recommendation 3	If the industry is made subject to a generic unfair contracts regime, the unfair contract model which should be adopted is the Productivity Commission model. The COAG model provision should be amended. (Paragraph 4.4)
Recommendation 4	If the industry is made subject to a generic unfair contracts regime, the interaction of industry specific laws with the national unfair contracts regime should also be clarified, and the effect studied. (Paragraph 4.8)
Recommendation 5	The unfair contract provisions should not apply to business to business contracts. (Paragraph 4.5)

Recommendation 6	It should not be possible for action to be undertaken simply on the basis of a 'substantial likelihood of detriment'; action should only be possible where actual detriment is suffered by a consumer. (Paragraph 9.3)
Recommendation 7	The definition of an unfair contract should make reference to 'good faith', and the concept of good faith should be clarified for the purposes of the provision. (Paragraphs 9.8,9.9,10.5,10.6)
Recommendation 8	The onus of proof with respect to whether a contract is 'non negotiated' should not be reversed with respect to the building and construction industry, because of statutory protections for consumers in domestic building contract legislation. (Paragraph 9.5)
Recommendation 9	If the onus of proof remains on the supplier of the contract (not preferred), the legislation should set out clear and reasonable criteria which the supplier must meet in order to satisfy the onus of proof. (Paragraph 9.6, 9.7)
Recommendation 10	A supplier should only be required to prove that a consumer has been given the opportunity to negotiate some of the terms of the contract. Whether the supplier agrees to the changes or not should be a commercial decision for the supplier. (Paragraph 9.7)
Recommendation 11	Remedies for breach of the provision should only be available where a consumer suffers a <i>financial</i> detriment. (Paragraph 9.4)
Recommendation 12	A reasonable transition period of 2-3 years would be appropriate to give businesses time to obtain legal advice and adapt standard form contracts. (Paragraph 9.11, 9.12)
Recommendation 13	In addition to a public advertising campaign, the Government should fund a workshop or seminar education program to be run by industry associations and tailored to individual industries to educate businesses about the implications of the new regime. (Paragraph 13.16, 9.12)
Recommendation 14	The government should prepare a detailed regulatory impact statement prior to introducing the legislation with details of the likely ongoing costs to business. (Paragraph 11.6)
Recommendation 15	The Government should reconsider a proposal to regulate and void many of the contractual terms in the Discussion Paper with respect to building contracts. (Paragraph 12 to 12.42)
Recommendation 16	There should be a single national regulator of the national consumer law. (Paragraph 13.3 to 13.5)
Recommendation 17	The maximum civil penalties in the TPA would be excessive as remedies for an unfair contracts regime. Fines should be reasonable rather than punitive. (Paragraph 13.11, 9.10)
Recommendation 18	Criminal sanctions or disqualification orders are not a proportionate response to a breach of the proposed unfair contract provisions. (Paragraph 13.9,13.10, 9.10)
Recommendation 19	If public warning powers are introduced, the legislation should contain rigorous criteria regarding their use. (Paragraph 13.12, 13.13)

Recommendation 20	COAG should examine the penalties and sanctions in place under equivalent unfair contract regimes interstate and overseas to develop a 'light touch' regulatory regime with more emphasis on education and information programs for employers. (Paragraph 13.14,13.15, 13.16)
Recommendation 21	Reviews of the national consumer law enforcement powers should consider the effect of the regime on various industries, and the effect of unfair contract provisions on large, small and medium sized businesses. The review should include an analysis of the ongoing cost of the regime to business, including legal and compliance costs. (Paragraph 9.13)

5 INTRODUCTION

- 5.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 5.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

6 PURPOSE OF SUBMISSION

- 2.1 On 17 February 2009 the Government released a Discussion Paper 'An Australian Consumer Law: Fair Markets – Confident Consumers'.⁹ The Discussion Paper follows agreement on 2 October 2008 between all Australian governments to establish a new consumer policy framework, comprising a single national consumer law and streamlined enforcement arrangements.¹⁰ One of the purposes of the Discussion Paper is to seek views on aspects of the reforms, and to explore options for the modification of existing generic consumer protections based on 'best practice' from existing state and territory laws.¹¹
- 2.2 The new national consumer law, which will be called the Australian Consumer Law, will be based on the existing consumer protection provisions of the *Trade Practices Act 1974 (Cth)* (TPA). It will also include a provision that regulates unfair terms in contracts, new enforcement powers with new redress options for consumers, and a new national legislative and regulatory regime for product safety.¹²
- 2.3 Master Builders is very concerned about the proposed content of national provisions regulating unfair terms in contracts. Accordingly, this submission focuses primarily on the proposals relating to that new unfair contract regime and the enforcement of that regime. Master Builders strongly advocates that the Productivity Commission's recommendations, discussed in detail in this submission, should guide the content of the proposed unfair contract provisions to be legislated.

7 BACKGROUND TO THE DISCUSSION PAPER

- 7.1 The Discussion Paper notes that the National Consumer Law will be implemented as part of an application law scheme, with the Commonwealth Government as the lead legislator, with other jurisdictions applying the national consumer law as part of their own laws.¹³ There will be an intergovernmental agreement concerning the

⁹ *An Australian Consumer Law. Fair Markets Confident Consumers Consultation Paper*, dated 17 February 2009 at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1482> as at 5/3/09.

¹⁰ *Ibid*, p 6.

¹¹ *Ibid*, p 1-2.

¹² *Ibid*, p 1.

¹³ *Ibid*, p 9.

process for amending the law, and the administrative architecture underpinning it.¹⁴

7.2 In terms of the implementation timeline, an inter governmental agreement is likely to be finalised by 30 June 2009, and the text of the legislation is likely to be agreed and finalised by 30 June 2010 to meet this timetable. The deadline for Parliament to have passed the Australian Consumer Law, and for the State and Territory Parliaments to have passed relevant application Acts, has been set for 31 December 2010.¹⁵

7.3 The Discussion Paper notes that the trend towards national consumer markets means that consumers at present, despite purchasing the same products from the same business, receive different levels of protection in different jurisdictions.¹⁶ By implementing a national consumer law, a more uniform system of protection for consumers will operate across jurisdictions. Master Builders does not oppose this policy approach, as long as regulation is reduced and made more efficient, a policy objective of the current Australian Government.

8 OVERVIEW OF CURRENT PROTECTIONS FOR CONSUMERS AND RELATED ISSUES

8.1 At present, consumers gain a measure of protection from the unconscionability provisions of the TPA and Fair Trading Acts (FTAs) (for example ss51AA, 51AB, 51AC of the TPA and mirror provisions in the FTAs); however critics argue that these have traditionally been narrowly interpreted.¹⁷ They argue that courts have traditionally focussed on procedural unconscionability (surrounding circumstances), rather than substantive unconscionability (contractual terms).¹⁸ Some of these provisions may also be subject to some uncertainty as to their scope.¹⁹

8.2 Victoria has also enacted unfair contracts provisions²⁰ directed at the protection of consumers. In addition, the common law has at times adopted the position that contracts between parties have an implied requirement for acting in good faith.²¹

¹⁴ Ibid, pp 9-12 and p 97.

¹⁵ Ibid, p 11.

¹⁶ Ibid, p 7-8.

¹⁷ *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 406-412.

¹⁸ Ibid, 408.

¹⁹ Ibid, 408.

²⁰ Ibid, 407.

- 8.3 Certain industries also have industry specific regimes that apply to them – such as the building and construction industry. The industry is subject to sector specific legislation regulating domestic building contracts; this State and Territory legislation currently differs from one jurisdiction to another. (See section 6 of this submission). Master Builders supports the retention of sector specific legislation in the building and construction industry.
- 8.4 Master Builders strongly advocates that the industry should be exempt from the national unfair contracts regime, as the sector specific legislation provides sufficient regulation of the industry and protection for consumers. Master Builders considers that further regulation of the industry would provide an unnecessary and costly overlay on existing protections available to consumers. Any moves to introduce an additional overriding law may also have unintended consequences, due to the interaction of both sets of legislation. However, if the industry is made subject to a generic unfair contracts regime, Master Builders argues that the best model is that put forward by the Productivity Commission.
- 8.5 Master Builders is opposed to unfair contracts proposals being extended to business to business contracts. While Master Builders recognises that consumers may in some contexts require special protection with respect to their purchases of goods or services, we do not consider that a case has been adequately made in the Discussion Paper for the extension of a generic unfair contracts regime to business to business contracts.
- 8.6 Master Builders also emphasises, like the Productivity Commission and recognised by the COAG proposal,²² that there is a need to distinguish between ‘contracts of adhesion’, that is contracts where consumers have no opportunity to negotiate the terms, and standard form contracts where consumers are able to negotiate changes to the terms.
- 8.7 Although standard form contracts are often used in the building industry, special conditions are frequently added to tailor the contract to the needs of the parties. In this sense consumers are able to negotiate with respect to the terms of standard form building contracts. Master Builders’ experience is that special conditions are frequently added to the Australian Building Industry Contract Suite (ABIC) and Master Builders pro forma contract documents. On this basis, Master Builders

²¹ Ibid, 406.

²² *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 32.

submits that domestic building contracts should be explicitly *exempt* from the regime, on the basis that standard form building contracts offer consumers the ability to negotiate terms. Many of the terms of these contracts are also in fact required by the specific provisions of the underlying domestic building statutes.

8.8 If building contracts are not exempted from the legislation, the interaction of industry specific laws with the national unfair contracts regime should be clarified, and its effect properly considered. As noted above, Master Builders submits that to have generic consumer protection legislation apply as outlined in the Discussion Paper, would be an unnecessary overlay on existing protections.

8.9 Master Builders also notes that the Government may decide to harmonise this industry specific legislation in keeping with the Productivity Commission's suggestion that:

"...divergent sector specific laws should be identified and repealed or harmonised across jurisdictions where possible".²³

8.10 Should the Government decide to adopt this approach, Master Builders would be happy to provide a further submission comparing the merits of each jurisdiction's sector specific laws, and proposing which model (or amalgam) should be put forward as the template for any national legislation.

9 THE PRODUCTIVITY COMMISSION'S APPROACH TO THE REGULATION OF THE BUILDING INDUSTRY

5.1 The Productivity Commission acknowledged that industry specific regulation can be an effective means of providing consumer protection where the risk of consumer detriment is high and/or the quality of the product or service is difficult to establish prior to purchase.²⁴ It noted that an *industry specific approach* was

²³ *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 81-88 and p xvii.

²⁴ *Ibid*, p 83.

warranted for more significant episodic purchases such as buying a home.²⁵ Master Builders agrees with the Productivity Commission in this regard.

5.2 However, the Productivity Commission noted that once a need for industry specific regulation is established, the activities it covers should be clearly identified and its requirements should *complement, rather than duplicate, generic provisions*.²⁶ These requirements should also be sufficiently flexible to accommodate changes in the market.²⁷ Master Builders submits that to extend the generic unfair contracts regime to the industry is unnecessary and would simply confuse all participants. The Productivity Commission's findings should be respected.

5.3 The Productivity Commission also noted that given the trend towards national markets, variable requirements across jurisdictions are increasingly a source of unwarranted added cost and frustration for businesses operating across Australia, or large parts of it, to the detriment of consumers.²⁸

5.4 The Productivity Commission noted that a home will typically be the largest purchase consumers will ever make.²⁹ At present, where consumers choose to have a home built, they will be subject to a range of consumer protection mechanisms. In addition to the generic TPA and FTA provisions relating to merchantable quality and fitness for purpose, the building and construction industry is subject to the following sector specific legislation at the State and Territory level:

5.4.1 *Licensing of building practitioners.* All jurisdictions require builders to be licensed, and Queensland and NSW also licence other building trade contractors.³⁰

5.4.2 *Statutory warranties.* In most jurisdictions, statutory warranties specific to home building require a building contractor to provide a product as agreed in a suitable state, and fit for its intended purpose for a set period of time. That period ranges from five

²⁵ Ibid, p 82.

²⁶ Ibid, p 84.

²⁷ Ibid, p 84.

²⁸ Ibid, p 86-87.

²⁹ Ibid, p 118.

³⁰ Ibid, p 118.

years from completion in SA to seven years in NSW. WA and the NT do not have building specific statutory warranties.³¹

5.4.3 *Access to dispute resolution mechanisms.* In Qld, NSW, and Victoria, there are sector-specific ADR bodies. In these jurisdictions and in WA, there are also dedicated appeals tribunals that hear building disputes.³²

5.4.4 *Mandatory home builders' warranty insurance.* In all jurisdictions, licensed builders must have home builders' warranty insurance (HBWI), although Tasmania has legislated to remove this requirement. In most jurisdictions, the scheme operates as a 'last resort scheme' provided by private insurers.³³

5.5 In relation to the building industry, the Productivity Commission's main recommendation focussed primarily on the issue of 'last resort' home builders' warranty insurance³⁴, rather than any other aspect of the industry's sector specific legislation. In order to properly consider the best approach to take to the regulation of the building industry, it is necessary to consider existing consumer protections in the current industry specific laws regulating the industry.

10 EXISTING SECTOR SPECIFIC LEGISLATION AND REGULATION IN EACH JURISDICTION DESIGNED TO PROTECT CONSUMERS OF DOMESTIC BUILDING CONTRACTS

10.1 There is currently sector specific legislation (and regulation) in each jurisdiction designed to protect consumers in relation to domestic building contracts. A list of these legislative instruments is set out below in Table 1.

Table 1: Domestic Building Contracts Acts

Jurisdiction	Name of Instrument
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³¹ Ibid, p 118.

³² Ibid, p 118.

³³ Ibid, pp 118-119.

³⁴ Ibid, p 127.

Jurisdiction	Name of Instrument
Australian Capital Territory	<i>Building Act 2004</i>
	<i>Building Amendment Regulations 2004</i>
New South Wales	<i>Home Building Act 1989</i>
	<i>Home Building Regulation 2004</i>
Northern Territory	<i>Building Act 1993</i>
	<i>Construction Contracts (Security of Payments) Act 2004</i>
	<i>Building Regulations</i>
Queensland	<i>Domestic Building Contracts Act 2000</i>
	<i>Domestic Building Contracts Regulation 2000</i>
South Australia	<i>Building Work Contractors Act 1995</i>
	<i>Building Work Contractors Regulations 1996</i>
Tasmania	<i>Building Act 2000</i>
	<i>Building Regulations 2004</i>
	<i>Housing Indemnity Act 1992</i>
Victoria	<i>Domestic Building Contracts Act 1995</i>
	<i>Domestic Building Contracts Regulations 2007</i>
	<i>Domestic Building Insurance Ministerial Order published in Special Government Gazette No S98 on 23 May 2003.</i>
Western Australia	<i>Home Building Contracts Act 1991</i>
	<i>Home Building Contracts Regulations 1992</i>

Source: Master Builders' compilation

11 OVERVIEW OF CONSUMER PROTECTIONS IN THE HOME BUILDING ACT 1989 (NSW), BY WAY OF EXAMPLE

- 7.1 The *Home Building Act 1989 (NSW)* (HBA) provides an example of the detailed sector specific consumer protections already in place with respect to domestic building contracts in Australia. The HBA is the centrepiece of a suite of legislation for the regulation of building work in NSW.³⁵ Another arm of that suite is the specialist tribunal set up with primary responsibility to deal with such claims, the Consumer Traders and Tenancy Tribunal. The Act took effect in its current form from 1 May 1997, and is broad in its scope.³⁶
- 7.2 Although it might be thought that the HBA is primarily focussed on smaller scale domestic building work, either in the form of new houses or renovations to houses, in fact it has a wide range of application.³⁷ It applies to most forms of residential dwelling, from the construction or renovation of a room in a free standing house to work on multi storey high rise projects. Indeed, with the increasing density of residential occupation in Sydney, the HBA is applying more and more to multi storey structures.³⁸
- 7.3 The provisions of the HBA reflect its consumer protection orientation, with the focus of the protection on the homeowner or proprietor.³⁹ One of the concerns it was directed towards was to redress a perceived uneven playing field between a 'sophisticated and experienced' builder and the less sophisticated homeowner.⁴⁰ However, as one commentator has noted, the standard assumption of unsophisticated proprietor and sophisticated builder in fact becomes strained in the context of commercial 'domestic' developments (such as high rise apartment blocks), where the degree of sophistication may in fact be the opposite, with the proprietor in a position of technical and financial strength and dominance.⁴¹ This is one area where uniform Australian legislation could assist to redress this imbalance.

³⁵ Bambagiotti, P of St James' Hall Chambers. "*The Home Building Act 1989 – March 2006*" available as a seminar paper through the College of Law, Sydney, pp 4-13.

³⁶ Ibid, pp 4-13.

³⁷ Ibid, p 4.

³⁸ Ibid, p 4.

³⁹ Ibid, p 4.

⁴⁰ Ibid, p 4.

⁴¹ View expressed by Bambagiotti, P in Ibid, p 4-5.

- 7.4 The HBA contains a very broad definition of ‘residential building work’ (in part due to the related definition of ‘dwelling’).⁴² This means that it applies not just to the construction of a residential home, but also to the building of a swimming pool, and other structures and improvements of various kinds including parts of buildings, fences, driveways, paths, retaining walls, sheds and ornamental ponds.⁴³
- 7.5 The HBA regulates contracts for residential building work as defined, and sets out formal requirements for these contracts,⁴⁴ designed to protect consumers. These formal requirements include that the contract must be in writing, and that it is signed and dated by all parties.⁴⁵ The contract must contain the parties’ names, the number of the contractor’s licence, a sufficient description of the work, any plans and specifications, the contract price if known, any statutory warranties that are applicable, and a statement setting out the cooling off period.⁴⁶
- 7.6 The contract price if known must be stated in a prominent position. If the price is not known or can be varied under the contract, *the contract must contain a warning and explanation* next to the price.⁴⁷ It is an offence to contract to do work unless the contract complies with the HBA’s requirements.⁴⁸ Courts and Tribunals apply these requirements strictly.⁴⁹
- 7.7 In terms of consumer information, s7AA provides that:
- “A holder of a contractor licence must, before entering into a contract..., give to the other party...information in a form approved by the Director General, that explains the operation of this Act and the procedure for resolution of disputes under the contract and...relating to insurance”.*
- 7.8 The ‘information’ referred to comprises a brochure produced by the Office of Fair Trading called the “Consumer Building Guide”.⁵⁰ This brochure clearly sets out some of the obligations placed on builders and contractors, and provides several pages of information to consumers about their rights under the HBA.

⁴² Section 3 of HBA and Regulations 5, 6, 8, 9 *Home Building Regulations 2004* (NSW) cited in Op.Cit., p 7 - 8.

⁴³ Ibid, p 7-8.

⁴⁴ Ibid, p 13 – 14.

⁴⁵ Ibid, pp 13-14.

⁴⁶ Ibid, pp 13-14.

⁴⁷ Ibid, p 13- 14.

⁴⁸ Ibid, p 15 citing section 7A of the Act.

⁴⁹ Ibid, p 14.

⁵⁰ Ibid, p15. The *Consumer Building Guide* is available through the NSW Office of Fair Trading at: www.fairtrading.nsw.gov.au/pdfs/About_us/Publications/ft246.pdf

- 7.9 Section 7BA imposes a “cooling off period” of 5 days, within which a person may rescind a contract for residential building work without penalty.⁵¹ This mandated “cooling off period” is designed to protect consumers, for the benefit of those who have second thoughts about the contract after it has been signed. It is also explicitly referred to in the “Consumer Building Guide” brochure. Section 7D of the HBA regulates and provides constraints on the ability of a contractor to obtain security over the land to ensure payment for the building work.⁵²
- 7.10 The statutory warranty provisions are found in Part 2C of the HBA, ss18A to 18G. These also provide consumers with considerable protection, and are drawn to consumers’ attention in the “Consumer Building Guide” brochure. S18B provides:

“The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

(a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person

⁵¹ Ibid, 16-17.

⁵² Ibid, 18-19.

with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment."

- 7.11 The Act as amended also contains provisions regulating Home Warranty Insurance in Part 6, for the benefit of consumers.
- 7.12 It is also worth noting that in NSW, as in other jurisdictions, there is a maximum deposit that consumers can be asked to pay;⁵³ similarly, the payment of progress payments is regulated in most jurisdictions. These requirements again provide consumers with considerable protection.
- 7.13 Consumers may apply to the Consumer Traders and Tenancy Tribunal for a remedy. The Tribunal's jurisdiction is conferred by the HBA.⁵⁴ The Tribunal has the power to adjudicate a 'building claim',⁵⁵ as defined by the Act, and its powers are very broad. These powers include that the Tribunal can make orders as it considers appropriate, for example that one party pay money to another party. Alternatively, it may order that a specified amount of money is not due or owing from one party to another, or that a party to the proceedings do or not do certain work. There is also scope for certain decisions of the Tribunal to be appealed to the District Court.⁵⁶
- 7.14 The protection provided by these provisions and their equivalents in other jurisdictions are considerable and in Master Builders' view distinguish the building and construction industry from other industries which are not subject to the same level of regulation for the benefit of consumers. As noted above, Master Builders considers that a sector specific approach should be retained in the building industry, as recommended by the Productivity Commission, without an overlay of additional generic unfair contract regulation.

⁵³ S8, s16E HBA.

⁵⁴ Bambagiotti, P of St James' Hall Chambers. "The Home Building Act 1989 – March 2006" available as a seminar paper through the College of Law, Sydney p 48 citing Part 3A HBA, together with the *Consumer Traders and Tenancy Tribunal Act 2001 (NSW)*, s21.

⁵⁵ Ibid, p 52 citing s48A HBA.

⁵⁶ Ibid, p 56 and 63-64 citing s48O HBA. The appeal mechanism has now been changed from the Supreme Court to the District Court.

7.15 If the Government does choose to make domestic building contracts, and the building industry generally subject to its proposed unfair contract regulation, Master Builders submits that the comments which are set out in the balance of this submission should form part of the governments' considerations.

12 PROPOSED MODEL FOR REGULATING UNFAIR CONTRACT TERMS

8.1 The Discussion Paper notes that the Productivity Commission's recommended model addressing unfair contract terms was considered by the Ministerial Council on Consumer Affairs (MCCA);⁵⁷ however COAG instead agreed to a legislative model *different* to that recommended by the Productivity Commission. The COAG model is as follows:

8.1.1 A term is '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 supplier.

8.1.2 The definition will not make reference to 'good faith'.

8.1.3 The inclusion of the phrase 'it is not reasonably necessary to protect the legitimate interests of the supplier' is designed to ensure that, when applying the test, the question of the business's reasons for including a provision in a contract is addressed.⁵⁸

8.2 Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment.

8.3 This element of the model goes beyond the PC's recommendation and suggests that action may also be undertaken on the basis of a 'substantial likelihood of detriment'.

8.4 The scope of the provision will extend to standard form contracts entered into by businesses, including small businesses, and would not be confined to individual consumers. This proposal purports to recognise that many businesses are also required to use standard form agreements and their interests are the same in

⁵⁷ It was considered at MCCA's meeting on 15 August 2008.

⁵⁸ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, pp 30-34.

respect of the potential for unfair contract terms.⁵⁹ This is patently not the case, especially where, for example, a small building firm undertakes work for a multinational corporation.

8.5 The provision will relate only to standard form, non negotiated contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.

8.5.1 This element of the model reflects the PC's view that the inclusion of negotiated contracts would involve risks that exceeded the likely benefits.

8.5.2 The onus of proof is reversed.

The provision will exclude the upfront price of the good or service.⁶⁰

8.6 The provision will require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.⁶¹

8.7 Although Master Builders submits that COAG's proposed provision, depending on how it is drafted, has merit and is superior to the Victorian model, Master Builders considers that the model put forward by the Productivity Commission would be a better model for the national consumer law's unfair contracts regime, especially as it followed the considerable scrutiny of extensive submissions on the subject. Accordingly, Master Builders submits that the COAG model should be amended in a number of respects.

13 PRODUCTIVITY COMMISSION'S MODEL FOR REGULATING UNFAIR CONTRACT TERMS AND COMPARISON WITH THE COAG MODEL

9.1 The Productivity Commission made a number of recommendations, some of which appear to have been adopted by COAG. The Productivity Commission recommended that Australian governments should implement a new national consumer law, based on the consumer provisions of the TPA. It suggested that the new law could be augmented in areas where the TPA does not provide adequate protection, and should apply to all consumer transactions.

⁵⁹ Ibid, pp 30-34.

⁶⁰ Ibid, pp 30- 34.

⁶¹ Ibid, pp 30-34.

9.2 The Productivity Commission also recommended that a provision should be incorporated that addresses unfair contract terms. We have underlined some of the differences between the Productivity Commission and COAG models. The Productivity Commission noted that its preferred approach would have the following features:

9.2.1 *A term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract;*

9.2.2 *There would need to be material detriment to consumers (individually or as a class);*

9.2.3 *It would relate only to standard form, non negotiated contracts;*

9.2.4 *It would exclude the upfront price of the good or service; and*

9.2.5 *It would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.*

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment, with suppliers also potentially liable to damages for that detriment. The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms.

9.2.6 *Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.*

9.2.7 *The operation and effects of the new provision should be reviewed within five years of its introduction.⁶²*

⁶² Recommendation 7.1 in *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 168-169.

- 9.3 In terms of the differences between the two models, Master Builders is concerned that under the COAG model, it will be easier to establish that a provision is unfair, as a consumer need only show that there is a 'substantial likelihood of detriment'; there is no need to show actual detriment as proposed in the PC model. This potentially exposes businesses to a far wider range of actions.
- 9.4 The COAG model also potentially opens up a broader range of situations where detriment may apply, as remedies are not limited to situations where a consumer suffers financial detriment, but may include broader detriment. It is unclear whether and how this will be defined – will it include the potential for damages for emotional distress, a matter normally excluded at common law? Master Builders submits that the provision should instead be limited to financial detriment, as this effect is easier to measure and quantify and will confine the scope of the provision within reasonable and certain boundaries.
- 9.5 While the COAG model suggests that the provision will relate only to standard form, non negotiated contracts, it is worth noting that the onus will be on the supplier to prove that a contract is not a 'non negotiated' contract. This means that at present, in the context of the building and construction industry, the onus will be on a builder or contractor to establish that a contract is in fact a 'negotiated' contract, and so falls outside the scope of the unfair contract provisions. In Master Builders view, this is unacceptable, especially in the light of the elaborate statutory provisions for domestic building contracts including in respect of cooling off which are currently in place. These provisions for domestic building contracts were outlined earlier in this submission in respect of NSW.
- 9.6 The Discussion Paper provides no guidance as to the criteria that are likely to be used to satisfy this onus of proof. Is it sufficient for a consumer to be provided with an opportunity to negotiate some of the terms of the contract? If so, how will this be determined? If not, will a contract only be regarded as a negotiated contract if the consumer successfully negotiates some changes to the terms? What if the terms requested by the consumer are unreasonable? These are all questions which should not be left to a court or tribunal to decide.
- 9.7 Master Builders argues that if the onus of proof remains on the supplier of the contract, the legislation should set out clear and reasonable criteria which the supplier must meet in order to satisfy the onus of proof. Master Builders strongly recommends that a supplier should simply be required to prove that the

consumer has been given the opportunity to negotiate some of the terms of the contract. This could be satisfied by the provision of a letter suggesting that the consumer contact the supplier or their solicitor if they would like to request any changes to a standard form contract. Whether the supplier agrees to the changes or not should be a commercial decision for the supplier.

9.8 In the COAG model provision, a decision has been made to remove the good faith requirement, yet that element exists in both the Productivity Commission model, and in the Victorian model. Thus even if a business has been acting in good faith in a transaction, this will be an irrelevant consideration in a court's determination that a contractual term is unfair. In the COAG model, the following words have instead been inserted: "and [the contractual term] is not reasonably necessary to protect the legitimate interests of the supplier."

9.9 Master Builders recommends that the good faith requirement should remain, to give businesses the opportunity to lead evidence about their intentions in situations where it is alleged that a contractual term is unfair, particularly where statutory provisions establish a required pattern of behaviour for a builder. Presumably, a court will reach its own judgement as to whether a contractual term is unfair even if this good faith requirement is reinstated. The scope of the notion of good faith in the unfair contract provision should also be clarified by Parliament. (See paragraph 10.3 and 10.5 for further detail about the good faith requirement in the Victorian context.)

9.10 A number of areas still need to be clarified in relation to the model provisions. It is unclear at present what penalties will apply for breach. It is difficult to judge the model provision properly without further insight into proposed sanctions, and whether they are proportionate to any offence. Master Builders submits that fines should be reasonable rather than punitive, particularly where businesses have acted in good faith or it is a first offence. Criminal sanctions should not apply. In Chapter 7 of the Discussion Paper, there is some discussion about different types of penalties that might apply, with reference to current consumer law penalties in the TPA and FTAs. That Chapter also considers a number of new enforcement powers. (We consider this Chapter further in section 13 of this submission.)

9.11 There is a lack of detail about the application of transitional provisions. Transitional provisions were recommended by the Productivity Commission to give businesses time to adapt. This issue is referred to briefly in the Discussion Paper, and again

in Attachment A, in the Joint Communique of the MCCA.⁶³ So transitional provisions will apply; however it is unclear what the length of these transitional provisions will be. Details of these arrangements will be crucial to the success of any reforms.

9.12 Master Builders submits that a reasonable transition period is essential to provide businesses with the time to obtain legal advice, consider that advice, and make any necessary changes to the contracts that they use well before the legislation comes into effect; especially as penalties may apply for breach. We suggest a transition period of 2-3 years would be appropriate, together with the provision of government funding for industry associations to run workshops and seminars to educate business about the implications of the new regime.

9.13 COAG appears to have taken up the Productivity Commission's recommendation that a review of the enforcement powers should occur from time to time. The criteria to be considered in reviews is discussed in Chapter 13 of the Discussion Paper.⁶⁴ Master Builders is keen to ensure that any review also considers in its evaluation, the effect of the provisions on various industries. Master Builders suggests that it would be of benefit to the industry for information to be collected about the effect of any unfair contract regime that is introduced, on large, small and medium sized businesses so that the regime can be properly evaluated. This is particularly the case given the paucity of evidence available in this area generally, as identified by the Productivity Commission. This latter proposition also raises the need for cost/benefit analysis of any final proposal in this subject area.

14 VICTORIAN MODEL FOR REGULATING UNFAIR CONTRACT TERMS

10.1 This section of the submission briefly considers some of the features of the Victorian unfair contracts model for completeness. Although the Victorian model is the most recent Australian legislative model, Master Builders believes that the models put forward by COAG and the Productivity Commission are superior to the model currently in place in Victoria.

10.2 The Victorian *Fair Trading Act 1999* was amended in 2003 by the Victorian Parliament through the addition of provisions (s2B) designed to address unfair contract terms. While the legislation draws heavily on the model adopted in the

⁶³ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 34 and Attachment A: 'Joint Communique – Ministerial Council of Consumer Affairs', p 105.

⁶⁴ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, Chapter 13, p 99.

UK's *Unfair Terms in Consumer Contracts Regulations 1999*, which focuses on substantive rather than procedural unfairness, the Victorian provisions have been criticised because they have considerably wider scope.⁶⁵

10.3 In the Victorian legislation, a term is considered unfair 'if contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer (s32W). If a court finds a term unfair, the term is void, though the rest of the contract stands. The statute does not apply to contracts between a supplier and a business, or to contracts covered by the *Consumer Credit (Victoria) Act 1995*.⁶⁶

10.4 Key differences between the Victorian and UK models include that the Victorian model:

10.4.1 Provides for a list of prohibited terms to be developed through the regulations.

10.4.2 Extends the reach of the provisions to non standard-form contracts; and

10.4.3 Covers terms relating to the price of a product.⁶⁷

10.5 It should be noted that the Victorian Government has introduced a Bill to the Victorian Parliament which proposes to remove the element of 'good faith' from the definition of 'unfair contract term' in the *Fair Trading Act 1999* (Vic). Master Builders is opposed to this proposal in relation to the Victorian Act. Master Builders considers that the element of 'good faith' should be reinforced not abandoned in all unfair contract term definitions. The process of considering a new national consumer law should embrace the need to clarify the conceptual obligation of good faith. As noted by Brigid Harradine recently:

"...the High Court of Australia is yet to consider the matter expressly, and there remains much confusion as a result of inconsistency between various

⁶⁵ *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, Appendix D, p 407.

⁶⁶ *Ibid*, p 407.

⁶⁷ *Ibid*, p 407.

*judges and jurisdictions in respect of the content, scope and source of the duty of good faith, where it is found to exist.*⁶⁸

- 10.6 In terms of the Victorian model generally, Master Builders submits that the Victorian provisions are in excess of the necessary mechanisms to protect consumers as clearly set out by the Productivity Commission. Master Builders prefers instead the model put forward by the Productivity Commission. Master Builders does not consider it appropriate that a list of prohibited terms be developed through regulations, due to the lack of transparency implicit in that process.
- 10.7 Master Builders shares the Productivity Commission's concern that to extend the reach of the provisions to non standard form contracts may have unintended consequences. It is also contrary to the notion of 'freedom of contract', which should be an inherent part of the process in negotiated contracts. Similarly, Master Builders considers that the parties to a contract should be free to negotiate the price of a good or service free from judicial interference. Master Builders rejects the Victorian model's capacity for investigation of ex post facto matters of price, in the interests of business certainty.

15 TYPES OF CONTRACTS THAT WOULD BE COVERED BY UNFAIR CONTRACT TERMS REGULATION

- 11.1 The Discussion Paper provides a list of a number of standard form contracts by way of example, that would be covered by the legislation. Many are of direct relevance to the building industry. These include:
- 11.1.1 *Domestic building, renovation and maintenance service contracts;*
...
 - 11.1.2 *Professional services, including services provided by engineers, surveyors, architects, lawyers, consultants and others; ...*
 - 11.1.3 *Publicly and privately provided vocational training and professional development services.*⁶⁹
- 11.2 As noted above, Master Builders considers that building contracts are generally negotiated and accordingly should be explicitly excluded from the

⁶⁸ Harradine, B. "Implied Duty of Good Faith – a Fetter on Powers under Australian Construction Contracts." *Australian Construction Law Newsletter* November/December 2008, p 25.

⁶⁹ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 33.

legislation. The onus should not be on the builder or contractor to establish that a particular contract falls outside the scope of the provisions, as is currently contemplated by the COAG model. This will lead to confusion, and potentially expose builders and contractors to uncertainty, and to unnecessary costs and delays.

11.3 Master Builders is very concerned that a wide range of other participants in the building industry are likely to be affected by the proposed unfair contracts regime as it is currently contemplated, from providers of vocational training relevant to the industry to engineers, surveyors, architects, and other professionals who perform work for the industry.

11.4 As noted above, Master Builders is opposed to unfair contracts proposals being extended to business to business contracts. While Master Builders recognises that consumers may in some contexts require special protection with respect to their purchases of goods or services, it does not consider that a case has been properly made in the Discussion Paper for the extension of a generic unfair contracts regime to business to business contracts.

11.5 If the government does choose to proceed on the basis outlined in the Discussion Paper, and extends the unfair contracts regime to business to business contracts, it is difficult to predict its impact due to the breadth of the proposal. It is clear however that a vast number of businesses will be exposed to increased legal fees and compliance costs with respect to all aspects of their commercial contracting. The new regime will also interfere with the ability of commercial players to freely contract with each other, free from bureaucratic or judicial interference, at a time of economic uncertainty caused by the global financial crisis.

11.6 Master Builders proposes a number of changes to the unfair contract provisions. Master Builders also suggests that the government prepare a detailed regulatory impact statement prior to introducing the legislation, and perform research into the effect of any new legislation on businesses and particular industries in future reviews of any legislation.

16 TYPES OF CONTRACT TERMS THAT MAY BE COVERED BY THE UNFAIR CONTRACT PROVISIONS

12.1 The Discussion Paper lists a number of types of contract terms that may be

covered by the unfair contract provisions.⁷⁰ Comments are made below about most but not all of the types of clauses listed. These comments relate primarily to building contracts and building services contracts, on the basis that with the proposed regime as presently outlined, some building and building services contracts may be caught within its scope (for instance, where builders or contractors are unable to establish that a contract is 'negotiated').

Clauses that permit the supplier to unilaterally vary the terms of the contract

- 12.2 Some building contracts may contain provisions dealing with the price of raw materials, or dealing with interest rates (which are adjusted by the Reserve Bank). Depending on the context, some clauses of this kind, if they are agreed between the parties, may be appropriate. Presumably most clauses of this kind however, would be found in negotiated contracts, so would fall outside the scope of the legislation.

Clauses that require the payment of fees when the service is not provided

- 12.3 Master Builders notes that in some situations, where jobs are planned well in advance, if equipment has been booked, labour hired, and other jobs turned down, it may be appropriate to require the payment of a fee when a service is not provided. This is, however, generally proscribed by the domestic building contracts legislation.

Clauses that exclude liability for harm resulting from the supplier's or its agents' actions

- 12.4 Master Builders does not consider that the unfair contracts jurisdiction should go beyond the existing extensive provisions in the TPA (and its mirror equivalents), which already regulate exclusion clauses to protect consumers.

Clauses that let only the supplier decide whether to renew or not to renew the contract

- 12.5 Master Builders notes in relation to the option not to renew a contract, if the supplier provides the service or product, then a supplier should be able to

⁷⁰ Ibid, p 31 – 33.

choose not to renew that contract. Refusal of supply is a matter currently adequately regulated by the TPA.

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

- 12.6 Sometimes part way through a building project there may be pricing changes to certain raw materials, based on market conditions or via a contractual variation agreed at the outset. Providing a contract foreshadows this scenario and contains provisions to deal with it, which are agreed by both parties, this should not be viewed as problematic. In some jurisdictions, domestic building legislation proscribes 'cost plus' contracts from being used domestically.

Clauses that allow the supplier to assign the contract to the consumer's detriment without the consumer's consent

- 12.7 Providing the consumer has been informed of the possibility at the outset and *there is no detriment to the consumer*, a supplier should be able to assign a contract.

Clauses purporting to limit the consumer's right to take legal action against the supplier

- 12.8 Master Builders does not object to this type of clause being addressed; however we note that it should be legitimate for a supplier to specify that dispute resolution procedures should first apply as a condition precedent to legal action.

Clauses imposing the evidential burden on the consumer in legal proceedings

- 12.9 Why should the evidential burden automatically be borne by the business, regardless of the context? In most areas of the law, the party alleging loss and seeking compensation would bear the burden of proof. Master Builders considers that the applicant should bear the evidential burden, and does not agree that the evidential burden should be shifted in this area of the law.

Clauses that require consumers who breach a contract term or terminate early to pay penalties, in the form of specific additional payments,

additional interest or indemnity legal costs, which do not reflect the supplier's reasonable costs

- 12.10 Master Builders considers that both parties should be liable to pay reasonable costs for breach of a contractual term.

Clauses that prevent the consumer from cancelling a contract

- 12.11 Master Builders considers that there should be no restriction on the usual contractual remedies for breach should a party not observe its contractual obligations.

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

- 12.12 Occasionally, a supplier might find that he or she is unable to obtain a particular brand or style of good, which they would normally have been able to supply. If he or she is able to obtain a good of the same quality, style and size etc from a different manufacturer, should the supplier be entitled to provide the consumer with the replacement good?

- 12.13 Ultimately, contracts should be clear about what the supplier is promising to the consumer, and at what point further consent must be obtained from the consumer if what results is not what was originally contemplated. As a general rule, applied within reason, Master Builders considers that consumers should not be obliged to accept a good or service which is not what they have contracted and paid for. However, if a contract to supply goods contains a clause allowing a supplier to replace one brand of good for another of equivalent quality, because the first brand is no longer available, this should be permissible providing it has been agreed by the consumer from the outset.

Clauses that do not permit refunds to consumers when the goods or service are not provided, or which apply conditions to the way in which consumers are refunded

- 12.14 As a general rule, refunds should be available where goods or services are not provided, subject to the consumer meeting his or her contractual obligations. If a consumer has not met his or her contractual obligations, it may be unreasonable to require a business to provide a refund for a good or service.

- 12.15 In most circumstances, if a good or service is provided in part, it would be appropriate for a business to require a consumer to pay the business for what has been provided.

Terms that may be banned

- 12.16 The Discussion Paper notes that a number of types of unfair contract terms may be banned on the basis that they are considered, in all circumstances, to be unfair.⁷¹ The Discussion Paper notes that the use of the terms would expose a *supplier* to enforcement action under the Australian Consumer Law.⁷² There is some overlap between the terms that are listed and those set out above. Master Builders comments on a number of these alleged types of unfair contract terms but not all of them as set out in the Discussion Paper.

Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such goods.

- 12.17 If a consumer has not observed their contractual obligations, and paid a supplier for goods which a supplier has provided, should a supplier be out of pocket for those goods, simply because those goods cannot be removed from the consumers' premises without damage?

- 12.18 Particularly where a supplier has provided a consumer with reasonable notice, and/or exhausted other remedies, there should be no impediment placed on suppliers from retrieving their goods, even if this causes damage to a consumers' premises.

Terms denying the existence or validity of pre or post contractual representations made to consumers; entire agreement terms

- 12.19 Master Builders submits that the difficulty with banning terms of this kind is that this will essentially introduce greater uncertainty about the validity of concluded, fully executed contracts, and whether they are enforceable.

- 12.20 At present the onus is on the consumer to consider, when signing a contract, what representations by the other party they have relied on prior to executing

⁷¹ Ibid, p 35 – 42.

⁷² Ibid, p 35.

the contract. In order to properly protect themselves, consumers should document any representations relied on in writing. Indeed, in many legal documents, such as in certain commercial leases, disclosure statements which landlords must provide to prospective tenants under retail leases legislation, usually provide tenants with the opportunity to list any representations that they have relied on prior to entering the lease, so that there is transparency between both parties. Full disclosure requirements and cooling off periods are set out in domestic building contract legislation.

12.21 Master Builders strongly advocates that providing consumers with an opportunity to list any representations relied on at the time of the transaction, and prior to entering into the agreement, is the best approach to this issue. It reduces the scope for parties to later dispute whether and what representations (if any) were made, after the bargain is concluded. It also creates a greater degree of certainty for businesses relying on a concluded contract, when providing goods or services.

12.22 To completely ban clauses which document whether the purchaser has relied on any representations in entering an agreement will undermine the validity of the concluded agreement on which both parties rely. This is likely to lead to more litigation, higher fees for lawyers, and will make it much more difficult for businesses to rely on concluded contracts. Certainty about the validity of concluded contracts is particularly important to businesses in the context of the current economic downturn; businesses need some degree of certainty so that they know they can pay their employees and suppliers.

Terms under which consumers acknowledge that they have read or understood the contract

12.23 Master Builders submits that it is appropriate that the onus be on the consumer to acknowledge whether or not they have read and understood a contract. This kind of clause may encourage a consumer, who is otherwise inclined not to take the time to read a contract, to properly consider it. It is also appropriate that a consumer acknowledge whether the consumer understands the contract they are proposing to enter. It is appropriate that the onus be on the consumer to *seek advice or clarification* if the consumer does not understand the contract. How else can a supplier of goods and/or services be satisfied that a

consumer understands a legal document?

- 12.24 Most Retail Leases Acts require landlords to provide tenants with a disclosure statement, which provides the tenant with a useful summary of key terms and conditions relating primarily to their financial obligations arising from the lease. Similarly, a number of the domestic building contract statutes have full disclosure regimes.
- 12.25 Master Builders submits that a requirement to increase disclosure about complex legal documents may be helpful to consumers in some situations, to assist them to better understand their legal obligations. Similarly an obligation to word legal documents, as far as practicable, in 'Plain English' is also likely to be helpful to assist consumers. This is a better approach to protecting consumers, than banning terms and introducing greater uncertainty about the validity of concluded contracts, which appears to be the approach foreshadowed in the Discussion Paper.
- 12.26 Providing these measures are put in place, Master Builders is strongly of the view that it is ultimately the responsibility of consumers to ensure that they understand the contractual obligations that they freely enter into, or to seek advice if they do not. If a particular consumer chooses not to take the time to do so, or chooses not to make the effort to ask pertinent questions about any matters they do not fully understand, the principle of caveat emptor should apply.
- 12.27 There will always be certain consumers who do not take the time or make the effort to ensure that they understand their contractual obligations, even where there is adequate disclosure as outlined above; in this situation, the consumer should bear the consequences of their own actions.

Conclusive evidence terms

- 12.28 Master Builders considers that all parties should be able to lead reasonable evidence where there is conflicting evidence about, for example, a costs dispute.

Terms that otherwise limit suppliers' liability for their negligence

- 12.29 Master Builders considers that existing laws that constrain the ability of

suppliers to limit liability for their negligence provide sufficient protection for consumers. Master Builders considers that there is no need for the Australian Consumer Law to provide additional protection for consumers in this regard.

- 12.30 Accordingly, the parties should be free to include contractual terms that create limits on the potential liability of suppliers, 'to the extent permitted by the law'.

Flat/fixed early termination fees and those requiring the paying out of the contract

- 12.31 In the building industry, builders may incur significant costs where a project is commenced, but then does not proceed to completion. This may include the cost of materials, the cost of labour, the cost of hired or leased equipment, including the cost of ordering materials and reserving labour and equipment ahead of time for a project. It may also include 'lost opportunity costs' where projects are usually scheduled approximately 6 months ahead of time.

- 12.32 Despite differences in regulation between jurisdictions, legislation currently exists which regulates builders, including with respect to security deposits and progress payments for building work. Master Builders is concerned about how any changes proposed as part of the Australian Consumer Law would interact with this industry specific legislation.

- 12.33 In the example cited in the Discussion Paper, depending on the manufacturer, normally a supplier must pay for the cost of the curtains/carpets, prior to installation. Indeed, the supplier may be required to pay a deposit to the manufacturer, in order for the manufacturer to manufacture and deliver the goods to the supplier. The supplier may then be required to pay for the costs of labour to transport and install those materials in the consumer's home.

- 12.34 In most transactions involving the sale of goods, a purchaser must pay for the goods prior to being able to 'take them away for their own use'. Where a good becomes a 'fixture' after installation, suppliers are usually not able to recover goods in the event of non payment by a consumer unless there is a properly drafted Romalpa clause.

- 12.35 Master Builders is keen to ensure that in any new scheme imposed on the industry, industry participants, whether they are suppliers, contractors or

builders, are not left out of pocket for materials purchased, and services rendered in installing those goods.

12.36 The disadvantage of prohibiting contract terms that allow suppliers, contractors or builders to charge reasonable deposits where goods must be purchased up front, is that those suppliers, contractors or builders may be significantly out of pocket if a consumer changes their mind or causes undue delay because of matters within their control.

12.37 The disadvantage of prohibiting contract terms that allow suppliers, contractors or builders to reserve title in goods until payment, or which prohibit terms that allow suppliers, contractors or builders to specify that consumers must pay for goods up front in full before they are installed, is that small businesses in particular may experience significant cash flow problems where they have paid for goods and labour, and consumers do not honour their contracts. As noted above, where the installation of goods result in those goods becoming a fixture, and/or where the value of the goods are diminished by the installation and use of the goods by the consumer (eg carpet), the risk of non payment by a consumer after installation would be a significant concern.

12.38 For the vast majority of consumer transactions, where goods are installed, businesses have an incentive to install them properly or they will lose future customers; the value of the business will then diminish with the value of its good will, or it will be unable to continue trading.

Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

12.39 Master Builders notes that party/party costs often do not cover anywhere near the true cost of litigation. By contrast, recovery of costs on an indemnity basis may provide a better estimate of the real cost of litigation. Usually in the litigation process, it is unclear at the outset who will be paying for the cost of litigation. If a case is clear cut, usually it will settle. Accordingly, in some circumstances it may be reasonable for a builder/contractor/supplier of building services to require a consumer to pay its costs on an indemnity basis, where a consumer is a vexatious litigant, for example, or where the provider would otherwise incur costs it could not recover.

- 12.40 As a general rule, Master Builders considers that parties should be free to contract as they see fit without intervention, unless that intervention is absolutely necessary. As noted above, most building contracts are negotiated in any case; they are not contracts of adhesion, where parties do not have an opportunity to bargain.

Terms requiring consumers to pay deposits or prepayments that do not leave a substantial amount of the price to be paid on delivery/installation/performance.

- 12.41 As noted above, in the building industry, sector specific legislation regulates the payment of deposits and progress payments. It is unclear how the proposed Australian Consumer Law will interact with this sector specific legislation. Hence Master Builders urges the Government to exempt the industry from the provisions of the Australian Consumer Law, and instead allow it to be regulated separately through a national uniform version of sector specific regulation.

Terms mandating arbitration or otherwise inhibiting access to courts or tribunals

- 12.42 Master Builders does not object to a provision designed to void terms of this kind in most circumstances, providing that a supplier, builder or contractor may make a dispute resolution clause a condition precedent to any action through the courts.
- 12.43 It may be worth including an exemption for related parties/ corporate entities. Sometimes related parties may specify that a dispute may only be resolved through a dispute resolution clause, to encourage the parties to resolve disputes internally.

17 REFORMS TO THE CONSUMER LAW ENFORCEMENT POWERS

- 13.1 This section of the submission considers the proposed reforms to the consumer law enforcement powers from the perspective of the proposed unfair contracts regime. Chapter 7 of the Discussion Paper considers reforms to the consumer law enforcement powers. Presumably, these proposals will also apply to the unfair contracts regime.

- 13.2 COAG has agreed that the enforcement of the law will be shared between the ACCC and the State and Territory Offices of Fair Trading. Formal agreements between them will cover arrangements for communication and coordination of activities. These enforcement arrangements will be reviewed by COAG within seven years after the commencement of the Australian Consumer Law.⁷³
- 13.3 Master Builders notes that this enforcement arrangement appears to be a recipe for duplication and waste. Why should taxpayers fund the activities of two sets of entities, at Commonwealth and State and Territory level, when the task could more efficiently and effectively be performed by one national entity? Given that the aim is to enact a *national* consumer law, to avoid unnecessary complexity, duplication and waste, why not also have a *national* regulator?
- 13.4 This would also allow the regulator to develop specialised expertise in the area, rather than having that expertise shared across a myriad of State and Territory entities then lost if there is a later amalgamation as would appear logical. It is also more likely to prevent the laws being enforced inconsistently across jurisdictions.
- 13.5 While the Productivity Commission supported a multiple regulator approach in the short term for pragmatic reasons (to facilitate agreement with the States and Territories for the development of a national consumer law) the Productivity Commission also suggested that the better approach for the long term was that the Australian Government through the ACCC be solely responsible for enforcing the new national generic law.⁷⁴
- 13.6 The Discussion Paper notes that the Australian Consumer Law will include “...the full range of penalties, enforcement powers and consumer remedies currently available in the TPA, with appropriate modifications”⁷⁵
- 13.7 COAG has agreed that these powers should be extended, and that the Australian Consumer Law will include provisions covering:
- 13.7.1 Civil pecuniary penalties and disqualification orders;
 - 13.7.2 Substantiation notices;

⁷³ Ibid, p 43.

⁷⁴ *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, p 72-73.

⁷⁵ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 43.

- 13.7.3 Availability of redress for non parties to proceedings;
- 13.7.4 Public warning powers; and
- 13.7.5 Infringement notices, to the extent permitted by relevant Commonwealth and state and territory laws and policies.⁷⁶

13.8 Unfortunately, Chapter 7 appears to contemplate a 'one size fits all' enforcement regime. It does not distinguish between the proposed unfair contracts regime and the remainder of the proposed and existing consumer law regime. Master Builders considers that the TPA already contains very wide ranging and powerful remedies to deal with breaches of the law. It does not consider it necessary to further broaden these potential powers and remedies as outlined above.

13.9 Master Builders also does not consider that criminal sanctions are appropriate or necessary in response to a breach of the proposed unfair contract provisions. It does not consider that criminal sanctions are a proportionate response to a breach of an unfair contract provision. Nor does it consider that disqualification orders are a proportionate response to the issue. The preference is for an approach which emphasises educating businesses, particularly small businesses, about their obligations under the proposed unfair contract provisions.

13.10 Master Builders notes that disqualification orders, which effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations, have the potential to bankrupt many small businesses. Furthermore, disqualification orders improperly applied have the potential to seriously disrupt the operation of a business of any size, where a manager is appointed or 'works their way up' based on specialised knowledge and expertise. It is also unclear what benefit these orders would have for the public, so are unlikely to meet a proper cost benefit analysis.

13.11 Although the Discussion Paper notes that the civil pecuniary penalties proposed would not exceed the current level of monetary *criminal* sanctions in the TPA: currently \$ 1.1 million for corporations and \$220,000 for individuals,⁷⁷

⁷⁶ Ibid, p 43.

⁷⁷ An *Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 46 – based on 10,000 penalty units for corporations and 2,000 penalty units for individuals.

Master Builders considers that these penalties are excessive for an unfair contracts regime.

13.12 In terms of the new enforcement powers which are proposed, Master Builders is concerned about the potential for inappropriate use of the Public Warning powers. Master Builders notes that the Discussion Paper does not provide any guidance about the formal criteria to be used to determine the use of the Public Warning powers.

13.13 Master Builders argues that the legislation should contain rigorous criteria, to ensure transparency and guard against abuse of process. Master Builders is concerned that applied inappropriately, the public warning powers could be used to destroy the reputations of businesses, where the circumstances do not justify it.

13.14 Master Builders suggests instead that COAG examine the penalties and sanctions in place under equivalent unfair contract regimes interstate and overseas to develop a 'light touch' regulatory regime.

13.15 Master Builders notes that in the Productivity Commission's discussion of consumer law enforcement models in different jurisdictions, the prevailing model is generally a *layered enforcement approach* based on an *enforcement pyramid* for business compliance.⁷⁸ The first element of that enforcement pyramid for business compliance is usually education and information programs from the regulator(s) designed to prevent the emergence of future compliance breaches.⁷⁹

13.16 Master Builders advocates more emphasis on education and information programs from the regulator(s) which will assist businesses with their compliance obligations. This will also prevent more costly 'intervention' by regulators to the detriment of taxpayers and businesses. Strangely, this element of a 'layered enforcement approach' is currently absent from Chapter 7 of the Discussion Paper. Master Builders suggests that in addition to a general public information campaign, the Government should fund a workshop

⁷⁸ *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, p227-231.

⁷⁹ *Ibid*, see the enforcement pyramid in Figure 10.1, p 228.

or seminar education program to be run by industry associations and tailored to individual industries.

18 CONCLUSION

- 14.1 Master Builders appreciates the opportunity to be consulted in the process of developing a new Australian Consumer Law. Master Builders considers that building contracts and building services contracts should not fall within the scope of the new Australian Consumer Law as they are already more appropriately and highly regulated through sector specific legislation. Building contracts should instead be specifically exempt from the scope of the legislation to avoid an additional and inappropriate regulatory overlay on that sector specific legislation.
- 14.2 Master Builders strongly advocates that the Australian Consumer Law should not apply to business to business contracts; instead it should be restricted to transactions involving individual consumers purchasing goods or services. Master Builders also advocates that the recommendations of the Productivity Commission as outlined in this submission, should have a greater influence on the final model to be adopted for the unfair contract provisions of the Australian Consumer Law.

Attachment 2



Submission to the

Treasury
on
The Australian Consumer Law – Consultation on draft provisions
on unfair contract terms

Master Builders Australia Inc
May 2009

Master Builders Australia Inc ABN 701 134 221 001

building australia



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18 INTRODUCTION

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

18.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders associations with over 31,000 members.

19 BACKGROUND TO CONSULTATION PAPER

19.1 On 17 February 2009, the Government released a Discussion Paper '*An Australian Consumer Law: Fair markets – Confident Consumers*'. That Discussion Paper

sought views on the model for a new National Consumer Law, including provisions regulating unfair contract terms. In response to that Discussion Paper, Master Builders lodged a detailed submission with Treasury in March 2009 (the Earlier Submission).

- 19.2 The Government recently announced that it planned to ‘fast track’ legislation based on the unfair contract provisions proposed in that Discussion Paper.⁸⁰ On 11 May 2009 it released a Consultation Paper ‘The Australian Consumer Law – Consultation on draft unfair contract terms provisions’.⁸¹ The related Press Release indicates that the Government is likely to introduce legislation to Parliament in June 2009.⁸² The Government has provided only a very limited time to comment upon proposals that will markedly affect Australian jurisprudence. It is recommended that there be a longer consultation process and that, at the least, a formal Senate Inquiry into the Bill should be conducted. The Inquiry should focus on the costs and benefits of the Bill so that the costs of the introduction of the finally agreed proposals may be adequately scrutinised.

Recommendation 22 (Following on from Recommendations 1-21 in Master Builders’ Earlier Submission, replicated in Appendix “A”)

There be a longer consultation process into the Bill, and at the least, a formal Senate Inquiry into the Bill should be conducted. The Inquiry should focus on the costs and benefits of the Bill so that the costs of its introduction may be adequately scrutinised.

20 PURPOSE OF THIS SUBMISSION

- 20.1 The purpose of this submission is to respond to the Consultation Paper. Master Builders continues to advocate that the building and construction industry should be exempt from the national unfair contracts regime, as industry specific legislation provides sufficient regulation of the building and construction industry and strong protection for consumers, as outlined in the Earlier Submission.
- 20.2 Master Builders considers that further regulation of the industry would provide an unnecessary and costly overlay on existing protections available to consumers. Master Builders also considers that to introduce an additional overriding ‘generic’

⁸⁰ “Australian consumers to receive protection from unfair contract terms”, Press Release No. 9 at: <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/009.htm&pageID=003&min=ceb&Year=&DocType> accessed on 18/5/09.

⁸¹ ‘The Australian Consumer Law – Consultation on draft unfair contract terms provisions’ available at <http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1537> accessed on 14/5/2009.

⁸² ‘Consultation on Unfair Contract Terms’ Media Release dated 11 May 2009 at: <http://www.alp.org.au/media/0509/msat111.php> accessed on 14/5/2009.

law is likely to have unintended consequences, due to the interaction of both sets of legislation. Master Builders strongly urges the Government to reconsider its approach to the unfair contracts regime. However, should the Government choose to proceed with its unfair contracts model as proposed, Master Builders makes the comments set out in this submission.

20.3 The Consultation Paper notes that the proposed unfair contract terms model "...reflects the PC's recommendations with some minor clarifying refinements to the model described by the PC." Master Builders does not consider the changes to be "minor clarifying refinements" but instead considers that the changes go well beyond the Productivity Commission model and are quite different in their intent and likely effect. These differences and their problematic nature were highlighted by Master Builders in the Earlier Submission.

20.4 Master Builders considers that if the building and construction industry is made subject to a generic unfair contracts regime, the best model is simply that put forward by the Productivity Commission. This is the model that should form the basis of any unfair contracts regime, unchanged.

20.5 Master Builders is also opposed to an unfair contracts regime being extended to business to business contracts. Master Builders recognises that consumers may in some contexts require special protection with respect to their purchases of goods or services. However, we do not consider that a case has been adequately made in either the Discussion Paper or in the Consultation Paper, for the extension of a generic unfair contracts regime to business to business contracts. In this regard, the arguments posed in the Consultation Paper would apply equally to contracts between Governments and business. If the proposed regime is to proceed, Master Builders would advocate its extension to all government to business contracts.

Recommendation 23	If the proposed regime regarding business to business contracts is to proceed, Master Builders would also advocate its extension to all government to business contracts.
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20.6 Master Builders' key concerns with respect to the unfair contracts regime as proposed centre around the potential for the unfair contracts regime to undermine certainty of contract, to the detriment of businesses, and for it to increase the

likelihood of litigation to the detriment of all parties except the legal profession. Indeed, concerns relating to the potential impact of the regime were recently highlighted in an *Australian Financial Review* article regarding business to business contracts,⁸³ discussed below. The article asserts that these laws are “fundamentally rewriting the law of contract in Australia”,⁸⁴ and in these economic times, are unwarranted. The laws will provide a mechanism for a party to challenge the validity of a concluded contract, with which both parties were happy at the time it was signed, at a future date, thereby undermining ‘sanctity of contract’, and leading to increased costs for consumers to ‘factor in the risk’.⁸⁵ These concerns were raised by Master Builders in the Earlier Submission.

21 ‘STANDARD FORM’ CONTRACTS IN THE BUILDING INDUSTRY COMPARED TO ‘CONTRACTS OF ADHESION’

21.1 Like the Productivity Commission,⁸⁶ Master Builders strongly suggests that there is a need to distinguish between ‘contracts of adhesion’, that is contracts where consumers have no opportunity to negotiate the terms, and standard form contracts where consumers are able to negotiate changes to the terms. Master Builders considers that the scope of application of the current proposed unfair contracts regime does not distinguish properly between the two forms of contract.

21.2 Although standard form contracts are often used in the building industry, special conditions are usually added to tailor the contract to the needs of the parties. In other words, consumers *are* able to negotiate with respect to the terms of standard form building contracts. On this basis, Master Builders submits that domestic building contracts should be explicitly *exempt* from the regime, on the basis that standard form building contracts offer consumers the ability to negotiate terms. Many contractual terms in building contracts are also in fact required by the specific provisions of the underlying domestic building statutes. The use of standard form contracts in the building industry is a time saving device, which is designed to save the builder and the client money. The process simply means that a solicitor does not have to charge an hourly rate to ‘reinvent the wheel’, that is the building contract, each time one is needed in similar circumstances. Simply because a standard form contract is used, *does not mean that the other party does not have the opportunity to negotiate changes to the contract.*

⁸³ Midalia, Ashley. “Contract terms a B2B hazard”, *Australian Financial Review*, 18/5/09, p 9.

⁸⁴ Ibid, citing HWL Ebsworth trade practices partner Richard Westmoreland, p 9.

⁸⁵ Midalia, Ashley. “Contract terms a B2B hazard”, *Australian Financial Review*, 18/5/09, p 9.

⁸⁶ *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 32.

- 21.3 The inevitable effect of not exempting standard form contracts will be that builders will incur greater legal costs in preparing contracts; those costs will be passed on to the consumer, while the consumer's lawyers will necessarily have to spend more time reviewing each contract, increasing the costs faced by the consumer. Both of these will have a detrimental effect on the cost of building and on housing affordability.
- 21.4 In most transactions, the contracts will be tailored to the circumstances, and the purchaser has every opportunity to request amendments and in many jurisdictions possesses a 'cooling off' period as a statutory right. In this sense, standard form contracts in the building industry are quite different, for example, from a contract for a consumer to hire a car on a one off basis, where there is rarely an opportunity to negotiate (a 'contract of adhesion').
- 21.5 If building contracts are not exempted from the legislation, the interaction of industry specific laws with the national unfair contracts regime should be clarified.

22 PRODUCTIVITY COMMISSION FINDINGS IN RELATION TO THE BUILDING AND CONSTRUCTION INDUSTRY

- 5.1 The Productivity Commission acknowledged that industry specific regulation can be an effective means of providing consumer protection where the risk of consumer detriment is high and/or the quality of the product or service is difficult to establish prior to purchase.⁸⁷ It noted that an *industry specific approach* was warranted for more significant episodic purchases such as buying a home.⁸⁸
- 5.2 However, the Productivity Commission noted that once a need for industry specific regulation is established, the activities it covers should be clearly identified and its requirements should *complement, rather than duplicate, generic provisions*.⁸⁹ Master Builders submits that to extend the generic unfair contracts regime to the industry is unnecessary and the Productivity Commission's findings should instead form the basis for the legislative arrangements for the industry. This is particularly the case given that the Government's overt intention is to follow the Productivity Commission model.

⁸⁷ Ibid, p 83

⁸⁸ Ibid, p 82

⁸⁹ Ibid, p 84

- 5.3 The Productivity Commission noted that a home will typically be the largest purchase consumers will ever make.⁹⁰ At present, where consumers choose to have a home built or renovated, they are subject to a wide range of existing consumer protection mechanisms. In addition to the generic *Trade Practices Act* (TPA) and *Fair Trading Acts* (FTA) provisions relating to merchantable quality and fitness for purpose, the building and construction industry is subject to the sector specific legislation at the State and Territory level.
- 5.4 With some differences between jurisdictions (detailed in our Earlier Submission), legislation in the States and Territories:
- 5.4.1 regulates the licensing of building practitioners;⁹¹
 - 5.4.2 imposes implied statutory warranties into building contracts;⁹²
 - 5.4.3 provides for access to dispute resolution mechanisms;⁹³ and
 - 5.4.4 provides for mandatory home builders' warranty insurance.⁹⁴
- 5.5 The Productivity Commission's main recommendation with respect to the building industry focussed primarily on the issue of 'last resort' home builders' warranty insurance,⁹⁵ rather than any other aspect of the industry's sector specific legislation.
- 5.6 Master Builders provided a great deal of detail about the strong existing consumer protection provisions in industry specific legislation in the Earlier Submission. That legislation includes the statutes set out in Table 1.

Table 1: Domestic Building Contracts Acts

Jurisdiction	Name of Instrument
Australian Capital Territory	<i>Building Act 2004</i>

⁹⁰ Ibid, p 118

⁹¹ Ibid, p 118

⁹² Ibid, p 118

⁹³ Ibid, p 118

⁹⁴ Ibid, pp 118-119, save for Tasmania

⁹⁵ Ibid, p 127

Jurisdiction	Name of Instrument
	<i>Building Amendment Regulations 2004</i>
New South Wales	<i>Home Building Act 1989</i>
	<i>Home Building Regulation 2004</i>
Northern Territory	<i>Building Act 1993</i>
	<i>Construction Contracts (Security of Payments) Act 2004</i>
	<i>Building Regulations</i>
Queensland	<i>Domestic Building Contracts Act 2000</i>
	<i>Domestic Building Contracts Regulation 2000</i>
South Australia	<i>Building Work Contractors Act 1995</i>
	<i>Building Work Contractors Regulations 1996</i>
Tasmania	<i>Building Act 2000</i>
	<i>Building Regulations 2004</i>
	<i>Housing Indemnity Act 1992</i>
Victoria	<i>Domestic Building Contracts Act 1995</i>
	<i>Domestic Building Contracts Regulations 2007</i>
	<i>Domestic Building Insurance Ministerial Order published in Special Government Gazette No S98 on 23 May 2003.</i>
Western Australia	<i>Home Building Contracts Act 1991</i>
	<i>Home Building Contracts Regulations 1992</i>

Source: Master Builders' compilation

5.7 The Earlier Submission also provided, by way of illustration, five pages of detailed analysis of the consumer protections in the *Home Building Act 1989 (NSW)*.⁹⁶ The protection provided by these consumer protection provisions and their equivalents in other jurisdictions are considerable and in Master Builders' view distinguish the building and construction industry from other industries which are not subject to the same level of regulation for the benefit of consumers.

⁹⁶ See paragraphs 7.1 to 7.15 of that Submission.

6 EXTENSION OF THE UNFAIR CONTRACTS REGIME TO BUSINESS TO BUSINESS CONTRACTS

- 6.1 As stated earlier, Master Builders' key concerns with respect to the unfair contracts regime centre around the potential for the unfair contracts regime to undermine certainty of contract, to the detriment of businesses. Businesses require certainty so that they can predict their costs, thereby enabling them to ensure that they can pay their employees, their suppliers, and their overheads with some degree of predictability. Businesses are already under pressure due to the severity of the economic downturn, and further legislative requirements of the kind proposed are potentially very damaging. Master Builders' concerns relating to the potential impact of the regime were recently reiterated by a number of commentators in the Financial Review article on the potential impact of the regime on business to business contracts,⁹⁷ mentioned earlier.
- 6.2 The article suggested that: "...when big blue-chip companies are contracting via standard form arrangements with other big businesses that are well resourced and well represented, why do they need the protection of this regime? All it will lead to is huge uncertainty."⁹⁸ Furthermore, "...the concept of sanctity of a contract – that parties were bound by terms of a contract – 'really goes out the door' under the new legislation...People, after entering a standard form contract they're happy with, [who]...later don't like the terms and want to get out [of it],...will challenge the terms as being unfair. The cost to business of the uncertainty in relation to this has not been addressed and is significant".⁹⁹
- 6.3 The article suggests that companies will no longer be able to rely on contractual terms with certainty, and will have to factor in the cost of that risk, which will inevitably flow through to prices.¹⁰⁰ The changes are likely to lead to increased litigation, but the changes are not in the interests of businesses and clients. These laws amount to "fundamentally rewriting the law of contract in Australia",¹⁰¹ and in these economic times, are not warranted.
- 6.4 The building and construction industry is centred upon a subcontractor system where contracts are regulated by the *Independent Contractors Act 2006 (Cth)*.

⁹⁷ Midalia, Ashley. "Contract terms a B2B hazard". *Australian Financial Review*, 18/5/09, p 9

⁹⁸ Ibid, citing Mallesons Stephen Jacques partner Amanda Bodger, p 9.

⁹⁹ Ibid, citing Mallesons Stephen Jacques partner Amanda Bodger, p 9.

¹⁰⁰ Ibid, citing Mallesons Stephen Jacques partner Amanda Bodger, p 9.

¹⁰¹ Ibid, citing HWL Ebsworth trade practices partner Richard Westmoreland, p 9.

Master Builders considers that this statute is sufficient in the area of regulating business to business contracts and there is no need to supplement its terms; part 3 of this Act relates to the ability of the court to review certain contracts if they are harsh or unfair.

8. COMMENTS SPECIFICALLY ON THE EXPOSURE DRAFT

8.1 The Consultation Paper notes that the draft unfair contract provisions will be implemented by the Australian Consumer Law, and as part of the ASIC Act which applies to financial services. Accordingly we comment only on the section dealing with the generic Australian Consumer Law, which is relevant to the building and construction industry.

9. TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL 2009: UNFAIR AND PROHIBITED CONTRACT TERMS

9.1 The Earlier Submission highlighted some of the differences between the Government's proposed model, and the model proposed by the Productivity Commission. Some of the key elements of the Government's proposed model, which concerned Master Builders, have been replicated in the Exposure Draft Bill. We have highlighted these ongoing concerns within our analysis of these proposed provisions. First we summarise the perceived effect of the Exposure Draft Bill and then make comments on various elements.

9.2 Clause 2(1) of the Exposure Draft provides that an unfair term of a standard form contract is void.¹⁰² However the contract may continue to bind the parties if it is capable of operating without the unfair term.¹⁰³

9.3 A term of a standard form contract is unfair if it would cause 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 party who would be advantaged by the term.¹⁰⁴

9.4 In determining whether a term of a standard form contract is unfair, a court has some discretion to take into account such matters as it thinks relevant, but it must

¹⁰² Exposure Draft of *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms*, Clause 2(1)

¹⁰³ *Ibid*, Clause 2(2)

¹⁰⁴ *Ibid*, Clause 3 (1) (a) and (b)

also take into account a specified list of factors.¹⁰⁵ This includes the extent to which it would cause, or there is a *substantial likelihood* it would cause, detriment (financial or *otherwise*) to a party if it were to be applied or relied on.¹⁰⁶ It also includes the extent to which a contractual term is transparent,¹⁰⁷ and the contract as a whole.¹⁰⁸

9.5 There is a *presumption* however, that a term of a standard form contract is not reasonably necessary to protect the legitimate interests of a party who would be advantaged by it, *unless that party proves otherwise*.¹⁰⁹

9.6 The legislation then lists a number of examples of unfair contractual terms,¹¹⁰ *however these are not exhaustive*.

9.7 The provision relating to unfair contract terms does not apply to a standard form contract to the extent that a term defines the subject matter of a contract, sets the upfront price or is a term required or expressly permitted by law.¹¹¹

Commentary

9.8 Under the Exposure Draft provisions, it will be easier (than in the Productivity Commission model) to establish that a provision is unfair, as a consumer need only show that there is a 'substantial likelihood of detriment'; there is no need to show actual detriment as proposed in the Productivity Commission model. (Exposure Draft Clause 3(2)(a)). This potentially exposes businesses to a far wider range of actions. The Consultation Paper notes that "...in requiring proof of a 'substantial likelihood of detriment', more than a hypothetical case of unfairness must be made out."¹¹² However, this statement alone provides little guidance for businesses based on the current terms of the Exposure Draft and adds to the uncertainty in the application of the provisions. The law should be known in advance, rather than be subject to tests which are amorphous (refer to Master Builders' Recommendation 6 from the Earlier Submission, set out in Appendix "A".)

¹⁰⁵ Ibid, Clause 3 (2)(a)-(c)

¹⁰⁶ Ibid, Clause 3 (2) (a)

¹⁰⁷ Ibid, Clause 3(2) (b), See also Clause 3(3).

¹⁰⁸ Ibid, Clause 3(2)(c)

¹⁰⁹ Ibid, Clause 3(4)

¹¹⁰ Ibid, Clause 4 (a)-(n)

¹¹¹ Ibid, Clause 5

¹¹² *The Australian Consumer Law: Consultation on draft unfair contract terms provisions*, 11 May 2009, p 3.

- 9.9 The Exposure Draft also potentially opens up a broader range of situations (than the Productivity Commission model) where detriment may apply, as remedies are not limited to situations where a consumer suffers financial detriment, but may include broader detriment. Indeed, Clause 3(2)(a) explicitly notes that detriment may be “...financial *or otherwise*”. The Consultation Paper indicates that this may include the potential for damages for emotional distress or the like,¹¹³ a matter normally excluded at common law. By contrast, if the provision was limited to financial detriment, this would confine the scope of the provision within quantifiable and therefore, more reasonable and certain boundaries. (See Recommendation 11, Appendix “A”.)
- 9.10 In the Exposure Draft, a decision has been made to remove the good faith requirement, yet that element exists in both the Productivity Commission model, and in the Victorian model. Thus even if a business has been acting in good faith in a transaction, this will be an irrelevant consideration in a court’s determination that a contractual term is unfair. In the Exposure Draft, the following words have instead been inserted: “and [the contractual term] is not reasonably necessary to protect the legitimate interests of the party advantaged by the term.” (Clause 3(1)(b)).
- 9.11 As noted in our Earlier Submission, Master Builders considers that the good faith requirement should remain, to give businesses the opportunity to lead evidence about their intentions in situations where it is alleged that a contractual term is unfair. The test as proposed is not based upon a principle that enables contracting parties’ sufficient certainty (See Recommendation 7, Appendix “A”).
- 9.12 One of Master Builders’ main concerns is that it is not predictable under the provisions as drafted, as to what terms may be found by a court to be unfair terms. Clause 4 provides a number of ‘examples’ of unfair terms; however the wording: “...without limiting section 3” makes it clear that the types of clauses provided in the legislation are not exhaustive but are simply examples, and the types of clauses that may be found to be unfair retrospectively after the date a contract has been made are only limited by the remainder of the Part. This is unacceptable and it undermines the required certainty that is essential when a business assesses risk. Master Builders has commented on a number of these examples already in the Earlier Submission. (See Recommendation 15,

¹¹³ Ibid, p 11

Appendix “A”). Master Builders also recommends that an exhaustive list of unfair contract terms should instead be included in the text of the legislation to provide better guidance and added certainty to businesses grappling with the implications of the changes.

Recommendation 24	Master Builders recommends that an exhaustive list of unfair contract terms should be included in the text of the legislation.
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9.13 In terms of the exclusion for terms that disclose an upfront price, this is not sufficiently broad for the building and construction industry, as building contracts do not usually specify a precise upfront price; the final price often depends on a number of variables, which are disclosed in the contract. (Exposure Draft, Clause 5).

9.14 For example, in fixed price contracts a contract price for specific work and services is ascertained before any work is carried out. This price is said to be fixed at the start of the contract, but it may change during its execution if the contract conditions allow cost adjustment.¹¹⁴ The most common contract conditions that allow cost to be adjusted are variations, latent site conditions, rise and fall, provisional or prime cost items, and clauses for other risks beyond the control of the contract party claiming for such cost adjustments. Generally, the original contract price will be different (almost always less) than the final contract cost.¹¹⁵ (While the principal may be able to draft a contract so that the contract price is fixed for the entire project period, the principal may end up paying more for the work in the long run.)¹¹⁶ Fixed price contracts are usually in the form of lump sum contracts or schedule contracts.¹¹⁷

9.15 Cost plus contracts are used where the true nature or extent of the work is unknown and where the risk or contingency factor is high. If the contractor was to allow for everything that might eventuate, the contract sum could be too high.¹¹⁸ However, a number of jurisdictions exclude cost plus contracts as suitable for domestic building work or make a number of modifications to the basic content of

¹¹⁴ Uher, T and Davenport, P, *Fundamentals of Building Contract Management*, UNSW Press, 2002, p 60-61.

¹¹⁵ *Ibid*, 60-61.

¹¹⁶ *Ibid*, 60-61

¹¹⁷ *Ibid*, 62-63

¹¹⁸ *Ibid*, p 64

cost plus contracts or the capacity to enter into the same (for example, s29(5) *Building Work Contracts Act 1995 (SA)*)¹¹⁹.

9.16 In cost plus contracts, the price to be paid may, at the time of entering the contract, be left out, and at completion be determined on the basis of the actual cost incurred. Although the contract will have no contract price in the usual sense, it is most important that the basis for determining the “cost” and the “plus” is prescribed in the contract.¹²⁰ “Cost” in this context, usually comprises direct cost to the contractor of materials and labour. “Plus” is the contractor’s bid price, which includes contractor’s overhead and profit. Plus can be a lump sum or a rate (ie a percentage of the cost) or both.¹²¹ Accordingly, Master Builders considers that the exclusion in Clause 5 relating to upfront price, should be widened by redefining the definition of upfront price for the purposes of the application of the regime to the building and construction industry, noting the issue of cost plus contracts but especially the adjustment of lump sum contracts.

Recommendation 25	Master Builders considers that the exclusion in Clause 5 should be widened by redefining the definition of upfront price for the purposes of the application of the regime to the building and construction industry.
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9.17 The Exposure Draft of the legislation then sets out a number of prohibited terms.¹²² It provides that a prohibited term of a standard form contract is void.¹²³ Penalties may apply if a person includes or tries to include,¹²⁴ or purports to rely on a prohibited term in a standard form contract.¹²⁵ What will constitute a ‘prohibited term’ is currently unclear. The meaning of a ‘prohibited term’ will be defined by the Regulations.¹²⁶

Commentary:

9.18 We note that Division 2 deals with prohibited terms, and Clause 6 expressly deals with prohibited terms of standard form contracts. It provides that: “...a prohibited

¹¹⁹ See also section 55 *Domestic Building Contracts Act 2000 (QLD)*. See section 13 of the *Domestic Building Contracts Act 1995 (VIC)* and r11 of the *Domestic Building Contract Regulations 2007(VIC)*.

¹²⁰ *Ibid*, p 64

¹²¹ *Ibid*, p 64

¹²² Exposure Draft of *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms*, Clause 6.

¹²³ *Ibid*, Clause 6 (1)

¹²⁴ *Ibid*, Clause 6 (2)

¹²⁵ *Ibid*, Clause 6 (3)

¹²⁶ *Ibid*, Clause 6 (4)

term of a standard form contract is void". It also defines a 'prohibited term' of a standard form contract as: "...a term of a kind prescribed by the regulations". Master Builders is concerned at the lack of transparency implicit in leaving the definition of a prohibited term to be established by the Regulations. This means that the Executive may change the definition at any time, and to the detriment of businesses that deal with standard form contracts. This lack of scrutiny implicit in changes to that definition also has implications for businesses that may not be aware of changes to the definition, but may find themselves penalised for breach in any event. Master Builders recommends that prohibited terms should be more clearly and explicitly defined in the legislation; an exhaustive list of prohibited terms should be included in the text of the legislation so that these are subject to the benefit of full Parliamentary scrutiny.

Recommendation 26	Master Builders recommends that prohibited terms should be more clearly and explicitly defined in the legislation; an exhaustive list of prohibited terms should be included in the text of the legislation.
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9.19 The Exposure Draft also contains a definition of 'standard form contracts'.¹²⁷ If a party alleges a contract is a standard form contract, it is presumed to be one unless another party to the proceedings alleges otherwise.¹²⁸ In determining whether a contract is a standard form contract, a court has some discretion, but must take into account a number of factors.¹²⁹ These include the bargaining power of the parties, when the contract was prepared (ie before or after any discussion relating to the transaction), whether the other party was required to accept or reject the terms in the form in which they were presented, or whether they were given an opportunity to negotiate changes, whether the contract terms took into account the characteristics of the party or transaction, and any other matter prescribed by the regulations.¹³⁰

Commentary

9.20 While the Exposure Draft suggests that the provision will relate only to standard form, non negotiated contracts, the onus will be on the supplier to prove that a

¹²⁷ Ibid, Clause 7

¹²⁸ Ibid, Clause 7 (1)

¹²⁹ Ibid, Clause 7 (2)

¹³⁰ Ibid, Clause 7 (2)(a)-(f)

contract is not a 'non negotiated' contract (Clause 7(1)). This means that the onus will be on a builder or contractor to establish that a contract is in fact a 'negotiated' contract, and so falls outside the scope of the unfair contract provisions. In Master Builders view, this is unacceptable given the detailed statutory consumer protection provisions that already apply to domestic building contracts in each State and Territory. (See Recommendation 8, Appendix "A".)

- 9.21 Master Builders is concerned that clause 7 does not distinguish sufficiently between standard form contracts and contracts of adhesion. As noted in the Earlier Submission, contracts of adhesion are contracts where there is no scope for negotiation. Standard form contracts, by contrast, often include negotiated terms, either in the form of special conditions, or in the form of changes to 'standard form' clauses in the text of the contract. This is usual in consumer building contracts.
- 9.22 The Exposure Draft provides quite unhelpful criteria which are to be used by builders and suppliers to try to satisfy this onus of proof. What is the relevance of the bargaining power of the parties? (7(2)(a)) After all, a consumer can always walk away from a transaction if it does not suit him or her. In business, this will be a part of commercial considerations subject to the TPA. In terms of criterion (b), this seems to suggest that the use of any kind of contractual precedent will always prejudice the decision as to whether it is a 'standard form contract' or not. If every contract must be drafted from scratch regardless of the size of the transaction, the end result will inevitably be higher legal costs for businesses, that will be passed on to consumers.
- 9.23 Furthermore, in relation to the criterion in clause (2)(d), is it sufficient for a consumer to be provided with an opportunity to negotiate some of the terms of the contract? Or must it be all of the terms of the contract? How will whether a person has been provided with an opportunity to negotiate (some of) the terms of the contract be determined? Will a contract only be regarded as a negotiated contract if the consumer successfully negotiates some changes to the terms? What if the terms requested by the consumer are unreasonable? (See Recommendation 9, Appendix "A".)

9.24 The proposed legislation will not apply to employment contracts (ie a 'contract of service').¹³¹ Master Builders considers this appropriate, as employment contracts are regulated sufficiently by the *Fair Work Act 2009 (Cth)* and related legislation.

9.25 In terms of the transition period to the new legislation, the Exposure Draft anticipates that the unfair contract provisions will apply to a contract entered into on or after 1 January 2010.¹³² It will also apply to contract renewals on or after that day¹³³, and to contract variations on or after that day¹³⁴.

Commentary

9.26 Master Builders notes that this is a very short transition period. In the Earlier Submission, we recommended a transition period of 2-3 years to provide businesses with the time to review their contracts, seek legal advice, and perform any necessary adjustments. Assuming the legislation is introduced to Parliament in June, this is likely to give businesses *less than 6 months* to adapt once the legislation is passed in its final form by Parliament. This is unacceptable. (See Recommendation 12, Appendix "A".)

Other issues

9.27 Clause 2(2) provides that a contract continues to bind the parties if it is capable of operating without an unfair term (which has been declared void under subclause (1)). Master Builders queries whether this provision provides sufficient guidance to a court as to when to determine that a contract should continue to apply despite the presence of an unfair term. It may not always be practical for the supplier of a service or product to continue to supply that product/service at the price it was offered at, where a court intervenes and voids certain provisions of a contract. Furthermore, Master Builders reiterates that it is not entirely predictable under the provisions as drafted, as to what terms may be found by a court to be unfair terms.

9.28 We note that the Exposure Draft contains no precise detail of the new penalties, enforcement powers and consumer redress options (previously outlined in principle in the Discussion Paper), which the Government plans to introduce with

¹³¹ Ibid, Clause 8

¹³² Ibid, 'Application and Transitional Provisions' Clause (1)

¹³³ Ibid, 'Application and Transitional Provisions' Clause (2)

¹³⁴ Ibid, 'Application and Transitional Provisions' Clause (2)

the unfair contract provisions in June.¹³⁵ This is unacceptable, and highlights the need for further consultation and a Senate Inquiry into the terms of the Bill.

10. CONCLUSION

10.1 We refer to Recommendations 1-21 from the Earlier Submission, which are attached to this submission for ease of reference as Appendix A. The additional Recommendations 22-26, which we have made in this submission, are summarised in Appendix B.

APPENDIX "A"

RECOMMENDATIONS FROM MASTER BUILDERS' EARLIER SUBMISSION

Recommendation 1	The Productivity Commission's recommendations should guide the content of the proposed unfair contract provisions.
Recommendation 2	Domestic building contracts should be <i>exempt</i> from the national unfair contracts regime, as sector specific domestic building contract legislation provides sufficient protection for consumers. This exemption should be explicit in the national consumer legislation.
Recommendation 3	If the industry is made subject to a generic unfair contracts regime, the unfair contract model which should be adopted is the Productivity Commission model. The COAG model provision should be amended.
Recommendation 4	If the industry is made subject to a generic unfair contracts regime, the

¹³⁵ *The Australian Consumer Law: Consultation on draft unfair contract terms provisions*, 11 May 2009, p 6.

	interaction of industry specific laws with the national unfair contracts regime should also be clarified, and the effect studied.
Recommendation 5	The unfair contract provisions should not apply to business to business contracts.
Recommendation 6	It should not be possible for action to be undertaken simply on the basis of a 'substantial likelihood of detriment'; action should only be possible where actual detriment is suffered by a consumer.
Recommendation 7	The definition of an unfair contract should make reference to 'good faith', and the concept of good faith should be clarified for the purposes of the provision.
Recommendation 8	The onus of proof with respect to whether a contract is 'non negotiated' should not be reversed with respect to the building and construction industry, because of statutory protections for consumers in domestic building contract legislation.
Recommendation 9	If the onus of proof remains on the supplier of the contract (not preferred), the legislation should set out clear and reasonable criteria which the supplier must meet in order to satisfy the onus of proof.
Recommendation 10	A supplier should only be required to prove that a consumer has been given the opportunity to negotiate some of the terms of the contract. Whether the supplier agrees to the changes or not should be a commercial decision for the supplier.
Recommendation 11	Remedies for breach of the provision should only be available where a consumer suffers a <i>financial</i> detriment.
Recommendation 12	A reasonable transition period of 2-3 years would be appropriate to give businesses time to obtain legal advice and adapt standard form contracts.
Recommendation 13	In addition to a public advertising campaign, the Government should fund a workshop or seminar education program to be run by industry associations and tailored to individual industries to educate businesses about the implications of the new regime.
Recommendation 14	The Government should prepare a detailed regulatory impact statement prior to introducing the legislation with details of the likely ongoing costs to business.
Recommendation 15	The Government should reconsider a proposal to regulate and void many of the contractual terms in the Discussion Paper with respect to building contracts.
Recommendation 16	There should be a single national regulator of the national consumer law.
Recommendation 17	The maximum civil penalties in the TPA would be excessive as remedies for an unfair contracts regime. Fines should be reasonable rather than punitive.
Recommendation 18	Criminal sanctions or disqualification orders are not a proportionate response to a breach of the proposed unfair contract provisions.
Recommendation 19	If public warning powers are introduced, the legislation should contain rigorous criteria regarding their use.

Recommendation 20	COAG should examine the penalties and sanctions in place under equivalent unfair contract regimes interstate and overseas to develop a 'light touch' regulatory regime with more emphasis on education and information programs for employers.
Recommendation 21	Reviews of the national consumer law enforcement powers should consider the effect of the regime on various industries, and the effect of unfair contract provisions on large, small and medium sized businesses. The review should include an analysis of the ongoing cost of the regime to business, including legal and compliance costs.

APPENDIX B

FURTHER RECOMMENDATIONS FROM THIS SUBMISSION

Recommendation 22	There be a longer consultation process into the Bill, and at the least, a formal Senate Inquiry into the Bill should be conducted. The Inquiry should focus on the costs and benefits of the Bill so that the costs of its introduction may be adequately scrutinised.
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Recommendation 23	If the proposed regime regarding business to business contracts is to proceed, Master Builders would also advocate its extension to all government to business contracts.
Recommendation 24	Master Builders recommends that an exhaustive list of unfair contract terms should be included in the text of the legislation.
Recommendation 25	Master Builders considers that the exclusion in Clause 5 should be widened by redefining the definition of upfront price for the purposes of the application of the regime to the building and construction industry.
Recommendation 26	Master Builders recommends that prohibited terms should be more clearly and explicitly defined in the legislation; an exhaustive list of prohibited terms should be included in the text of the legislation.

Attachment 3

DOMESTIC BUILDING CONTRACTS ACT 2000 (QLD)

Penalties applicable to the Contractor in breach of these sections of the Act

Section	Description	Penalty Units	Maximum Fine
26	Contracts must be in writing	80	\$8,000
27	General contents - compliance	20	\$2,000
31	Documents must be kept for 7 years	100	\$10,000
33	Calculable delays	20	\$2,000
	Statement of number of days allowed	20	\$2,000
34	Incalculable delays	40	\$4,000

36	Copy of contract for building owner	20	\$2,000
39	Copies of contract related documents (Certificate of Inspection)	20	\$2,000
	Other than a Certificate of Inspection	20	\$2,000
40	Copy of contract information statement	20	\$2,000
52	Licencing requirement for building contractors	80	\$8,000
53	Foundations data	100	\$10,000
	Copy of Foundations data to owner	10	\$1,000
54	Mixed purpose contracts	100	\$10,000
55	Cost plus Contracts	100	\$10,000
	Fair and reasonable estimate	100	\$10,000
59	Prime Costs and Provisional Sums - Stating amounts	50	\$5,000
61	Schedule of Prime Cost/Provisional Sum	50	\$5,000
62	Evidence of cost	20	\$2,000
63	Adjustments	20	\$2,000
64	Deposits	100	\$10,000
65	Progress payments for contracts other than Designated Stages Contracts	50	\$5,000
66	Progress payments for Designated Stages Contracts:		
	· Build to Enclosed stage	50	\$5,000
	· Build to Fixing stage	50	\$5,000
	· Build to All stages	50	\$5,000
67	Completion payments - practical completion	100	\$10,000
	Owners agreement to practical completion with defects	100	\$10,000
68	Associated third party amounts	40	\$4,000
79	Variations must be in writing	20	\$2,000
	No work to be carried out without signed variation	20	\$2,000
80	General contents of Variation document	20	\$2,000
82	Variation document must be signed	20	\$2,000
83	Copy of Variation document to owner	20	\$2,000
85	Building contractor does not acquire interest in land of resident owner (caveat)	100	\$10,000
87	Access to building sites (by owner)	20	\$2,000
88	Display of documents at Display Homes	100	\$10,000
89	Construction of home based on Display Home	100	\$10,000