

Master Builders Australia

Submission to Treasury

on

Extending Unfair Contract Term Protections to Small Businesses

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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of submission

- 2.1 This submission is in reply to Treasury's ["Extending Unfair Contract Term Protections to Small Businesses Consultation Paper"](#) (Consultation Paper). The questions raised in the Consultation Paper are each answered in section 5 of this submission. The questions are set out in italics.
- 2.2 This submission amplifies the matters discussed between Master Builders and Treasury officials on 16 June 2014 when the central focus of discussions was the systemic issues raised in Master Builders' submission dated 10 June 2014 to the Competition Policy Review entitled *Integrating the Australian Consumer Law and Domestic Building Contract Legislation – Small Business Perspectives* (the ACL submission) (attached). As indicated in the ACL submission and during the discussion, Master Builders maintains its position that domestic building contracts should not be caught by the unfair contract terms law.
- 2.3 At the essence of Master Builders' concerns is the proposition that the flawed idea that consumers should have the right to re-open contracts, especially building and construction industry contracts, after they have been properly and transparently negotiated and agreed to goes against hundreds of years of jurisprudence.

3 Unfairness in the Contract Chain

- 3.1 Master Builders view of the current unfair contract terms law is that despite the number of small businesses in the building and construction industry, (see Table 1) the proposed extension of the unfair contract law as currently framed would create uncertainty and lead to more litigation in the industry to the detriment of businesses of all sizes.

Table 1: Small Business – Composition of building and construction industry as at June 2012

Number of Employing Building and Construction Businesses as of June 2012*

State	1-19 Employees	20-199 Employees	200+ Employees	Total
New South Wales	5,793	282	19	6,094
Victoria	4,838	212	16	5,066
Queensland	4,229	298	17	4,544
South Australia	831	71	3	905
Western Australia	1,311	117	6	1,434
Tasmania	378	27	0	405
Northern Territory	157	17	0	174
Australian Capital Territory	245	11	0	256
Total Australia	17,782	1,035	61	18,878

Source: ABS catalogue 81650 Counts of Australian Businesses, including Entries and Exits, Jun 2008 to Jun 2012

*Excludes ANZIC subcategories, Heavy and Civil Engineering Construction and Construction Services

- 3.2 We reinforce that the uncertainty of the proposal - that is, the uncertainty the law in its current form would generate if it applied to business-to-business transactions - should be taken into account in any new legislation. This would be particularly the case where governments were not bound by the provisions of the unfair terms contract law. In that regard, unfairness would not be limited to small businesses but would be imposed on other contractors and industry, e.g. by way of inclusion in government contracts of termination for convenience provisions or similar provisions in commercial contracts as discussed with Treasury officials. For example, GC21 Edition 2, a contract form used extensively by the NSW and ACT governments, contains a unilateral termination for convenience provision. Unfairness must be tackled systemically, including in relation to unfair risk balances in government contracts epitomised in many Department of Defence contracts.

- 3.3 At the least, unfairness which is created at the top of the contractual chain should not be so labelled where it was lawful for government or the private sector principal to impose the relevant obligation; as to whether that would then mean the mirror or similar provision further down the contractual chain would be reasonably necessary to protect legitimate business interests of the contractor which won the relevant tender should be acknowledged in the new law rather than be left to the litigation lottery. The legislation should specifically acknowledge that such a practice would not offend the terms of the law as extended to small business.
- 3.4 The Interim Report of the Building the Education Revolution (BER) Taskforce¹ provides an insight as to where risk is loaded onto specific industry participants. The Interim Report made the preliminary finding that the Managing Contractor model identified as one of three delivery mechanisms for BER projects charged higher management fees than the other models, but that this 'prima facie reflect[ed] a higher assumption of risk.'²
- 3.5 In its final report³ this issue was even more cogently expressed:

Business as usual arrangements, with managing architects in the equivalent superintendent's representative role, would have been more suitable for BER school projects given their relatively small size, complexity and risk profile. This approach would have maintained a more traditional relationship with building contractors than has been the case of the more complex outsourced, multi-site procurement models used by the Victorian and NSW governments. These education authorities have had the vast majority of complaints, value for money concerns and quality issues.

*NSW elected to engage seven managing contractors across nine NSW regions. Managing contractors are responsible to arrange for the scoping, budget and quality delivery of projects through the engagement of their own design and sub-contractors to perform the projects in accordance with a modified GC21 contract form which **transfers design, procurement, construction and commercial risk. NSW has paid relatively high fees (documented in our previous report) to managing contractors***

¹ See *Building the Education Revolution Implementation Taskforce Interim Report* (Cth of Aust, 6 August 2010); <http://www.bertaskforce.gov.au/pages/publications.aspx>.

² *Ibid* at 42.

³ See *Building the Education Revolution Implementation Taskforce Final Report* (Cth of Aust, July 2011); <http://www.bertaskforce.gov.au/pages/publications.aspx>.

in order to transfer considerable performance and commercial risk away from the NSW Government.⁴

- 3.6 This phenomenon seems to reflect what has been identified by Ulbrick⁵ as follows:

During the contracting phase little consideration is given to how the risks associated with construction ought to be allocated. Rather, the focus during the contracting phase is dedicated to how risks will be allocated where each party to the contract acts on a self preservation basis.⁶

- 3.7 This 'self-preservation' philosophy leads to risk transfer down the contractual chain discussed above. Government should not, via the proposed extension of the law, frame one part of the risk transfer as 'unfair.' Further examples of the "risk shifting" approach to building contracts have been well set out by Oxbrough.⁷

4 Distinguishing Contracts of Adhesion

- 4.1 There are 15 questions asked in the Consultation Paper: as stated earlier, each is responded to in turn in section 5 of this submission. These responses deal with the issues associated with building and construction industry standard form contracts. However, Master Builders' members do not accept that all standard form contracts should be treated in the same manner by the proposed law. As Master Builders has articulated in other submissions, it is contracts of adhesion that should be the primary target of the legislation not all standard form contracts, particularly not those formulated in the context of the domestic building contract legislation. It is Master Builders' contention that building and construction contracts formulated under the domestic building contract legislation do not meet the definition of a standard form contract as expressed under current law, but this is far from certain.
- 4.2 It is noted that Burke⁸ has indicated that, in the context of the jurisprudence in the USA, distinguishing contracts of adhesion is misguided. This view is held

⁴ Ibid at 63 (Master Builders' emphasis).

⁵ D Ulbrick, 'No Dispute? Testing the Wisdom of Abrahamson' (2010) 21 Insurance LJ 96.

⁶ Ibid at 100.

⁷ A Oxbrough "Risk Shifting in Building contracts" ACLN 154 Jan/Feb 2014

⁸ JJA Burke *Reinventing Contract* [2003] MurUEJL 18

because of the mechanism of remedy (replicated in the current Australian law) rather than because the notion is not distinguishable:

While courts classify certain contracts as "adhesion contracts," the designation itself has not resulted in the large scale setting aside of standardized terms. Rather, an adhesion contract triggers a set of criteria by which courts determine whether to enforce the contract or any particular term.⁹

- 4.3 Contracts of adhesion may be differentiated from domestic building contracts on the basis that the ability to bargain is constrained, not shaped by legislation which requires mandated measures about transparency and contractual terms. As discussed by Paterson¹⁰ the current test as to whether a contract has been entered into voluntarily is:

"[A] qualified standard. As described by Andrew Robertson, the standard probably requires that 'the decision to assume the obligation ... be substantially unconstrained ... and the obligation itself ... be substantially understood.'¹¹

- 4.4 It is these very matters that domestic building contract legislation forces on those who enter into transactions for domestic building work. Those contracts are readily able to be distinguished from contracts where signing the proffered terms on a 'take it or leave it' basis is a precondition to receiving a service e.g. with hire car transactions.

- 4.5 Master Builders' members, it should be made clear, believe that there is equity in extending laws to small business which seek to apply fairness in relation to "take it or leave it" contracts, that is contracts of adhesion albeit subject to what we have said in paragraph 3.3 above about causing further unfairness elsewhere in the contractual chain. We reiterate that the legislation contemplated by the Government should expressly acknowledge that any otherwise unfair provision would not be caught by the legislation if it was imposed as a result of contractual conditions which are passed down the contractual chain as part of risk transfer. The law should hence be directed at contracts of adhesion i.e. contracts that lack the two elements isolated by Paterson as above.

⁹ Id at para 133

¹⁰ Paterson, Jeannie "[The Australian Unfair Contract Terms Law](#): The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts" [2009] UMelbLRS 20

¹¹ Ibid

5 Questions to be answered

5.1 *How widespread is the use of standard form contracts for small business and what are their benefits and disadvantages?*

5.1.1 Every building or structure has unique characteristics. Unique drawings, specifications and individual building schedules will be prepared for a particular project. However, the fundamental legal rights and obligations of the parties, the owner, the builder and subcontractors, rarely change from project to project. As a consequence the building and construction industry relies on standard forms of contract to apply these rights and obligations in a consistent and uniform manner. It does so in the domestic sector largely mandated by the terms of the domestic building contract legislation, discussed in detail in the ACL submission.

5.1.2 In the commercial context bespoke contracts are more common but there are a large number of commercial standard form contracts in use. To this end, Standards Australia publishes the AS2124 and the AS4000 series with appropriate training courses also published for each. Jointly with the Royal Australian Institute of Architects (AIA), Master Builders also prepares standard form contracts for sale: the Australian Building Industry Contract (ABIC Suite). The ABIC Suite is a new generation of standard form, plain English building contracts for use in all market sectors, domestic and commercial.

5.1.3 The industry relies on standard form contracts as an everyday practice. Their benefits outweigh the disadvantages, albeit that Bell¹² has questioned their utility in the context of, ABIC aside, not being regularly and appropriately updated.

¹² Matthew Bell *Standard Form Construction Contracts in Australia: Are Our Reinvented Wheels Carrying Us Forward?* UMelbvLRS13 7 December 2009. This article reviews the range of standard form construction contracts which were in common use in Australia in 2009 including their history and key features (with a particular focus upon the then recently-released ABIC MW-2008 form) and treatment in the courts. In doing so, it seeks to reflect upon the purpose and utility of standard forms, as well as what their role may be in a future which promises ever-increasing complexity in the law, commerce and practice of the industry.

5.1.4 The Melbourne Law School, with the support of the Society of Construction Law Australia, recently released a report into the use of standard form construction contracts in Australia ([Law School Report](#)). The Report was based on a web survey and interviews conducted with legal advisors (both external and in-house), contractors and subcontractors, commercial teams and contract administrators.

5.1.5 The Report indicates that standard form contracts were used on 68% of the projects surveyed. It notes there is broad support in principle for having suitable standard forms available for use by the industry.

5.2 *What considerations influence the design of terms and conditions in standard form contracts?*

5.2.1 The most prominent reason identified for the use of standard form contracts in the building and construction industry was set out in the Law School Report as their familiarity, and their perception as an important benchmark of reasonableness. Other factors listed as influencing the use of standard forms were (listed in order of importance):

- suitability of the standard form to the risk profile;
- ease of contract administration through the use of the form;
- minimising transaction and legal costs;
- best reflecting the 'deal';
- well-drafted form;
- form was recommended or mandated by a party's organisation, such as government tendering requirements; and
- gaining a commercial advantage for the party procuring the work.

5.2.2 In considering the projects which used a standard form contract, AS4300 was used on 23% of these projects, 18% used AS4000, 17% used AS2124 and 14% used AS4902. In over 80% of these cases, the principal or the principal's lawyer was responsible for choosing the standard form. Hence, Standards Australia processes

are influential but the Law School Report indicates that amendments to standard form contracts were generally voluminous.

5.3 *To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?*

The Law School Report states that:

- The primary reason identified for amending standard forms was the 'need to shift risk'.
- As to the types of clauses which are amended from (including added to) the standard forms, the highest incidence of amendment across all forms, contracting sectors and values was in respect of: extensions of time (76% of forms where amendments were reported), delay damages (including liquidated damages) (71%) site conditions (68%), payment (65%) and variations (63%).
- That said, there were substantial variations across categories as to the types of clauses amended. For example:
 - the highest incidence of amendment in respect of extension of time clauses was in the residential building-commercial developer sector (92%) and contract values from \$20 million to \$50 million (84%); and
 - limitations of liability were added to 48% of forms overall, but this incidence rose to 73% in the private sector infrastructure (mining and resources) sector.

5.4 *To what degree do small businesses try to negotiate standard form contracts?*

5.4.1 Small businesses in the domestic context are constrained from making amendments because of the domestic building contract legislation. In the commercial context they are constrained by the fact that most work is done as a result of responding to a tender where the contractual conditions are fixed.

5.4.2 In the commercial context it is reasonably common for businesses including small businesses to place conditions in their tender submissions. This practice then leads to negotiations between the

small business and the potential client. It is Master Builders' experience that non-conforming responses to tenders are often received and the terms of the ultimate contract negotiated.

5.5 *Is it the terms or the process by which some contracts are negotiated that is the main concern for small businesses?*

The answer to this question depends on context. In many instances Master Builders receives complaints based on a dispute which has arisen from poor processes; on the other hand complaints are also referred to Master Builders when the content of a contract is fully known to the small business operator. This latter issue arises from the often held philosophy that a good contract is one that is able to be stored in the bottom drawer and never looked at.

5.6 *How do small businesses differ from consumers in relation to their interaction with standard form contracts?*

In the building and construction industry consumers are protected by law, as discussed earlier. For small businesses in the building and construction industry, standard form contracts are part of their daily business.

5.7 *What terms are businesses encountering that might be considered 'unfair'?*

Illegitimate risk transfer occurs when principals, particularly governments, impose non-negotiable obligations on those further down the contractual chain. Often the risk is not borne by the party best able to manage that risk. We emphasise that unilateral termination for convenience is one such provision e.g. clause 74 in GC21 Edition 2. Similarly GC21 requires defect free completion in order to reach practical completion, which is an unachievable goal within the timeframes set out in GC21.

5.8 *What detriment have businesses suffered from unfair contract terms?*

5.8.1 There are a large number of insolvencies in the building and construction industry which are caused or exacerbated by the application of unfair contract terms.

5.8.2 Unfair contract terms also increase the level of disputation within the building and construction industry. Disputes are often engendered when adequate disclosure of the terms and conditions of the contract does not occur at tender.

5.8.3 The cost of seeking legal or other advice about contractual terms at tender stage is often prohibitive and difficult to organise within many of the required, limited response times.

5.9 *What protections do businesses currently have when they encounter unfair contract terms and are they sufficient?*

Unconscionable provisions are generally not able to be pleaded as such in the commercial context because of the disclosure of terms via a tender process. Despite the notion of publication of the terms and conditions before acceptance of tenders being regarded as a sufficient protection, it is often the case that particularly smaller businesses do not seek advice before submitting a response to tender.

5.10 *What regulatory responses are already in place that aim to protect small business from unfair contract terms and how effective are these mechanisms?*

5.10.1 In Queensland Part 4A of the *Queensland Building and Construction Commission Act 2014* provides minimum requirements for commercial contracts, for example in respect of retentions and their release.

5.10.2 Each State and Territory has legislation dealing with security of payment.

5.11 *What responses (including by government or industry) could be implemented to help businesses with ensuring contract terms respect the legitimate business objectives and interests of both big and small contracting parties?*

5.11.1 We answer this question by reference to the discussion set out in sections 3 and 4 of this submission.

5.11.2 The greatest contributor to fairness in the building and construction industry would be for governments to comply with the law in relation to unfair contract terms. Government should adopt a standard form contract that encapsulates best practice risk allocation as exemplified in Abrahamson's *No Dispute*.¹³

¹³ "No Dispute – Strategies for Improvement in the Australian Building and Construction Industry" *NPWC/NBCC Joint Working Party 1990* (National Public Works Conference, 1990).

- 5.12 *Would information disclosure requirements impact on the decision to review standard form contracts and/or consider the terms included in them?*

Adequate disclosure forms the basis of domestic building contracts around Australia as indicated in the ACL submission.

- 5.13 *Given the Commonwealth Government's commitment to extend existing unfair contract term provisions to small businesses, what should be the scope of the protections?*

5.13.1 Master Builders believes that the extension of the law and the current law relating to unfair contract terms should be restricted to contracts of adhesion as outlined earlier in this submission.

5.13.2 The law should exclude domestic building contracts from its provisions both currently and in any extension.

- 5.14 *Should the Australian Consumer Law UCT provisions be extended to cover small businesses defined using contracting party characteristics or transaction size? Should small business to small business contracts be included?*

5.14.1 There currently exists in Australian legislation no coherent or consistent definition of a small business. Master Builders favours a definition based upon turnover. The criterion in the *Privacy Act 1988*, that is a turnover of less than \$3 million is the preferred delineator.

5.14.2 Master Builders does not support the extension of the unfair contract terms law to small business to small business contracts. As set out elsewhere in this submission, the level of uncertainty that this would create around contracting practices would be toxic e.g. significant legal costs would likely to be incurred.

- 5.15 *Should the extension of the UCT provisions provide protection for small business when they both acquire and supply goods or services?*

5.15.1 Most of the litigation relating to small business in the building and construction industry occurs in relation to subcontracts which bind small business in the supply of their goods and services.

- 5.15.2 In the broader context the acquisition of goods or services under a contract of adhesion should be captured. This area appears to be at the centre of the mischief the new law seeks to address.

6 Conclusion

Master Builders proposes that the extension of unfair contract terms protections should only be applied to small businesses where a contract of adhesion is at issue. We recommend that the current law be remediated to ensure its provisions affect only contracts of adhesion and that domestic building contracts be excluded from its provisions.

Master Builders Australia

Submission to the Competition Policy Review

On

Integrating the Australian Consumer Law and Domestic Building Contract Legislation – Small Business Perspectives

10 June 2014



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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of submission

- 2.1 This is the third submission to be provided to the Review. This submission sets out Master Builders' strategic priorities for rationalising and reforming a critical aspect of regulation as contemplated by Item 6 of the Review Panel's Terms of Reference as follows:

The Review Panel should consider and make recommendations on the most appropriate ways to enhance competition, by removing regulation and by working with stakeholders to put in place economic devices that ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.

- 2.2 It is essential in reviewing and rationalising the regulatory impact borne by business, particularly small business, to consider the issue of the manner in which consumers are 'protected' and for rationalisation of those protections to occur where they are duplicated or overlapping and/or where they hamper competition. Hence, this submission stands as separate to Master Builders' other submissions to the Review. It focuses on how the current burden of regulation that is in place to protect consumers in the building and construction industry acts as a barrier to the efficient operation of the market, especially for small business.

- 2.3 Whilst Master Builders understands that the Review Panel is constrained in its examination of the Australian Consumer Law (ACL),¹ the idea of who is protected by the ACL and who is not is encapsulated in the notion of who is a consumer. Unfortunately the concept of 'consumer' is not sui generis. It is fractured. There are differing ways in which a consumer is defined in the ACL. In essence, one of the features of the ACL which, we submit, should be identified as inappropriate by the Review Panel is that it treats many commercial transactions as if they had the characteristics required to protect a consumer. This submission explores that theme as well as pointing out there are too many overlapping protections for consumers, especially in respect of domestic building work and the definition of 'consumer' provides for small business, potential protection as a consumer (depending on how that concept is defined in context) but, in addition, potential capture as a supplier or manufacturer.
- 2.4 In other words, whilst the ACL is directed at consumer transactions, there are a number of implications for commercial contracts that arise from the breadth of the law and from the terms used. This submission highlights those issues and calls for further review.

3 The nature of the ACL

- 3.1 The genesis of the ACL was in the findings of the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.² Master Builders made a submission to the Productivity Commission on the draft report that preceded the publication of the final report. Master Builders commended the main focus of the report, namely proposals for unfair contract terms legislation, that would limit the new laws to individuals making purchases of goods or services for private use. Master Builders supported this perspective, with appropriate exemption of domestic building contracts (a matter we return to in this submission), and opposed any unfair contracts proposals being extended to business-to-business contracts. This is the stance we maintain.

¹ See the following term of reference: *The Review Panel should only consider the ACL (Schedule 2 of the CCA and corresponding provisions in Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001), to the extent they relate to protections (such as from unfair and unconscionable conduct) for small businesses.*

² <http://www.pc.gov.au/projects/inquiry/consumer> (accessed 22 May 2014)

3.2 The legislation was passed limiting the unfair contract terms provisions to business to consumer transactions but not exempting domestic building contracts. The ACL acts as an overlay on existing protection of consumers entering into domestic building contracts under a number of State and Territory laws; the statutory guarantees operate contemporaneously with other consumer protections. This plethora of regulation has been added to without rationalisation or proper study. We support action to reduce the regulatory burden, particularly on small business. This burden is exemplified in the range of overlapping protections provided to consumers which are also incongruously provided to business as a result of the poor manner in which the law is expressed, a matter taken up below.

3.3 At present in the building and construction industry the following protections, many of which overlap, are in force to assist consumers:

- State based domestic building contract legislation – see Table 1 below;
- The ACL guarantees discussed in section 6 of this submission;
- The Building Code of Australia (which is part of the National Construction Code) as a minimum contractual requirement³ – see Table 2, and
- The unfair contracts provisions of the *Competition and Consumer Act, 2010* (Cth) (CCA) discussed in section 5 of this submission.

³ See *The Owners – Strata Plan No 69312 v Rockdale City Council & Anor etc* [2012] NSWSC (18 October 2012) per Lindsay J especially at para 60-62 for discussion of the legal status of the BCA, and its Guide.

Table 1: Domestic Building Contracts Acts

Jurisdiction	Name of Instrument
Australian Capital Territory	<i>Building Act 2004</i>
	<i>Building (General) Regulations 2008</i>
New South Wales	<i>Home Building Act 1989</i>
	<i>Home Building Legislation Amendment Act 2001</i>
	<i>Home Building Regulation 2004</i>
Northern Territory	<i>Building Act 2014</i>
	<i>Construction Contracts (Security of Payments) Act 2004</i>
	<i>Construction Contracts (Security of Payments) Regulations</i>
	<i>Building Regulations</i>
Queensland	<i>Building Act 1975</i>
	<i>Building Regulation 2006</i>
	<i>Building and Construction Industry Payments Act 2004</i>
	<i>Building and Construction Industry Payments Regulation 2004</i>
	<i>Subcontractors Charges Act 1974</i>
	<i>Queensland Building and Construction Commission Act 1991</i>
	<i>Queensland Building and Construction Commission Regulation 2003</i>
	<i>Domestic Building Contracts Act 2000</i>
	<i>Domestic Building Contracts Regulation 2010</i>
South Australia	<i>Building Work Contractors Act 1995</i>
	<i>Building Work Contractors Regulations 2011</i>
Tasmania	<i>Building Act 2000</i>
	<i>Building Regulations 2013</i>
	<i>Building Amendment Act 2009</i>
	<i>Building Amendment Regulations 2013</i>
	<i>Housing Indemnity Act 1992</i>
Victoria	<i>Building Act 1993</i>
	<i>Domestic Building Contract Act 1995</i>
	<i>Building Amendment Regulations 2011</i>
	<i>Building Regulations 2006</i>
Western Australia	<i>Building Act 2011</i>
	<i>Building Regulations 2012</i>

Table 2: Building Code of Australia Legal Basis for Reference by State and Territory Building Legislation

State	Provision	Section of Act	Regulation
Australian Capital Territory	<i>Building Act 2004</i>	S136 & 137 Plus see s49 which describes the BCA as a minimum standard	Issued from time to time e.g. Building (Publication of Building Code) Notice 2010 (No 1)
New South Wales	<i>Environmental Planning and Assessment Act 1979</i>	S80A	
	<i>Home Building Act 1989</i>	S7E and 16DE	
	<i>Environment Planning and Assessment Regulation 2000</i>		CI 7 and 98
	<i>Home Building Regulations 2004</i>		CI 12 and Schedule 2 Part 1 Clause 2(1)(a) and Clause 4(1)(a)
Northern Territory	<i>Building Act</i>	S52	
	<i>Building Regulations</i>		Reg 2 and 4
Queensland	<i>Building Act 1975</i>	S12, 14 and 30	
South Australia	<i>Development Act 1993</i>	S36	
	<i>Development Regulations 2008</i>		Reg 4
Tasmania	<i>Building Act 2004</i>	S55	
Victoria	<i>Building Act 1993</i>	S9	
	<i>Building Regulations 2006</i>		Reg 109
Western Australia	<i>Building Act 2011</i>	S37	
	<i>Building Regulations 2012</i>		S31A(2)

3.4 Master Builders considers that a rationalisation of these laws would provide greater clarity and a better regulatory environment for all building and construction industry participants and better stimulate competition.

3.5 Master Builders supports the idea of the Productivity Commission conducting an *ex post* review of the ACL, particularly as many aspects of the consumer laws also affect business transactions as discussed below. The need for a further review was raised by the Productivity Commission as follows:

An ex post review to determine whether the new laws have created any unintended consequences for producers or consumers could be worthwhile once experience has been gained in the operation of the new national framework.⁴

- 3.6 To the extent that the Review is constrained in undertaking this work, Master Builders recommends that it indicate to government this is necessary work and that further scrutiny of this area of the CCA should occur.

4 Who gets the benefit of the ACL

- 4.1 The Explanatory Memorandum for the Bill founding the ACL articulates that there are six areas where the definition of consumer is relevant.⁵ For the purposes of this submission, we focus on the consumer guarantees regime and the unfair contracts regime. The difference in the coverage of protection between these two areas is illustrative of two distinct approaches. The first is the restriction of the remedies for unfair contract terms to consumers through the definition of consumer contract in s23(3) of the ACL – that is by reference to the type of transaction. On the other hand, the definition of a ‘consumer’ in s3 ACL is based on s4B of the former *Trade Practices Act* where the definition is by reference to the types or value of goods or services purchased.
- 4.2 It is via the definition of ‘consumer’ for the purposes of the statutory guarantees that small business is caught in the provisions of the ACL, potentially as an affected consumer as well as a supplier or manufacturer.
- 4.3 We now turn to an examination respectively of the unfair contract terms and the statutory guarantees provisions to highlight the differences in the way the definition of ‘consumer’ has varying practical effects, as well as exploring some of the issues which adversely affect businesses in the building and construction industry.

5 Unfair Contract Terms

- 5.1 Section 23 of the ACL is pivotal to an understanding of how the unfair contract terms law operates. It is as follows:

⁴ Productivity Commission Research Report “Impacts of COAG Reforms: Business Regulation and VET”, Volume 2 p42 April 2012

⁵ Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 at para 2.12

- (1) *A term of a consumer contract is void if:*
 - (a) *the term is unfair; and*
 - (b) *the contract is a standard form contract.*
- (2) *The contract continues to bind the parties if it is capable of operating without the unfair term.*
- (3) *A consumer contract is a contract for:*
 - (a) *a supply of goods or services; or*
 - (b) *a sale or grant of an interest in land;*

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

- 5.2 A contract is unfair for the purposes of s23(1)(a) if, pursuant to s24, it
- causes a significant imbalance in the rights and obligations of the parties;
 - is not reasonably necessary to protect the interests of the advantaged party; and
 - would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.
- 5.3 Section 24 also sets out that a court must take into account the extent to which the term is transparent, and the contract as a whole, when looking at whether it is unfair. This impinges particularly on some of the domestic building legislation where the terms of the contract must be made clear to a consumer and there is a cooling-off provision as part of the statutory construct. Under the ACL a term is transparent if it is expressed in reasonably plain language; legible; presented clearly; and readily available to any party affected by the term: s24(2).
- 5.4 Section 25 then sets out a non-exhaustive list of the kinds of terms of a consumer contract that 'may be unfair'. One example will suffice to show how the provisions are novel in Australian contract law. Section 25(1)(m) provides the example of terms imposing the evidential burden on one party in proceedings relating to the contract. 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, particularly as the legislation presumes that where it is pleaded that a contract is a standard form that is the case and the onus is then on the respondent to prove otherwise – section 27(1).

- 5.5 In addition, Carter⁶ has criticised a number of the factors set out in s25 as indeterminate in that they are too broadly stated and do not take a specific consumer protection focus, as reflected in the United Kingdom law on which they are based. This extract from his work that is highly critical of s25 is illustrative:

The example stated in s25(k): a term that limits, or has the effect of limiting, 'one party's right to sue another party'. That example would apply to any exclusion or limitation of liability. The impact would seem to be that a supplier must be in a position to justify any exclusion or limitation of liability. A corresponding example in the Unfair Terms in Consumer Contracts Regulations 1999 (UK) is:

Excluding or hindering the consumer's rights to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.⁷

- 5.6 Master Builders has serious concerns about the basis of the unfair contract terms law as it affects domestic building contracts. This is because its provisions introduce a high degree of uncertainty into the residential building sector where the large majority of transactions are undertaken using standard form contracts, contracts which are, in any event, constrained by the domestic building legislation. This uncertainty operates to the detriment of both business and consumers and brings into effect an unnecessary dual level of regulation.
- 5.7 In the building and construction industry even the 'standard' printed conditions can be – and routinely are – altered, added to or deleted. None of the major terms of building contracts such as price, quality, length of contract time, security for performance, insurances, dispute resolution methods, or liquidated damages are "standard", but are required to be individually

⁶ JW Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 JCL 221 at p2, print version.

⁷ Ibid at p11 print version

negotiated and inserted into each contract. Standard form contracts are targeted by the ACL to be of concern because they are labelled as having a “non-negotiated character.” We believe a generalised categorisation of standard form contracts in the building and construction industry in this manner is fundamentally flawed and some of the specific assumptions underlying the ACL are equally flawed, particularly that all standard form contracts cannot be renegotiated and the notion of unfairness must be assessed in each case on a subjective basis.

- 5.8 The ACCC has made it plain that it is “take it or leave it” contracts or contracts of adhesion that are the target but despite those assertions the ACL creates a much larger regulatory net. A senior officer of the ACCC has said:

The unfair contract terms laws are designed to protect consumers from terms and conditions not adequately disclosed to, understood by or even contemplated by them, which are offered in standard form contracts on a ‘take it or leave it’ basis.⁸

- 5.9 This narrows the manner in which the law is conceived well beyond the tenor of its provisions.⁹ The law should be re-framed to better encapsulate this intent.

- 5.10 In contradistinction to the stated purpose of the ACL from the quotation set out in paragraph 5.8, the current domestic building contract legislation generally provides consumers with ample protection. It is based on there being disclosure and other elements of procedural fairness, such as the cooling off provisions in s72 *Domestic Building Contracts Act, 2000* (Qld). In addition, at least in New South Wales in the current context of domestic building regulation, there is already an opportunity to challenge domestic building contracts on the basis of unfairness. Section 89D of the *Home Building Act 1989* (NSW) relating to jurisdiction concerning unjust contracts, provides to the relevant Tribunal, the NSW Civil and Administrative Tribunal, the jurisdiction of the Supreme Court under the *Contracts Review Act 1980* (NSW) with regard to contracts for residential building work, building consultancy work, or specialist work. The only restriction on the power available to the Tribunal under the Act is a prohibition from exercising power

⁸ P Kell Deputy Chairman ACCC, *The Australian Consumer Law – What it Means for Business in the Northern Territory* speech 25 May 2010 (unpublished)

⁹ A point also not addressed in the recently released Treasury consultation paper *Extending Unfair Contract Terms Protections to Small Business* May 2014 – see in particular the assertion at paragraph 10 on page 7.

under s10 *Contracts Review Act 1980*.¹⁰ In effect, NSW has an unfair contracts jurisdiction in place and the ACL unfair contract terms law acts as additional protection which effectively is otiose.

- 5.11 Generally, the current law regulating domestic building contracts recognises that some consumers may be vulnerable. It recognises suppliers may have a superior bargaining position to consumers. The law has more than overcome the problem of a supplier taking advantage of a domestic consumer through a superior bargaining position. It has swung the pendulum in favour of consumers, even where the consumer has greater marketplace power than, say, a small builder. Generally, the statutes protecting consumers in the domestic sector of the building and construction industry fulfil this function by ensuring they have sufficient information about the contract in a readily accessible form and they have an opportunity to ‘cool off’ after entering into the contract. They are given ample procedural fairness.
- 5.12 However, despite these requirements at the time of contract formulation, detriment for the purposes of the unfair terms law is not limited to financial detriment. A court is able to consider situations where there may be other forms of detriment that have affected or may affect consumers disadvantaged by the practical effect of an unfair term. Detriment may include inconvenience, delay or distress suffered by the consumer as a result of the unfair term, making the assessment of the notion of unfairness on the face of it a subjective notion. This ex post facto determination contrasts markedly with the approach under domestic building legislation which is to provide as much information as possible to a consumer before and as part of contract formation.
- 5.13 The ACL palpably moves away from a procedural fairness formulation which underpins the domestic building legislation into areas where Australia has embraced a new jurisprudence which sits uncomfortably with domestic building contracts legislation. Master Builders recommends the exemption of domestic building contracts from the unfair contracts regime.

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

6 New Statutory Guarantees

6.1 As indicated earlier, the ACL introduces a new national law on consumer guarantees. The new law replaces provisions that implied conditions and warranties into consumer contracts that were set out in Part V Division 2 of the *Trade Practices Act* and the relevant fair trading legislation in each State and Territory. These guarantees affect building and construction industry contracts where a builder supplies goods and/or services to a consumer as defined. Builders obviously supply both goods and services to consumers.

6.2 Where that is the case the following guarantees must be provided:

- to title;
- to undisturbed possession;
- to undisclosed securities;
- to acceptable quality - this replaces the notion of merchantable quality;
- fitness for a disclosed purpose;
- goods match the description;
- goods match a sample or demonstration model;
- the availability of repairs and spare parts; and
- any express warranty is complied with.

6.3 These are a comprehensive range of new protections. The scope of application for the provisions has been labelled by Nottage as “convoluted and seemingly quite arbitrary.”¹¹ Master Builders agrees, noting the definition of who is a consumer stands in marked contrast to the definition used to apply the unfair terms law. Hence, it is appropriate to set out the definition of ‘consumer’ in s3; the critical subsections of s3 are as follows:

- (1) *A person is taken to have acquired particular goods as a **consumer** if, and only if:*

¹¹ L Nottage *Consumer Law Reform In Australia: Contemporary and Comparative Constructive Criticism* (2009) Vol 9 No 2 QUTLJJ 111p 122

- (a) *the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:*
 - (i) *\$40,000; or*
 - (ii) *if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or*
 - (b) *the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or*
 - (c) *the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.*
- (2) *However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:*
- (a) *for the purpose of re-supply; or*
 - (b) *for the purpose of using them up or transforming them, in trade or commerce:*
 - (i) *in the course of a process of production or manufacture; or*
 - (ii) *in the course of repairing or treating other goods or fixtures on land.*
- (3) *A person is taken to have acquired particular services as a **consumer** if, and only if:*
- (a) *the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:*
 - (i) *\$40,000; or*
 - (ii) *if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or*
 - (b) *the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.*

6.4 These provisions effectively define a consumer by reference to the type of goods they obtain, i.e. whether they are of a kind “ordinarily acquired for personal, domestic or household use.” Other types of goods are caught where they do not exceed the sum of \$40,000 no matter their character. By way of contrast, the definition of a ‘consumer contract’ with respect to the unfair terms provisions of the ACL, reflected in s23 referred to earlier, deems the consumer nexus satisfied if the goods or services are ‘wholly or predominantly for personal, domestic or household use or consumption’. This concept is not replicated. It must be emphasised that because s3 determines

whether a transaction has been performed by a ‘consumer’ by reference to the *type* of goods or services obtained, rather than the *use* to which they are put, it captures both corporations and individuals alike. While this is arguably aimed at protection of small businesses, as Carter has pointed out, ‘what seems to have been ignored is that small business is protected only where it is an end-user’.¹²

6.5 The latter point in the last paragraph arises because goods purchased for re-supply are excluded from the definition of a consumer. Accordingly, many small business subcontractors are excluded from the benefit of the ACL, unlike the corporations they deal with who acquire goods which can be categorised as “ordinarily acquired for personal, domestic or household use.” The protection obviously extends beyond the small business user to all end users of the products of the kind articulated, unconstrained by the arbitrary figure of \$40,000 that would otherwise apply. This point about the broad ambit of the protection is better understood when it is considered that the Explanatory Memorandum sets out with regard to the interpretation of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption the prior jurisprudence relating to s4B of the *Trade Practices Act* is relevant.¹³ The \$40,000 threshold which would otherwise apply is irrelevant where that criterion is satisfied.

6.6 The problematic nature of this issue for the building and construction industry is best illustrated by drawing on that jurisprudence in the context of an argument about whether white-faced foil laminate used for, in the main part, commercial insulation was a product of a kind ordinarily acquired for personal, domestic or household use or consumption: see *Bunnings Group Limited v Laminex Group Limited*.¹⁴ The judgment contains a great deal of analysis of the nature of the product. Young J relied on the case of *Webb Distributors (Aust) P/L v Victoria*¹⁵ to take a broad view of the evidence before him citing the approach to the construction of the legislation as follows:

¹² Supra note 5 at pg 5, print version.

¹³ Supra note 4 para 2.20

¹⁴ [2006] FCA 682

¹⁴ Per McHugh J at 41

¹⁴ Supra note 13 at para 114

¹⁵ (1993) 179 CLR 15

*The Trade Practices Act is a fundamental piece of remedial and protectionist legislation. Such legislation should be construed broadly so as to give the fullest relief which the fair meaning of its language will allow.*¹⁶

- 6.7 Taking a broad view of the evidence, Young J found the goods in question met the requisite characteristics on this basis:

*In my opinion, the special features relied upon by the respondent do not mean that white-faced and other decorative foil laminates are goods of a kind different from reflective foil laminates. Rather, it indicates that white-faced and other decorative foil laminates are a product variant, amongst many different product variants, of standard reflective foil laminates. Nor can it be said that white-faced or decorative foil laminates are the only reflective foil laminates that function as a form of internal roof or wall lining. Both uncoated reflective foil laminates and white-faced foil laminates are and were commonly left exposed to view in commercial and industrial buildings as the only form of roof or wall lining. The relevant difference between the two variations is that if there are special needs for washability, corrosion resistance, light reflectivity, or simply a desire to present a more finished appearance, white-faced foil laminates can provide those extra features at an additional cost.*¹⁷

- 6.8 On the basis of the judge's analysis the products that may be included in the definition of personal, domestic or household use are able to be widely defined. Obviously there are two companies which were in contest over product which had a number of commercial and industrial applications. But on the basis of the test in s3 of the ACL, a large corporation that would not appear to be in the contemplation of the kind of entity needing the benefit of the new statutory guarantees succeeded because of the nature of the goods supplied. Small business is not denoted for protection; the test is not related to that characterisation at all.

- 6.9 A most novel characteristic of the new law is the consumer guarantees operate independently from contracts for sale of goods and services to consumers as defined by s3. They are independent statutory rights that cannot be excluded by contract: s64 ACL. A new basis for consumers to act on is the guarantee which mandates acceptable quality according to the usual purposes of the goods¹⁸ and to any particular purpose for which the goods are

¹⁶ Per McHugh J at 41

¹⁷ Supra note 13 at para 114

¹⁸ Section 54, ACL

being acquired that is disclosed to the supplier.¹⁹ This is a minefield for the building and construction industry, particularly for small businesses, where often latent characteristics of the product fall beyond the control of the builder despite consumer expectations and communications, as for example with the instance of carpet shading.²⁰ With respect to supply of services, there is an implied guarantee as to 'due care and skill',²¹ along with warranty as to 'fitness to a particular purpose', where it has been identified by the consumer as their motivation for the bargain.²²

6.10 The notion of guarantee of acceptable quality deserves special attention as it is entirely new. Acceptable quality is defined in the ACL such that goods are of acceptable quality if they are:

- fit for all the purposes for which goods of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe; and
- durable.²³

6.11 Relevant to the current discussion is the guarantee a manufacturer of goods must comply with any express warranty²⁴ in a contract for sale.²⁵ This is a major change introduced by the ACL. Express warranties are expansively defined to include pre-contractual statements of facts which *might* induce the consumer to purchase the goods.²⁶ All consumer guarantees, including as to

¹⁹ Section 55.

²⁰ But see *Nuttall v Maher & DiPiero t/as Solomon's Carpets Tweed Heads & Feltex Australia P/L* [2003] NSWCTTT 115 (29 January 2003) Note also that in *Carpet Call P/L v Chan* ATPR (Digest) 46-025 carpet is classified as goods ordinarily acquired for domestic consumption no matter that it is of commercial quality. See the Carpet Institute of Australia publication on this topic to show its latent characteristics: <http://members.carpetinstitute.com.au/pubs/documents/Carpets0272Shading6pp.pdf>

²¹ Section 60,

²² Section 61,

²³ Section 54

²⁴ Defined at section 3,

²⁵ Section 59,

²⁶ Section 3,

express warranties, cannot be excluded by agreement.²⁷ So there will undoubtedly be litigation to clarify the full extent of the sort of facts which might have induced the consumer to enter into the transaction as well as about the effects of a breach of the Building Code of Australia (BCA) referred to in section 3 of this submission, as with respect to building contracts it is a required term that the BCA standards are met.

6.12 The consequences of a statutory guarantee of express contractual warranties are central to a number of concerns Master Builders has with the new regime. The remedy provisions are, like much of the ACL, rather complicated. The availability of particular remedies depends upon whether a breach of a consumer guarantee is a 'major failure',²⁸ the existence of which entitles the consumer to compensation for a reduction in value in the goods, to recover damages, or to reject the goods. The latter option depends on whether or not the 'rejection period' as defined²⁹ has lapsed. The ability to reject goods for breach of an 'express warranty', expansively defined under the ACL,³⁰ arguably extends to breaches of mere statements of fact, remedies previously available at common law only for contravention of essential terms.

6.13 Builders, small or large, acting in their role as contractors for re-supply of goods are unable to limit their liability.³¹ As Carter has noted in this regard:

It would be a major step to declare void all exclusions or limitations of liability in contracts under which consumers acquire goods for personal use. It is nothing short of remarkable that the freedom of contract in relation to such terms should also be denied to suppliers supplying to commercial acquirers of goods.³²

This point is highly relevant for small businesses who are likely to be unaware of the reach of the ACL in this regard.

6.14 As stated, the activities of builders will constitute both supply of goods and services³³ and will be subject to the consumer guarantee regime. It will also

²⁷ Section 64,

²⁸ See sections 259-260,

²⁹ See subsection 262(2),

³⁰ See section 3,

³¹ Section 64,

³² Supra note 5 at pg 14, print version.

³³ See definitions at section 3

often be unclear to contractors whether or not they are providing goods to an end user (i.e. a consumer), particularly for small business contractors. Certainly, it will not be obvious to many in the marketplace that a corporation may be entitled to protections under the ACL, which can easily distort the risk-management and insurance arrangements of small business and even large business suppliers.³⁴

7 Conclusion

- 7.1 Whilst Master Builders does not support the unfair contracts regime described in this submission, the definition of ‘consumer’ used in that part of the CCA is preferred to that used to frame the ACL scope.
- 7.2 Master Builders urges the Review to recommend the ACL be better integrated with domestic building contract legislation and domestic building contracts be excluded from the unfair contract terms law. Master Builders also submits the Review consider applying a consistent definition of ‘consumer’ to the ACL and to the other provisions of the CCA, one that does not randomly and inappropriately capture a large number of business transactions.

³⁴ Carter supra note 5 at pg 6, print version