SUBMISSION BY THE

Housing Industry Association

to the

Treasury

on the

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

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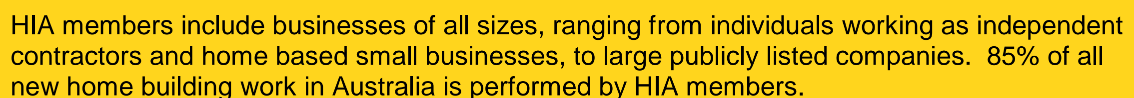
HIA :

Housing Industry Association Limited
79 Constitution Avenue
Campbell ACT 2612

Contact :

David Humphrey
Senior Executive Director – Business, Compliance & Contracting
Phone: 02 6245 1300
Email: d.humphrey@hia.com.au

HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.



HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

1 Executive Summary

HIA welcomes the opportunity to comment on the draft *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* ('the Bill").

1.1 Background

HIA acknowledges that it has been the Government's long standing policy to seek to extend unfair contract consumer protections to business-to-business transactions. The draft Bill reflects this policy.

However and as indicated in HIA's submissions in response to the Treasury consultation paper released in May 2014, HIA opposes the Government's policy position.

If implemented, the Bill will impose further regulation on the residential building industry.

The Government's broad (and otherwise supported) objective to promote and support small business could be better achieved by reducing burdensome taxes on industry and eliminating unnecessary red tape and regulation (such as the ATO contactor reporting requirements), not by imposing artificial legal constraints on the content of commercial contracts.

1.2 Regulation, red tape and the building industry

An efficient residential building sector is one of the key requisites for achieving economic competitiveness internationally and raising domestic standards of living. Since the downturn in mining investment activity, residential construction has become a central driver of domestic demand growth.

ABS figures indicate that during the full 2014 calendar year, dwelling construction – new home building as well alterations and additions – was worth $75.2 billion, equivalent to 4.9 per cent of GDP.

The residential industry is principally comprised of small businesses and self-employed independent contractors. HIA estimates that more than 90% of the residential building industry is comprised of small businesses and sole traders.

There is a large red tape and regulation burden imposed on these businesses.

The average small business builder/principal contractor spends significant hours each week attending to paperwork and compliance obligations arising from regulatory requirements including business, income and payroll tax compliance, training regulations that apply to apprentice employees, workplace health and safety management, occupational licensing and state-based home building laws and requirements.

Regulations impose cost, barriers and administrative constraints on firms that distract them from their principal objective of running profitable and growing businesses that have greater capacity to expand and increase their workforce. This overwhelming

burden of excessive red tape and regulation is often cited by HIA members as the number one reason they leave the industry.

HIA's members would prefer less regulation and red tape rather than more unnecessary government interference and constraints in their business operations.

1.3 The Bill is opposed by the residential construction industry

As the leading industry association in the Australian residential building sector, HIA supports and represents the views and interests of over 40,000 members.

HIA's members include builders, contractors, suppliers and manufacturers. Most HIA members are "small businesses". At various points, they will be both suppliers and recipients under standard form contract documentation.

HIA notes that the other peak building association - Master Builders Association (MBA)– has previously outlined their opposition to the laws and Government's policy.

Similarly a number of other peak business bodies, including both AIG and Business Council of Australia have articulated significant defects with the Government's proposed approach.

1.4 Problems with the "third option"

A key flaw in the Bill is its adoption of the "third option" identified in Treasury's discussion paper from May 2014.

Under this option, the current Australian Consumer Law unfair contract provisions that apply to consumers will automatically apply to "small business contract" transactions, unamended.

This approach is problematic.

Even if there is a case for protection of small businesses from alleged unfair contracts of adhesion, it is inappropriate to simply treat them as "consumers" under a consumer protection framework designed for "mums and dads".

Businesses, large and small, are established as part of the market economy. They are running their enterprise with a view to make a profit and should acknowledge there are risks involved with all commercial activities. It is up to them to assess these risks and, where prudent, seek independent advice before proceeding.

They are not 'consumers', nor are they passive participants to a contract and should not anticipate government protection.

1.5 Recommended changes

It is HIA's principal submission that if the legislation proceeds, the current ACL should not apply.

Rather the statutory framework for protection for small businesses should be amended to reflect the commercial character of the parties.

HIA recommends the following key changes to improve the Bill and make it workable for business:

- Change the definition of “unfair”
- Special conditions, amendments and any individually negotiated terms should be exempt
- Onus of proof should rest with the small business claimant
- Delete the example of unfair terms provisions
- The threshold should be clarified to exempt multiple contracts
- Small business should be defined by turnover not number of employees
- The laws should not apply to contracts between two small businesses
- Contracts covered by the Independent Contractors Act should be exempt
- Transitional provisions to apply to varied terms only

2 Recommended changes to the Bill

2.1 Change the definition of "unfair"

2.1.1 *Financial detriment only*

Under the ACL, the onus is on the supplier of the contract to disprove that a particular term will have a "substantial likelihood of detriment (financial or otherwise)" to the consumer. This is overwhelmingly broad and reverses the ordinary burden of proof.

Given the commercial nature of the transaction, detriment should be limited to actual financial loss only.

2.1.2 *The overall circumstances of the transaction should be considered*

The ACL currently provides that in determining whether a contract term is unfair the Court must take into account the "contract as a whole".

In HIA's view, for commercial transactions the Court should also be required to specifically take into account broader considerations such as the "overall circumstances of the transaction".

This would be defined to include any other legislated protections, such as the availability of the *Independent Contractors Act*, the overall allocation of risk between the parties to the contract and any individually negotiated or variable contract terms, in considering whether a term is unfair.

2.2 Special conditions, amendments and any individually negotiated terms should be exempt

Under the ACL, it is assumed that all standard form contracts are presented in a "take it or leave it" fashion and hence with the exception of the "upfront price", all terms in a standard form contract are susceptible for judicial review.

In HIA's view, notwithstanding the use of a pre-printed contract, any terms that have been individually negotiated should not be subject to further scrutiny under the unfair contract provisions.

For many commercial building transactions, standard form contracts are simply used as a template document which the parties work off and use as a basis for further negotiation.

The terms produced during such negotiations should not be capable of being unraveled via threat of litigation.

2.3 Onus of proof should rest with the claimant

Under section 24(4) of the ACL, for a term to be "unfair" it must not be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. The onus of proving that a term is not unfair is on the supplier.

Given the commercial character of the transactions sought to be covered by the Bill, the onus and evidential burden should be on those business seeking to avail themselves of the law to show how an allegedly “unfair” term will affect them.

2.4 Delete the example of unfair terms provisions

The list of “examples” of unfair terms in the ACL is quite expansive.

HIA recommends that these examples should be deleted insofar as the ACL applies to business-to business transaction.

Whilst in a business-to-consumer context this list might conveniently signpost commonplace unfair terms, in a business-to-business context each allegation of unfairness should be addressed on a case-by-case basis. There is no “one size fits all”.

It is inappropriate to assume that if only one party holds a power to do or not do something, it is prima facie unfair unless the party seeking to rely on the term can prove it is reasonably necessary.

For example a term in the ACL that is prima facie unfair is:

> *“A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract”*

It has been longstanding and accepted practice in most commercial building contracts, for the superintended to hold a power to direct the contractor/builder to undertake a variation to the physical works.

Variations can be necessary for any number of reasons, including the fact the original scope of works was reflective of preliminary designs which have changed, unanticipated circumstances have arisen or statutory requirements have changed.

Subcontracts which follow the head building contract will similarly give the principal contractor/ builder the power to direct the subcontractor to undertake a varied scope of works.

It would be uncommercial for all parties to hold this power – for instance for the subcontractor to hold a power to unilaterally delete a portion of the scope of works because it is no longer convenient for them.

2.5 Thresholds and application of the legislation

2.5.1 ***Small business contracts***

The proposed laws will apply to “small business contracts” where at least one party is a “small business” and the upfront price payable under the contract does not exceed either $100,000, or $250,000 if its duration is more than 12 months.

HIA supports a contract threshold that is based on the contract value, but it is not clear whether the laws are intended to apply to one contract or a series of transactions that are underpinned by a master contract.

For example, in residential construction, subcontracting parties are often engaged by a principal contractor/ builder on a "period" basis under which the same terms and conditions under a "master" contract may apply for multiple projects. Separate "work orders" are then used for each project reflecting the rates, scope of works and special conditions that might apply.

In HIA's submission, the cumulative value of multiple contracts should be taken into account when calculating the threshold ie. if the contractor is engaged on 3 projects at a combined value that exceeds the $100,000 threshold then the ACL should not apply.

2.5.2 *Definition of small business*

Consistent with the approach found by the Australian Bureau of Statistics, a "small business" is defined in the Bill as one with 20 employees or less, based on a head count of employee and excluding casuals employees who are not regularly or systematically engaged.

However a clear objective of the legislation is to displace the perceived inequality of bargaining power based upon "big" and small business.

In the residential construction industry, it is not unusual for a large building company to have relatively few employees as the majority of on-site construction activity is performed by independent trade subcontractors.

To this extent, HIA submits that turnover would be better indicator of a businesses' financial and bargaining capacity rather than the number of employees. This is also better reflects the obvious intent of the government's policy.

As an example, the ATO definition of a small business, which is one with an annual turnover less than $2 million, better reflects the intent of the policy.

There is also nothing in the Bill which allows a business to identify whether the business they are proposing to contract with is a 'small business'.

There should be a positive obligation on small businesses to disclose that they are a "small business" and hence covered by the ACL.

2.5.3 *Laws should not apply to 2 small business transactions*

HIA notes that the laws will apply even when the contract is between two small businesses and there is no evidence of a preponderance of bargaining power either way.

It is not the Government's role to interfere in contracts between two small businesses even if one of the parties alleges the negotiations were "one-sided".

2.6 Exclusion of contracts covered by the *Independent Contractors Act 2006*

The *Independent Contractors Act* (ICA) already establishes an unfair contracts jurisdiction. The Federal Court has jurisdiction to review a "services contract" if that contract is alleged to be "unfair" or "harsh".

According to the Decision Regulation Impact Statement, the ICA "provides a substantial level of protection". [1]

The Court's very broad discretion in determining whether a contract is unfair or harsh, includes looking at:

- the terms of the contract when it was made;
- the relative strengths of the parties to the contract;
- whether any undue influence or pressure was exerted upon, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration; and
- any other matters the Court considers relevant.

The Court may make an order setting aside in whole or in part the contract or may make orders varying the contract. The Court may also make interim orders to preserve the positions of the parties while the matter is being determined.

Although there have been relatively few cases under the Act, this does not mean they are ineffective.

Consistent with the Government's policy to avoid duplication of legislative protection, the Bill should be amended to specifically exclude contracts covered by the ICA from coverage under the ACL.

2.7 Transitional provisions to apply to varied terms only

Contract variations are commonplace under building and construction contracts.

Under section 294(2)(b) it is proposed that the laws would apply to varied terms of a contract that is in place before the commencement of the legislation.

Confining the application of the ACL to varied terms rather than the entire contract (as varied), is a significant improvement on the transitional provisions that were included in the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.

However the term 'variation' in the context of construction contracts can mean two things, namely:

- a 'variation', amendment or change to the contract terms; or
- a physical 'variation' or change to the work (quantity or quality) required to be carried out under the contract.

The transitional provisions of the ACL should not extend to the second type of variation which will ordinarily be made in accordance with contractual provisions contained within the pre-existing contract.

[1] See page 27