

Manager, Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

27th March 2020

Dear Sir or Madam,

Please find attached our submission as part of the **Unfair Contract Term Provisions** consultation. The submission is in two parts:

- Part 1 deals with what we see as the specific concerns we regularly deal with, including design risk, payment delays, and intermittent supply and demand; and
- Part 2 deals with our recommendations to better enhance the unfair contract term protections, including in respect of legalities and penalties, flexible remedies, a better definition of small business contract, value thresholds, and the definition of standard form contracts.

National Precast Concrete Association represents one of the only growing manufacturing sectors in Australia, the precast concrete manufacturing industry.

Our members are located in all states and vary in size, supplying the Australian design and construction industry with high quality precast concrete elements.

Precast concrete that is manufactured by our members can include structural and architectural building elements like walling, flooring, beams and columns, stairs and lift shafts, along with civil elements like pipes, culverts, bridge beams, tunnel segments, noisewalls, retaining walls, piles, piers, towers and poles, barriers, tanks, railway sleepers, dam segments and the like. A range of other products are used in landscaping such as seating, bollards, planters and monuments. Other less mainstream products are also becoming increasingly popular like crypts, artificial reefs and fish baffles.

Many award winning buildings and structures are designed and constructed using precast concrete that has been supplied by National Precast members. Examples – just to name a few - include the ANZAC Memorial Centenary Project, the Cadogan Song School, the National Portrait Gallery, the Melbourne Convention Centre and the Geelong Library. There are many others.

Being manufactured offsite, prefabricated, precast concrete offers one of the greatest opportunities for productivity improvement for the Australian construction industry, delivering safer construction sites with high quality building elements that are manufactured in factory-controlled conditions. Because exact elements are delivered to



site, waste and site congestion are minimised. Natural resources and waste materials are used in its manufacture and its high thermal mass can deliver exceptionally cost-effective structures from a heating and cooling perspective. Structures are also fire, termite and flood safe and incredibly long life and durable, while needing minimal maintenance throughout their lives.

While the precast industry is taking the construction industry by storm, it is very often subject to unfair conditions imposed by head contractors.

Increasingly, head contractors attempt to force precast manufacturers to accept contract conditions that are onerous, in an effort to pass on risk. While some of the more astute, highly regarded and experienced precasters will refuse these conditions, the result is that less commercially savvy precasters will accept these terms, which can put substantial undue strain on their businesses.

What is worse, are the very frequent occurrences of not-so-highly-regarded precasters accepting unfair conditions purely to win work. The end result can be incredibly detrimental to projects, clients and end users, with consequences including poor quality workmanship, incorrect installation and safety incidents.

National Precast is committed to furthering productivity, safety and quality improvements both within and on behalf of the precast concrete manufacturing sector

In order to protect the good operators in this industry however, measures must be taken to ensure they are not subject to unfair contract conditions.

Thank you for the opportunity to provide a submission on this matter and we welcome further communication at any time.

Kind regards,



Sarah Bachmann
CEO

ENHANCEMENTS TO UNFAIR CONTRACT TERM PROTECTIONS

PUBLIC CONSULTATION

SUBMISSION BY NATIONAL PRECAST CONCRETE ASSOCIATION OF AUSTRALIA

Overview

Members of National Precast Concrete Association Australia are regularly presented with unfair contract terms in tenders. Our members often find that, as a subcontractor with relatively weak bargaining power, they have minimal ability to negotiate these terms. Given that unfair terms are so prevalent in the industry, the small businesses are presented with a difficult choice: enter into contracts with unfair terms, with all the attendant risk, or slowly go out of business through a lack of work.

The unfairness arises generally as a result of:

- 1. The contracts apportioning the risk to the subcontractor for events that are outside their control; and**
- 2. The “one size fits all” nature of the contracts, which do not cater for the nature of design, manufacture, periodic supply and installation of precast elements.**

Part 1: Specific Concerns

1. Design risk

In most contracts for supply and installation of precast elements, there is an aspect of design. Typically, this design involves the nature, number, specifications and finishes of elements, which is submitted to a head contractor or principal, in the form of shop drawings. Design can also include engineering designs to accommodate for the lifting, handling and erection of precast elements.

These shop drawings and engineering calculations are prepared with reliance on surveys, levels, drawings, and designs provided by the head contractor, or principal and their consultants.

Despite a precaster’s sometimes minimal involvement in the substantial aspect of the precast’s design, it is commonplace for contracts to include clauses to the effect that the subcontractor (precaster) warrants that the designs (including designs supplied by others) and the completed works, will be “fit for purpose”. Not only does this misrepresent the extent of the design influence that the subcontractor has over the completed works, but it also presents the subcontractor with difficulty in securing appropriate professional indemnity insurance.

2. Payment for goods offsite and payment delays

The production of precast elements – most of which are bespoke to a project - involves significant costs that are incurred by subcontractors upfront and often these costs are incurred long before expected delivery and installation of the precast elements.

Very often, elements are manufactured long before they are required on site. This can occur at the decision of the precaster in preparation for delivery, or because unexpected project delays require elements to remain in the factory for extended periods.

Standard form contracts often include clauses whereby the title to precast elements vests with the head contractor or principal upon manufacture, while they remain in the precaster's factory. Yet the same standard form payment clauses also often specify that the subcontractor cannot claim payment for an item until delivery. Additionally, long payment terms are often dictated which further extend the period until payment is actually received.

This presents significant cash flow problems to subcontractors, especially in circumstances where projects experience significant delays. The precast elements are cast and can end up being stored in production facilities for long periods of time without the subcontractor being entitled to any payment.

The cash flow issues presented in these circumstances can cause the subcontractor to experience delays in completing its works' schedule – delays over which the subcontractor has absolutely no control – and place the subcontractor at risk of being in default under the contract.

Once precast elements are delivered to site it is almost impossible (and extremely commercially unviable) for the subcontractor to protect against damage. At this point the subcontractor has no longer has any control over the precast elements. Despite this, the subcontractor is often required to accept the risk of damage to the precast elements until practical completion is reached. This is not reasonable and, again, can present problems for the subcontractor in securing appropriate (and affordable) insurance.

3. Intermittent supply

Most standard form subcontracts do not appropriately allow for circumstances where the manufacture and supply of precast elements is subject to numerous different delivery dates. The subcontracts will often include a single "date for practical completion" and impose liquidated damages on the subcontractor for the failure to achieve practical completing by this date. Even if one of potentially thousands of elements is not delivered by the date for practical completion, the subcontractor is at risk of being met with claims for liquidated damages, which are often substantial.

The precast subcontractor's pricing and anticipated delivery dates are reliant on timely approval of designs and design changes, as well as production capacity (including the number of moulds and beds for a particular element).

Standard form subcontracts often do not recognise that a resequencing or reprogramming of the delivery schedule could result in significant increased time and cost consequences for the subcontractor. The standard forms generally do not include an entitlement for the subcontractor to claim for resequencing or reprogramming of production and delivery. The subcontractor therefore unfairly bears the risk of the head contractor's changes.

As well, the extent of the head contractor's power under standard form subcontracts often includes being able to direct the subcontractor to deliver large numbers of precast elements all at once. Often, this will present manufacturing and storage difficulties for subcontractors given the limited capacity for both, that is inherent in the manufacture of precast elements.

Part 2: Enhancements to Unfair Contract Term Protections – Consultation Regulation Impact Statement

The effect of the protections afforded by the unfair contract provisions are diluted by a strict interpretation of what constitutes a "standard form contract".

While a contract may not of itself be considered a "standard form" if minor parts of that contract are negotiated, the reality remains that one party to the contract may have had very little commercial power to negotiate the relative risks of those terms. This is often evident in the apportioning of risk to the party who has no control over that risk, or the contract failing to reflect the true nature of the relationship between the parties.

Our comments on the unfair term protections by specific reference to the "Enhancements to Unfair Contract Term Protections – Consultation Regulation Impact Statement" are below.

Parts 4 – Legality and penalties

We agree that the introduction of penalties for breaches of the unfair contract terms would potentially be a deterrent for businesses that would otherwise rely upon unfair terms (Option 3). However, the effect of the penalties as a deterrent will be heavily reliant on whether the imposition of such penalties is a reality in the industry. The potential for penalties may provide a platform for negotiating unfair terms for precast businesses that meet the threshold test of "small businesses".

Part 5 – Flexible remedies

In our view, the courts should have the power to determine that an unfair contract term is void or, to the extent that to declare the term as void would make the contract unworkable, the court should have the power to vary unfair contract term or terms (Option 2).

In the event that an unfair term is determined to be void (or varied to prevent the terms from being unfair), in our view there should be a rebuttable presumption that the same (or substantially similar) term used by the same entity or in the same industry, would also be void or varied (Option 4).

Part 6 – Definition of a small business contract

In relation to the definition of “small business,” (Option 3) – which includes alternative thresholds of both a head count for the business (with an increase to 100 employees) or annual turnover of less than \$10,000,000 – would have greater application for precast businesses and, therefore, be preferred over Options 1 or 2, these thresholds should not include related bodies corporate as this may unnecessarily limit application of the unfair contracts’ regime. Therefore, we would recommend retaining the status quo with regard to related bodies corporate (Option 1).

A commercial concern associated with the unfair contract protections applying to small business is that head contractors may prefer to contract with organisations who do not meet the threshold and, therefore, are not subject to the protections.

Part 7 – Value Threshold

We support any change to the definition of a “small business contract” that would result in the unfair contract protections having greater application in the precast industry.

The present thresholds of contracts valued at \$300,000, or \$1,000,000, or contracts running for more than 12 months, are a relatively low value in the precast industry, where the set-up costs of a business are significant and contracts can often have significant value. The nature of precast work is that a large part of the contract price comprises materials (concrete, steel and componentry) and, therefore, a relatively “small business” is capable of entering into contracts with a greater value than \$300,000.

We also support the increase of the threshold for a small business contract to \$5 million (Option 2).

Part 8 – Standard form contracts

Repeat usage

The law could become more effective by defining standard form contracts by reference to “repeat usage” (Option 2). This could address some of the issues faced in the precast industry by the unfair nature of the “one size fits all” terms that are regularly encountered in subcontracts.

Effective opportunity to negotiate

The law could become more effective if it were to more broadly describe the types of actions that do not constitute an “effective opportunity to negotiate”.

In our view the definition of “standard form contract” could be improved by:

- a. an acknowledgement in the legislation that “standard form contracts” may include contracts which are partially negotiated;

- b. explaining that unfair terms may take the form of terms that are not negotiated (or only partially negotiated) and pursuant to which the small business assumes risks that are outside its control;
and
- c. providing that broad indemnities will be considered unfair unless the party giving the indemnity can control the underlying risk or liability.

Generally, the legislation should make it clear that a term is unfair if the party who bears the risk or responsibility is not in a position to manage that risk and, as a corollary, the other contracting party is in a better position to manage the risk.

National Precast Concrete Association Australia

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