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### **‘An Australian Consumer Law: Fair markets - Confident consumers’**

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

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

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

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

#### Chapter 6 - Unfair Contracts

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

- **Current regulation is satisfactory**

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

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

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

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

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

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

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

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

- **No evidence of market failure**

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

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

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

- **All the Circumstances**

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

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

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

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

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

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

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

## **Chapter 11 – Suggested reform to definitions**

HIA does not support the extension of the “consumer contract” provisions to business-to- business transactions.

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

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

**Your sincerely**  
**HOUSING INDUSTRY ASSOCIATION LTD**

A handwritten signature in black ink, appearing to read "Chris Lamont". The signature is written in a cursive style and is positioned to the right of a large, stylized left-facing bracket that spans the width of the signature.

**Chris Lamont**  
**Chief Executive - Association**

*Attachment A*

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

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

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

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

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

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

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

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

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

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