



**MASTER BUILDERS**  
AUSTRALIA

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

**Master Builders Australia Inc  
March 2009**

Master Builders Australia Inc ABN 701 134 221 001

*building australia*



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## RECOMMENDATIONS

<b>Recommendation 1</b>	The Productivity Commission's recommendations should guide the content of the proposed unfair contract provisions. (Paragraph 2.3)
<b>Recommendation 2</b>	Domestic building contracts should be <i>exempt</i> from the national unfair contracts regime, as sector specific domestic building contract legislation provides sufficient protection for consumers. This exemption should be explicit in the national consumer legislation. (Paragraph 4.4 & 4.7)
<b>Recommendation 3</b>	If the industry is made subject to a generic unfair contracts regime, the unfair contract model which should be adopted is the Productivity Commission model. The COAG model provision should be amended. (Paragraph 4.4)
<b>Recommendation 4</b>	If the industry is made subject to a generic unfair contracts regime, the interaction of industry specific laws with the national unfair contracts regime should also be clarified, and the effect studied. (Paragraph 4.8)
<b>Recommendation 5</b>	The unfair contract provisions should not apply to business to business contracts. (Paragraph 4.5)
<b>Recommendation 6</b>	It should not be possible for action to be undertaken simply on the basis of a 'substantial likelihood of detriment'; action should only be possible where actual detriment is suffered by a consumer. (Paragraph 9.3)
<b>Recommendation 7</b>	The definition of an unfair contract should make reference to 'good faith', and the concept of good faith should be clarified for the purposes of the provision. (Paragraphs 9.8,9.9,10.5,10.6)
<b>Recommendation 8</b>	The onus of proof with respect to whether a contract is 'non negotiated' should not be reversed with respect to the building and construction industry, because of statutory protections for consumers in domestic building contract legislation. (Paragraph 9.5)
<b>Recommendation 9</b>	If the onus of proof remains on the supplier of the contract (not preferred), the legislation should set out clear and reasonable criteria which the supplier must meet in order to satisfy the onus of proof. (Paragraph 9.6, 9.7)
<b>Recommendation 10</b>	A supplier should only be required to prove that a consumer has been given the opportunity to negotiate some of the terms of the contract. Whether the supplier agrees to the changes or not should be a commercial decision for the supplier. (Paragraph 9.7)
<b>Recommendation 11</b>	Remedies for breach of the provision should only be available where a consumer suffers a <i>financial</i> detriment. (Paragraph 9.4)
<b>Recommendation 12</b>	A reasonable transition period of 2-3 years would be appropriate to give businesses time to obtain legal advice and adapt standard form contracts. (Paragraph 9.11, 9.12)
<b>Recommendation 13</b>	In addition to a public advertising campaign, the Government should fund a workshop or seminar education program to be run by industry associations and tailored to individual industries to educate businesses about the implications of the new regime. (Paragraph 13.16, 9.12)
<b>Recommendation 14</b>	The government should prepare a detailed regulatory impact statement prior to introducing the legislation with details of the likely ongoing costs to business. (Paragraph 11.6)

<b>Recommendation 15</b>	The Government should reconsider a proposal to regulate and void many of the contractual terms in the Discussion Paper with respect to building contracts. (Paragraph 12 to 12.42)
<b>Recommendation 16</b>	There should be a single national regulator of the national consumer law. (Paragraph 13.3 to 13.5)
<b>Recommendation 17</b>	The maximum civil penalties in the TPA would be excessive as remedies for an unfair contracts regime. Fines should be reasonable rather than punitive. (Paragraph 13.11, 9.10)
<b>Recommendation 18</b>	Criminal sanctions or disqualification orders are not a proportionate response to a breach of the proposed unfair contract provisions. (Paragraph 13.9,13.10, 9.10)
<b>Recommendation 19</b>	If public warning powers are introduced, the legislation should contain rigorous criteria regarding their use. (Paragraph 13.12, 13.13)
<b>Recommendation 20</b>	COAG should examine the penalties and sanctions in place under equivalent unfair contract regimes interstate and overseas to develop a 'light touch' regulatory regime with more emphasis on education and information programs for employers. (Paragraph 13.14,13.15, 13.16)
<b>Recommendation 21</b>	Reviews of the national consumer law enforcement powers should consider the effect of the regime on various industries, and the effect of unfair contract provisions on large, small and medium sized businesses. The review should include an analysis of the ongoing cost of the regime to business, including legal and compliance costs. (Paragraph 9.13)

## 1. INTRODUCTION

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

## 2. PURPOSE OF SUBMISSION

- 2.1 On 17 February 2009 the Government released a Discussion Paper 'An Australian Consumer Law: Fair Markets – Confident Consumers'.<sup>1</sup> The Discussion Paper follows agreement on 2 October 2008 between all Australian governments to establish a new consumer policy framework, comprising a single national consumer law and streamlined enforcement arrangements.<sup>2</sup> One of the purposes of the Discussion Paper is to seek views on aspects of the reforms, and to explore options for the modification of existing generic consumer protections based on 'best practice' from existing state and territory laws.<sup>3</sup>
- 2.2 The new national consumer law, which will be called the Australian Consumer Law, will be based on the existing consumer protection provisions of the *Trade Practices Act 1974 (Cth)* (TPA). It will also include a provision that regulates unfair terms in contracts, new enforcement powers with new redress options for consumers, and a new national legislative and regulatory regime for product safety.<sup>4</sup>
- 2.3 Master Builders is very concerned about the proposed content of national provisions regulating unfair terms in contracts. Accordingly, this submission focuses primarily on the proposals relating to that new unfair contract regime and the enforcement of that regime. Master Builders strongly advocates that the Productivity Commission's recommendations, discussed in detail in this submission, should guide the content of the proposed unfair contract provisions to be legislated.

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<sup>1</sup> *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, dated 17 February 2009 at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1482> as at 5/3/09.

<sup>2</sup> *Ibid*, p 6.

<sup>3</sup> *Ibid*, p 1-2.

<sup>4</sup> *Ibid*, p 1.

### **3. BACKGROUND TO THE DISCUSSION PAPER**

- 3.1 The Discussion Paper notes that the National Consumer Law will be implemented as part of an application law scheme, with the Commonwealth Government as the lead legislator, with other jurisdictions applying the national consumer law as part of their own laws.<sup>5</sup> There will be an intergovernmental agreement concerning the process for amending the law, and the administrative architecture underpinning it.<sup>6</sup>
- 3.2 In terms of the implementation timeline, an inter governmental agreement is likely to be finalised by 30 June 2009, and the text of the legislation is likely to be agreed and finalised by 30 June 2010 to meet this timetable. The deadline for Parliament to have passed the Australian Consumer Law, and for the State and Territory Parliaments to have passed relevant application Acts, has been set for 31 December 2010.<sup>7</sup>
- 3.3 The Discussion Paper notes that the trend towards national consumer markets means that consumers at present, despite purchasing the same products from the same business, receive different levels of protection in different jurisdictions.<sup>8</sup> By implementing a national consumer law, a more uniform system of protection for consumers will operate across jurisdictions. Master Builders does not oppose this policy approach, as long as regulation is reduced and made more efficient, a policy objective of the current Australian Government.

### **4. OVERVIEW OF CURRENT PROTECTIONS FOR CONSUMERS AND RELATED ISSUES**

- 4.1 At present, consumers gain a measure of protection from the unconscionability provisions of the TPA and Fair Trading Acts (FTAs) (for example ss51AA, 51AB, 51AC of the TPA and mirror provisions in the FTAs); however critics argue that these have traditionally been narrowly interpreted.<sup>9</sup> They argue that courts have traditionally focussed on procedural unconscionability (surrounding circumstances), rather than substantive unconscionability (contractual terms).<sup>10</sup>

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<sup>5</sup> Ibid, p 9.

<sup>6</sup> Ibid, pp 9-12 and p 97.

<sup>7</sup> Ibid, p 11.

<sup>8</sup> Ibid, p 7-8.

<sup>9</sup> *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 406-412.

<sup>10</sup> Ibid, 408.

Some of these provisions may also be subject to some uncertainty as to their scope.<sup>11</sup>

- 4.2 Victoria has also enacted unfair contracts provisions<sup>12</sup> directed at the protection of consumers. In addition, the common law has at times adopted the position that contracts between parties have an implied requirement for acting in good faith.<sup>13</sup>
- 4.3 Certain industries also have industry specific regimes that apply to them – such as the building and construction industry. The industry is subject to sector specific legislation regulating domestic building contracts; this State and Territory legislation currently differs from one jurisdiction to another. (See section 6 of this submission). Master Builders supports the retention of sector specific legislation in the building and construction industry.
- 4.4 Master Builders strongly advocates that the industry should be exempt from the national unfair contracts regime, as the sector specific legislation provides sufficient regulation of the industry and protection for consumers. Master Builders considers that further regulation of the industry would provide an unnecessary and costly overlay on existing protections available to consumers. Any moves to introduce an additional overriding law may also have unintended consequences, due to the interaction of both sets of legislation. However, if the industry is made subject to a generic unfair contracts regime, Master Builders argues that the best model is that put forward by the Productivity Commission.
- 4.5 Master Builders is opposed to unfair contracts proposals being extended to business to business contracts. While Master Builders recognises that consumers may in some contexts require special protection with respect to their purchases of goods or services, we do not consider that a case has been adequately made in the Discussion Paper for the extension of a generic unfair contracts regime to business to business contracts.
- 4.6 Master Builders also emphasises, like the Productivity Commission and recognised by the COAG proposal,<sup>14</sup> that there is a need to distinguish between ‘contracts of adhesion’, that is contracts where consumers have no opportunity to negotiate the

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<sup>11</sup> Ibid, 408.

<sup>12</sup> Ibid, 407.

<sup>13</sup> Ibid, 406.

<sup>14</sup> *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 32.

terms, and standard form contracts where consumers are able to negotiate changes to the terms.

- 4.7 Although standard form contracts are often used in the building industry, special conditions are frequently added to tailor the contract to the needs of the parties. In this sense consumers are able to negotiate with respect to the terms of standard form building contracts. Master Builders' experience is that special conditions are frequently added to the Australian Building Industry Contract Suite (ABIC) and Master Builders pro forma contract documents. On this basis, Master Builders submits that domestic building contracts should be explicitly *exempt* from the regime, on the basis that standard form building contracts offer consumers the ability to negotiate terms. Many of the terms of these contracts are also in fact required by the specific provisions of the underlying domestic building statutes.
- 4.8 If building contracts are not exempted from the legislation, the interaction of industry specific laws with the national unfair contracts regime should be clarified, and its effect properly considered. As noted above, Master Builders submits that to have generic consumer protection legislation apply as outlined in the Discussion Paper, would be an unnecessary overlay on existing protections.
- 4.9 Master Builders also notes that the Government may decide to harmonise this industry specific legislation in keeping with the Productivity Commission's suggestion that:

*"...divergent sector specific laws should be identified and repealed or harmonised across jurisdictions where possible".<sup>15</sup>*

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

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<sup>15</sup> *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 81-88 and p xvii.

## 5. THE PRODUCTIVITY COMMISSION'S APPROACH TO THE REGULATION OF THE BUILDING INDUSTRY

- 5.1 The Productivity Commission acknowledged that industry specific regulation can be an effective means of providing consumer protection where the risk of consumer detriment is high and/or the quality of the product or service is difficult to establish prior to purchase.<sup>16</sup> It noted that an *industry specific approach* was warranted for more significant episodic purchases such as buying a home.<sup>17</sup> Master Builders agrees with the Productivity Commission in this regard.
- 5.2 However, the Productivity Commission noted that once a need for industry specific regulation is established, the activities it covers should be clearly identified and its requirements should *complement, rather than duplicate, generic provisions*.<sup>18</sup> These requirements should also be sufficiently flexible to accommodate changes in the market.<sup>19</sup> Master Builders submits that to extend the generic unfair contracts regime to the industry is unnecessary and would simply confuse all participants. The Productivity Commission's findings should be respected.
- 5.3 The Productivity Commission also noted that given the trend towards national markets, variable requirements across jurisdictions are increasingly a source of unwarranted added cost and frustration for businesses operating across Australia, or large parts of it, to the detriment of consumers.<sup>20</sup>
- 5.4 The Productivity Commission noted that a home will typically be the largest purchase consumers will ever make.<sup>21</sup> At present, where consumers choose to have a home built, they will be subject to a range of consumer protection mechanisms. In addition to the generic TPA and FTA provisions relating to merchantable quality and fitness for purpose, the building and construction industry is subject to the following sector specific legislation at the State and Territory level:

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<sup>16</sup> Ibid, p 83.

<sup>17</sup> Ibid, p 82.

<sup>18</sup> Ibid, p 84.

<sup>19</sup> Ibid, p 84.

<sup>20</sup> Ibid, p 86-87.

<sup>21</sup> Ibid, p 118.

5.4.1 *Licensing of building practitioners.* All jurisdictions require builders to be licensed, and Queensland and NSW also licence other building trade contractors.<sup>22</sup>

5.4.2 *Statutory warranties.* In most jurisdictions, statutory warranties specific to home building require a building contractor to provide a product as agreed in a suitable state, and fit for its intended purpose for a set period of time. That period ranges from five years from completion in SA to seven years in NSW. WA and the NT do not have building specific statutory warranties.<sup>23</sup>

5.4.3 *Access to dispute resolution mechanisms.* In Qld, NSW, and Victoria, there are sector-specific ADR bodies. In these jurisdictions and in WA, there are also dedicated appeals tribunals that hear building disputes.<sup>24</sup>

5.4.4 *Mandatory home builders' warranty insurance.* In all jurisdictions, licensed builders must have home builders' warranty insurance (HBWI), although Tasmania has legislated to remove this requirement. In most jurisdictions, the scheme operates as a 'last resort scheme' provided by private insurers.<sup>25</sup>

5.5 In relation to the building industry, the Productivity Commission's main recommendation focussed primarily on the issue of 'last resort' home builders' warranty insurance<sup>26</sup>, rather than any other aspect of the industry's sector specific legislation. In order to properly consider the best approach to take to the regulation of the building industry, it is necessary to consider existing consumer protections in the current industry specific laws regulating the industry.

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<sup>22</sup> Ibid, p 118.

<sup>23</sup> Ibid, p 118.

<sup>24</sup> Ibid, p 118.

<sup>25</sup> Ibid, pp 118-119.

<sup>26</sup> Ibid, p 127.

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

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

*Table 1: Domestic Building Contracts Acts*

<b>Jurisdiction</b>	<b>Name of Instrument</b>
Australian Capital Territory	<i>Building Act 2004</i>
	<i>Building Amendment Regulations 2004</i>
New South Wales	<i>Home Building Act 1989</i>
	<i>Home Building Regulation 2004</i>
Northern Territory	<i>Building Act 1993</i>
	<i>Construction Contracts (Security of Payments) Act 2004</i>
	<i>Building Regulations</i>
Queensland	<i>Domestic Building Contracts Act 2000</i>
	<i>Domestic Building Contracts Regulation 2000</i>
South Australia	<i>Building Work Contractors Act 1995</i>
	<i>Building Work Contractors Regulations 1996</i>
Tasmania	<i>Building Act 2000</i>
	<i>Building Regulations 2004</i>
	<i>Housing Indemnity Act 1992</i>

Jurisdiction	Name of Instrument
Victoria	<i>Domestic Building Contracts Act 1995</i>
	<i>Domestic Building Contracts Regulations 2007</i>
	<i>Domestic Building Insurance Ministerial Order published in Special Government Gazette No S98 on 23 May 2003.</i>
Western Australia	<i>Home Building Contracts Act 1991</i>
	<i>Home Building Contracts Regulations 1992</i>

Source: Master Builders' compilation

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

- 7.1 The *Home Building Act 1989 (NSW)* (HBA) provides an example of the detailed sector specific consumer protections already in place with respect to domestic building contracts in Australia. The HBA is the centrepiece of a suite of legislation for the regulation of building work in NSW.<sup>27</sup> Another arm of that suite is the specialist tribunal set up with primary responsibility to deal with such claims, the Consumer Traders and Tenancy Tribunal. The Act took effect in its current form from 1 May 1997, and is broad in its scope.<sup>28</sup>
- 7.2 Although it might be thought that the HBA is primarily focussed on smaller scale domestic building work, either in the form of new houses or renovations to houses, in fact it has a wide range of application.<sup>29</sup> It applies to most forms of residential dwelling, from the construction or renovation of a room in a free standing house to work on multi storey high rise projects. Indeed, with the increasing density of residential occupation in Sydney, the HBA is applying more and more to multi storey structures.<sup>30</sup>

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<sup>27</sup> Bambagiotti, P of St James' Hall Chambers. "*The Home Building Act 1989 – March 2006*" available as a seminar paper through the College of Law, Sydney, pp 4-13.

<sup>28</sup> *Ibid*, pp 4-13.

<sup>29</sup> *Ibid*, p 4.

<sup>30</sup> *Ibid*, p 4.

- 7.3 The provisions of the HBA reflect its consumer protection orientation, with the focus of the protection on the homeowner or proprietor.<sup>31</sup> One of the concerns it was directed towards was to redress a perceived uneven playing field between a 'sophisticated and experienced' builder and the less sophisticated homeowner.<sup>32</sup> However, as one commentator has noted, the standard assumption of unsophisticated proprietor and sophisticated builder in fact becomes strained in the context of commercial 'domestic' developments (such as high rise apartment blocks), where the degree of sophistication may in fact be the opposite, with the proprietor in a position of technical and financial strength and dominance.<sup>33</sup> This is one area where uniform Australian legislation could assist to redress this imbalance.
- 7.4 The HBA contains a very broad definition of 'residential building work' (in part due to the related definition of 'dwelling').<sup>34</sup> This means that it applies not just to the construction of a residential home, but also to the building of a swimming pool, and other structures and improvements of various kinds including parts of buildings, fences, driveways, paths, retaining walls, sheds and ornamental ponds.<sup>35</sup>
- 7.5 The HBA regulates contracts for residential building work as defined, and sets out formal requirements for these contracts,<sup>36</sup> designed to protect consumers. These formal requirements include that the contract must be in writing, and that it is signed and dated by all parties.<sup>37</sup> The contract must contain the parties' names, the number of the contractor's licence, a sufficient description of the work, any plans and specifications, the contract price if known, any statutory warranties that are applicable, and a statement setting out the cooling off period.<sup>38</sup>
- 7.6 The contract price if known must be stated in a prominent position. If the price is not known or can be varied under the contract, *the contract must contain a warning and explanation* next to the price.<sup>39</sup> It is an offence to contract to do work

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<sup>31</sup> Ibid, p 4.

<sup>32</sup> Ibid, p 4.

<sup>33</sup> View expressed by Bambagiotti, P in Ibid, p 4-5.

<sup>34</sup> Section 3 of HBA and Regulations 5, 6, 8, 9 *Home Building Regulations 2004* (NSW) cited in Op.Cit., p 7 - 8.

<sup>35</sup> Ibid, p 7-8.

<sup>36</sup> Ibid, p 13 – 14.

<sup>37</sup> Ibid, pp 13-14.

<sup>38</sup> Ibid, pp 13-14.

<sup>39</sup> Ibid, p 13- 14.

unless the contract complies with the HBA's requirements.<sup>40</sup> Courts and Tribunals apply these requirements strictly.<sup>41</sup>

7.7 In terms of consumer information, s7AA provides that:

*“A holder of a contractor licence must, before entering into a contract..., give to the other party...information in a form approved by the Director General, that explains the operation of this Act and the procedure for resolution of disputes under the contract and...relating to insurance”.*

7.8 The 'information' referred to comprises a brochure produced by the Office of Fair Trading called the "Consumer Building Guide".<sup>42</sup> This brochure clearly sets out some of the obligations placed on builders and contractors, and provides several pages of information to consumers about their rights under the HBA.

7.9 Section 7BA imposes a "cooling off period" of 5 days, within which a person may rescind a contract for residential building work without penalty.<sup>43</sup> This mandated "cooling off period" is designed to protect consumers, for the benefit of those who have second thoughts about the contract after it has been signed. It is also explicitly referred to in the "Consumer Building Guide" brochure. Section 7D of the HBA regulates and provides constraints on the ability of a contractor to obtain security over the land to ensure payment for the building work.<sup>44</sup>

7.10 The statutory warranty provisions are found in Part 2C of the HBA, ss18A to 18G. These also provide consumers with considerable protection, and are drawn to consumers' attention in the "Consumer Building Guide" brochure. S18B provides:

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

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

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<sup>40</sup> Ibid, p 15 citing section 7A of the Act.

<sup>41</sup> Ibid, p 14.

<sup>42</sup> Ibid, p15. The *Consumer Building Guide* is available through the NSW Office of Fair Trading at: [www.fairtrading.nsw.gov.au/pdfs/About\\_us/Publications/ft246.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/Publications/ft246.pdf)

<sup>43</sup> Ibid, 16-17.

<sup>44</sup> Ibid, 18-19.

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

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

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

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

*(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment."*

7.11 The Act as amended also contains provisions regulating Home Warranty Insurance in Part 6, for the benefit of consumers.

7.12 It is also worth noting that in NSW, as in other jurisdictions, there is a maximum deposit that consumers can be asked to pay;<sup>45</sup> similarly, the payment of progress payments is regulated in most jurisdictions. These requirements again provide consumers with considerable protection.

7.13 Consumers may apply to the Consumer Traders and Tenancy Tribunal for a remedy. The Tribunal's jurisdiction is conferred by the HBA.<sup>46</sup> The Tribunal has the

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<sup>45</sup> S8, s16E HBA.

<sup>46</sup> Bambagiotti, P of St James' Hall Chambers. "The Home Building Act 1989 – March 2006" available as a seminar paper through the College of Law, Sydney p 48 citing Part 3A HBA, together with the *Consumer Traders and Tenancy Tribunal Act 2001 (NSW)*, s21.

power to adjudicate a 'building claim',<sup>47</sup> as defined by the Act, and its powers are very broad. These powers include that the Tribunal can make orders as it considers appropriate, for example that one party pay money to another party. Alternatively, it may order that a specified amount of money is not due or owing from one party to another, or that a party to the proceedings do or not do certain work. There is also scope for certain decisions of the Tribunal to be appealed to the District Court.<sup>48</sup>

7.14 The protection provided by these provisions and their equivalents in other jurisdictions are considerable and in Master Builders' view distinguish the building and construction industry from other industries which are not subject to the same level of regulation for the benefit of consumers. As noted above, Master Builders considers that a sector specific approach should be retained in the building industry, as recommended by the Productivity Commission, without an overlay of additional generic unfair contract regulation.

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

## **8. PROPOSED MODEL FOR REGULATING UNFAIR CONTRACT TERMS**

8.1 The Discussion Paper notes that the Productivity Commission's recommended model addressing unfair contract terms was considered by the Ministerial Council on Consumer Affairs (MCCA);<sup>49</sup> however COAG instead agreed to a legislative model *different* to that recommended by the Productivity Commission. The COAG model is as follows:

8.1.1 A term is 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier.

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

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<sup>47</sup> Ibid, p 52 citing s48A HBA.

<sup>48</sup> Ibid, p 56 and 63-64 citing s48O HBA. The appeal mechanism has now been changed from the Supreme Court to the District Court.

<sup>49</sup> It was considered at MCCA's meeting on 15 August 2008.

- 8.1.3 The inclusion of the phrase 'it is not reasonably necessary to protect the legitimate interests of the supplier' is designed to ensure that, when applying the test, the question of the business's reasons for including a provision in a contract is addressed.<sup>50</sup>
- 8.2 Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment.
- 8.3 This element of the model goes beyond the PC's recommendation and suggests that action may also be undertaken on the basis of a 'substantial likelihood of detriment'.
- 8.4 The scope of the provision will extend to standard form contracts entered into by businesses, including small businesses, and would not be confined to individual consumers. This proposal purports to recognise that many businesses are also required to use standard form agreements and their interests are the same in respect of the potential for unfair contract terms.<sup>51</sup> This is patently not the case, especially where, for example, a small building firm undertakes work for a multinational corporation.
- 8.5 The provision will relate only to standard form, non negotiated contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.
- 8.5.1 This element of the model reflects the PC's view that the inclusion of negotiated contracts would involve risks that exceeded the likely benefits.
- 8.5.2 The onus of proof is reversed.
- The provision will exclude the upfront price of the good or service.<sup>52</sup>
- 8.6 The provision will require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.<sup>53</sup>

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<sup>50</sup> *An Australian Consumer Law. Fair Markets Confident Consumers Consultation Paper*, pp 30-34.

<sup>51</sup> *Ibid*, pp 30-34.

<sup>52</sup> *Ibid*, pp 30- 34.

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

## **9. PRODUCTIVITY COMMISSION'S MODEL FOR REGULATING UNFAIR CONTRACT TERMS AND COMPARISON WITH THE COAG MODEL**

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

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

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

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

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

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

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

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<sup>53</sup> Ibid, pp 30-34.

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

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

*9.2.7 The operation and effects of the new provision should be reviewed within five years of its introduction.<sup>54</sup>*

9.3 In terms of the differences between the two models, Master Builders is concerned that under the COAG model, it will be easier to establish that a provision is unfair, as a consumer need only show that there is a 'substantial likelihood of detriment'; there is no need to show actual detriment as proposed in the PC model. This potentially exposes businesses to a far wider range of actions.

9.4 The COAG model also potentially opens up a broader range of situations where detriment may apply, as remedies are not limited to situations where a consumer suffers financial detriment, but may include broader detriment. It is unclear whether and how this will be defined – will it include the potential for damages for emotional distress, a matter normally excluded at common law? Master Builders submits that the provision should instead be limited to financial detriment, as this effect is easier to measure and quantify and will confine the scope of the provision within reasonable and certain boundaries.

9.5 While the COAG model suggests that the provision will relate only to standard form, non negotiated contracts, it is worth noting that the onus will be on the supplier to prove that a contract is not a 'non negotiated' contract. This means that at present, in the context of the building and construction industry, the onus will be

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<sup>54</sup> Recommendation 7.1 in *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pp 168-169.

on a builder or contractor to establish that a contract is in fact a 'negotiated' contract, and so falls outside the scope of the unfair contract provisions. In Master Builders view, this is unacceptable, especially in the light of the elaborate statutory provisions for domestic building contracts including in respect of cooling off which are currently in place. These provisions for domestic building contracts were outlined earlier in this submission in respect of NSW.

9.6 The Discussion Paper provides no guidance as to the criteria that are likely to be used to satisfy this onus of proof. Is it sufficient for a consumer to be provided with an opportunity to negotiate some of the terms of the contract? If so, how will this be determined? If not, will a contract only be regarded as a negotiated contract if the consumer successfully negotiates some changes to the terms? What if the terms requested by the consumer are unreasonable? These are all questions which should not be left to a court or tribunal to decide.

9.7 Master Builders argues that if the onus of proof remains on the supplier of the contract, the legislation should set out clear and reasonable criteria which the supplier must meet in order to satisfy the onus of proof. Master Builders strongly recommends that a supplier should simply be required to prove that the consumer has been given the opportunity to negotiate some of the terms of the contract. This could be satisfied by the provision of a letter suggesting that the consumer contact the supplier or their solicitor if they would like to request any changes to a standard form contract. Whether the supplier agrees to the changes or not should be a commercial decision for the supplier.

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

9.9 Master Builders recommends that the good faith requirement should remain, to give businesses the opportunity to lead evidence about their intentions in situations where it is alleged that a contractual term is unfair, particularly where statutory provisions establish a required pattern of behaviour for a builder. Presumably, a court will reach its own judgement as to whether a contractual term

is unfair even if this good faith requirement is reinstated. The scope of the notion of good faith in the unfair contract provision should also be clarified by Parliament. (See paragraph 10.3 and 10.5 for further detail about the good faith requirement in the Victorian context.)

- 9.10 A number of areas still need to be clarified in relation to the model provisions. It is unclear at present what penalties will apply for breach. It is difficult to judge the model provision properly without further insight into proposed sanctions, and whether they are proportionate to any offence. Master Builders submits that fines should be reasonable rather than punitive, particularly where businesses have acted in good faith or it is a first offence. Criminal sanctions should not apply. In Chapter 7 of the Discussion Paper, there is some discussion about different types of penalties that might apply, with reference to current consumer law penalties in the TPA and FTAs. That Chapter also considers a number of new enforcement powers. (We consider this Chapter further in section 13 of this submission.)
- 9.11 There is a lack of detail about the application of transitional provisions. Transitional provisions were recommended by the Productivity Commission to give businesses time to adapt. This issue is referred to briefly in the Discussion Paper, and again in Attachment A, in the Joint Communique of the MCCA.<sup>55</sup> So transitional provisions will apply; however it is unclear what the length of these transitional provisions will be. Details of these arrangements will be crucial to the success of any reforms.
- 9.12 Master Builders submits that a reasonable transition period is essential to provide businesses with the time to obtain legal advice, consider that advice, and make any necessary changes to the contracts that they use well before the legislation comes into effect; especially as penalties may apply for breach. We suggest a transition period of 2-3 years would be appropriate, together with the provision of government funding for industry associations to run workshops and seminars to educate business about the implications of the new regime.
- 9.13 COAG appears to have taken up the Productivity Commission's recommendation that a review of the enforcement powers should occur from time to time. The criteria to be considered in reviews is discussed in Chapter 13 of the Discussion Paper.<sup>56</sup> Master Builders is keen to ensure that any review also considers in its

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<sup>55</sup> *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 34 and Attachment A: 'Joint Communique – Ministerial Council of Consumer Affairs', p 105.

<sup>56</sup> *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, Chapter 13, p 99.

evaluation, the effect of the provisions on various industries. Master Builders suggests that it would be of benefit to the industry for information to be collected about the effect of any unfair contract regime that is introduced, on large, small and medium sized businesses so that the regime can be properly evaluated. This is particularly the case given the paucity of evidence available in this area generally, as identified by the Productivity Commission. This latter proposition also raises the need for cost/benefit analysis of any final proposal in this subject area.

## **10. VICTORIAN MODEL FOR REGULATING UNFAIR CONTRACT TERMS**

- 10.1 This section of the submission briefly considers some of the features of the Victorian unfair contracts model for completeness. Although the Victorian model is the most recent Australian legislative model, Master Builders believes that the models put forward by COAG and the Productivity Commission are superior to the model currently in place in Victoria.
- 10.2 The Victorian *Fair Trading Act 1999* was amended in 2003 by the Victorian Parliament through the addition of provisions (s2B) designed to address unfair contract terms. While the legislation draws heavily on the model adopted in the UK's *Unfair Terms in Consumer Contracts Regulations 1999*, which focuses on substantive rather than procedural unfairness, the Victorian provisions have been criticised because they have considerably wider scope.<sup>57</sup>
- 10.3 In the Victorian legislation, a term is considered unfair 'if contrary to the requirement of good faith and in all the circumstances it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer (s32W). If a court finds a term unfair, the term is void, though the rest of the contract stands. The statute does not apply to contracts between a supplier and a business, or to contracts covered by the *Consumer Credit (Victoria) Act 1995*.<sup>58</sup>
- 10.4 Key differences between the Victorian and UK models include that the Victorian model:
- 10.4.1 Provides for a list of prohibited terms to be developed through the regulations.

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<sup>57</sup> *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, Appendix D, p 407.

<sup>58</sup> *Ibid*, p 407.

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

10.4.3 Covers terms relating to the price of a product.<sup>59</sup>

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

*"...the High Court of Australia is yet to consider the matter expressly, and there remains much confusion as a result of inconsistency between various judges and jurisdictions in respect of the content, scope and source of the duty of good faith, where it is found to exist."*<sup>60</sup>

10.6 In terms of the Victorian model generally, Master Builders submits that the Victorian provisions are in excess of the necessary mechanisms to protect consumers as clearly set out by the Productivity Commission. Master Builders prefers instead the model put forward by the Productivity Commission. Master Builders does not consider it appropriate that a list of prohibited terms be developed through regulations, due to the lack of transparency implicit in that process.

10.7 Master Builders shares the Productivity Commission's concern that to extend the reach of the provisions to non standard form contracts may have unintended consequences. It is also contrary to the notion of 'freedom of contract', which should be an inherent part of the process in negotiated contracts. Similarly, Master Builders considers that the parties to a contract should be free to negotiate the price of a good or service free from judicial interference. Master Builders rejects the Victorian model's capacity for investigation of ex post facto matters of price, in the interests of business certainty.

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<sup>59</sup> Ibid, p 407.

<sup>60</sup> Harradine, B. "Implied Duty of Good Faith – a Fetter on Powers under Australian Construction Contracts." *Australian Construction Law Newsletter* November/December 2008, p 25.

## 11. TYPES OF CONTRACTS THAT WOULD BE COVERED BY UNFAIR CONTRACT TERMS REGULATION

11.1 The Discussion Paper provides a list of a number of standard form contracts by way of example, that would be covered by the legislation. Many are of direct relevance to the building industry. These include:

11.1.1 *Domestic building, renovation and maintenance service contracts;*

...

11.1.2 *Professional services, including services provided by engineers, surveyors, architects, lawyers, consultants and others; ...*

11.1.3 *Publicly and privately provided vocational training and professional development services.*<sup>61</sup>

11.2 As noted above, Master Builders considers that building contracts are generally negotiated and accordingly should be explicitly excluded from the legislation. The onus should not be on the builder or contractor to establish that a particular contract falls outside the scope of the provisions, as is currently contemplated by the COAG model. This will lead to confusion, and potentially expose builders and contractors to uncertainty, and to unnecessary costs and delays.

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

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

11.5 If the government does choose to proceed on the basis outlined in the Discussion Paper, and extends the unfair contracts regime to business to

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<sup>61</sup> An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper, p 33.

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

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

## **12. TYPES OF CONTRACT TERMS THAT MAY BE COVERED BY THE UNFAIR CONTRACT PROVISIONS**

- 12.1 The Discussion Paper lists a number of types of contract terms that may be covered by the unfair contract provisions.<sup>62</sup> Comments are made below about most but not all of the types of clauses listed. These comments relate primarily to building contracts and building services contracts, on the basis that with the proposed regime as presently outlined, some building and building services contracts may be caught within its scope (for instance, where builders or contractors are unable to establish that a contract is 'negotiated').

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

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

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

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<sup>62</sup> Ibid, p 31 – 33.

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

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

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

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

12.5 Master Builders notes in relation to the option not to renew a contract, if the supplier provides the service or product, then a supplier should be able to choose not to renew that contract. Refusal of supply is a matter currently adequately regulated by the TPA.

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

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

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

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

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

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

*Clauses imposing the evidential burden on the consumer in legal proceedings*

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

*Clauses that require consumers who breach a contract term or terminate early to pay penalties, in the form of specific additional payments, additional interest or indemnity legal costs, which do not reflect the supplier's reasonable costs*

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

*Clauses that prevent the consumer from cancelling a contract*

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

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

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

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

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

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

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

#### **Terms that may be banned**

12.16 The Discussion Paper notes that a number of types of unfair contract terms may be banned on the basis that they are considered, in all circumstances, to be unfair.<sup>63</sup> The Discussion Paper notes that the use of the terms would expose a *supplier* to enforcement action under the Australian Consumer Law.<sup>64</sup> There is some overlap between the terms that are listed and those set out above. Master Builders comments on a number of these alleged types of unfair contract terms but not all of them as set out in the Discussion Paper.

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

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<sup>63</sup> Ibid, p 35 – 42.

<sup>64</sup> Ibid, p 35.

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

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

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

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

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

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

12.22 To completely ban clauses which document whether the purchaser has relied on any representations in entering an agreement will undermine the validity of the concluded agreement on which both parties rely. This is likely to lead to

more litigation, higher fees for lawyers, and will make it much more difficult for businesses to rely on concluded contracts. Certainty about the validity of concluded contracts is particularly important to businesses in the context of the current economic downturn; businesses need some degree of certainty so that they know they can pay their employees and suppliers.

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

- 12.23 Master Builders submits that it is appropriate that the onus be on the consumer to acknowledge whether or not they have read and understood a contract. This kind of clause may encourage a consumer, who is otherwise inclined not to take the time to read a contract, to properly consider it. It is also appropriate that a consumer acknowledge whether the consumer understands the contract they are proposing to enter. It is appropriate that the onus be on the consumer to *seek advice or clarification* if the consumer does not understand the contract. How else can a supplier of goods and/or services be satisfied that a consumer understands a legal document?
- 12.24 Most Retail Leases Acts require landlords to provide tenants with a disclosure statement, which provides the tenant with a useful summary of key terms and conditions relating primarily to their financial obligations arising from the lease. Similarly, a number of the domestic building contract statutes have full disclosure regimes.
- 12.25 Master Builders submits that a requirement to increase disclosure about complex legal documents may be helpful to consumers in some situations, to assist them to better understand their legal obligations. Similarly an obligation to word legal documents, as far as practicable, in 'Plain English' is also likely to be helpful to assist consumers. This is a better approach to protecting consumers, than banning terms and introducing greater uncertainty about the validity of concluded contracts, which appears to be the approach foreshadowed in the Discussion Paper.
- 12.26 Providing these measures are put in place, Master Builders is strongly of the view that it is ultimately the responsibility of consumers to ensure that they understand the contractual obligations that they freely enter into, or to seek advice if they do not. If a particular consumer chooses not to take the time to do so, or chooses not to make the effort to ask pertinent questions about any

matters they do not fully understand, the principle of caveat emptor should apply.

- 12.27 There will always be certain consumers who do not take the time or make the effort to ensure that they understand their contractual obligations, even where there is adequate disclosure as outlined above; in this situation, the consumer should bear the consequences of their own actions.

*Conclusive evidence terms*

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

*Terms that otherwise limit suppliers' liability for their negligence*

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

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

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

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

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

- 12.33 In the example cited in the Discussion Paper, depending on the manufacturer, normally a supplier must pay for the cost of the curtains/carpets, prior to installation. Indeed, the supplier may be required to pay a deposit to the manufacturer, in order for the manufacturer to manufacture and deliver the goods to the supplier. The supplier may then be required to pay for the costs of labour to transport and install those materials in the consumer's home.
- 12.34 In most transactions involving the sale of goods, a purchaser must pay for the goods prior to being able to 'take them away for their own use'. Where a good becomes a 'fixture' after installation, suppliers are usually not able to recover goods in the event of non payment by a consumer unless there is a properly drafted Romalpa clause.
- 12.35 Master Builders is keen to ensure that in any new scheme imposed on the industry, industry participants, whether they are suppliers, contractors or builders, are not left out of pocket for materials purchased, and services rendered in installing those goods.
- 12.36 The disadvantage of prohibiting contract terms that allow suppliers, contractors or builders to charge reasonable deposits where goods must be purchased up front, is that those suppliers, contractors or builders may be significantly out of pocket if a consumer changes their mind or causes undue delay because of matters within their control.
- 12.37 The disadvantage of prohibiting contract terms that allow suppliers, contractors or builders to reserve title in goods until payment, or which prohibit terms that allow suppliers, contractors or builders to specify that consumers must pay for goods up front in full before they are installed, is that small businesses in particular may experience significant cash flow problems where they have paid for goods and labour, and consumers do not honour their contracts. As noted above, where the installation of goods result in those goods becoming a fixture, and/or where the value of the goods are diminished by the installation and use of the goods by the consumer (eg carpet), the risk of non payment by a consumer after installation would be a significant concern.
- 12.38 For the vast majority of consumer transactions, where goods are installed, businesses have an incentive to install them properly or they will lose future customers; the value of the business will then diminish with the value of its good will, or it will be unable to continue trading.

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

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

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

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

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

*Terms mandating arbitration or otherwise inhibiting access to courts or tribunals*

12.42 Master Builders does not object to a provision designed to void terms of this kind in most circumstances, providing that a supplier, builder or contractor may make a dispute resolution clause a condition precedent to any action through the courts.

12.43 It may be worth including an exemption for related parties/ corporate entities. Sometimes related parties may specify that a dispute may only be resolved through a dispute resolution clause, to encourage the parties to resolve disputes internally.

### **13. REFORMS TO THE CONSUMER LAW ENFORCEMENT POWERS**

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

13.2 COAG has agreed that the enforcement of the law will be shared between the ACCC and the State and Territory Offices of Fair Trading. Formal agreements between them will cover arrangements for communication and coordination of activities. These enforcement arrangements will be reviewed by COAG within seven years after the commencement of the Australian Consumer Law.<sup>65</sup>

13.3 Master Builders notes that this enforcement arrangement appears to be a recipe for duplication and waste. Why should taxpayers fund the activities of two sets of entities, at Commonwealth and State and Territory level, when the task could more efficiently and effectively be performed by one national entity? Given that the aim is to enact a *national* consumer law, to avoid unnecessary complexity, duplication and waste, why not also have a *national* regulator?

13.4 This would also allow the regulator to develop specialised expertise in the area, rather than having that expertise shared across a myriad of State and Territory entities then lost if there is a later amalgamation as would appear logical. It is also more likely to prevent the laws being enforced inconsistently across jurisdictions.

13.5 While the Productivity Commission supported a multiple regulator approach in the short term for pragmatic reasons (to facilitate agreement with the States and Territories for the development of a national consumer law) the Productivity Commission also suggested that the better approach for the long

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<sup>65</sup> Ibid, p 43.

term was that the Australian Government through the ACCC be solely responsible for enforcing the new national generic law.<sup>66</sup>

13.6 The Discussion Paper notes that the Australian Consumer Law will include “...the full range of penalties, enforcement powers and consumer remedies currently available in the TPA, with appropriate modifications ....”<sup>67</sup>

13.7 COAG has agreed that these powers should be extended, and that the Australian Consumer Law will include provisions covering:

13.7.1 Civil pecuniary penalties and disqualification orders;

13.7.2 Substantiation notices;

13.7.3 Availability of redress for non parties to proceedings;

13.7.4 Public warning powers; and

13.7.5 Infringement notices, to the extent permitted by relevant Commonwealth and state and territory laws and policies.<sup>68</sup>

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

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

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<sup>66</sup> *Review of Australia’s Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, p 72-73.

<sup>67</sup> *An Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 43.

<sup>68</sup> *Ibid*, p 43.

- 13.10 Master Builders notes that disqualification orders, which effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations, have the potential to bankrupt many small businesses. Furthermore, disqualification orders improperly applied have the potential to seriously disrupt the operation of a business of any size, where a manager is appointed or ‘works their way up’ based on specialised knowledge and expertise. It is also unclear what benefit these orders would have for the public, so are unlikely to meet a proper cost benefit analysis.
- 13.11 Although the Discussion Paper notes that the civil pecuniary penalties proposed would not exceed the current level of monetary *criminal* sanctions in the TPA: currently \$ 1.1 million for corporations and \$220,000 for individuals,<sup>69</sup> Master Builders considers that these penalties are excessive for an unfair contracts regime.
- 13.12 In terms of the new enforcement powers which are proposed, Master Builders is concerned about the potential for inappropriate use of the Public Warning powers. Master Builders notes that the Discussion Paper does not provide any guidance about the formal criteria to be used to determine the use of the Public Warning powers.
- 13.13 Master Builders argues that the legislation should contain rigorous criteria, to ensure transparency and guard against abuse of process. Master Builders is concerned that applied inappropriately, the public warning powers could be used to destroy the reputations of businesses, where the circumstances do not justify it.
- 13.14 Master Builders suggests instead that COAG examine the penalties and sanctions in place under equivalent unfair contract regimes interstate and overseas to develop a ‘light touch’ regulatory regime.
- 13.15 Master Builders notes that in the Productivity Commission’s discussion of consumer law enforcement models in different jurisdictions, the prevailing model is generally a *layered enforcement approach* based on an *enforcement pyramid* for business compliance.<sup>70</sup> The first element of that enforcement

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<sup>69</sup> An *Australian Consumer Law: Fair Markets Confident Consumers Consultation Paper*, p 46 – based on 10,000 penalty units for corporations and 2,000 penalty units for individuals.

<sup>70</sup> *Review of Australia’s Consumer Policy Framework*, Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, p227-231.

pyramid for business compliance is usually education and information programs from the regulator(s) designed to prevent the emergence of future compliance breaches.<sup>71</sup>

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

#### **14. CONCLUSION**

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

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<sup>71</sup> Ibid, see the enforcement pyramid in Figure 10.1, p 228.