Master Builders Australia

# Submission to the Treasury

On

# Extending Unfair Contract Terms Protection to Small Business – Draft Legislation

12 May 2015

MASTER BUILDERS AUSTRALIA

Master Builders Australia Limited

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# 1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

# 2 Purpose of Submission

2.1 On 28 April 2015 Treasury informed Master Builders about the consultation process on the Exposure Draft legislation and Explanatory Materials (the Materials) for the extension of the consumer unfair contract term protections to small businesses. This proposed extension of the law was a pre-election commitment of the Government. Master Builders respects the Government's mandate.

2.2 The publication of the Materials follows an initial consultation process that involved stakeholders responding to Treasury's Extending Unfair Contract Term Protections to Small Businesses Consultation Paper. Master Builders responded to that consultation paper via a comprehensive submission dated 31 July 2014 (the First Submission). We have subsequently had discussions on the subject with Treasury officials and with the responsible Minister, the Hon Bruce Billson, Minister for Small Business.

2.3 The consultation is open until Tuesday 12 May 2015. This submission contains Master Builders' response to the Materials. Master Builders has confined comments to that part of Schedule 1 of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Exposure Draft Bill 2015 (Exposure Draft) dealing with the *Competition and Consumer Act 2010*

(Cth) (CC Act). Schedule 1, inter alia, contains amendments to extend the consumer unfair contract term provisions in the Australian Consumer Law (ACL) of the CC Act to small businesses agreeing to standard form contracts valued at less than a prescribed threshold, concepts that are discussed in more detail below.

2.4 In the main Master Builders welcomes the protections that a large number of our members will gain from the proposal. However, we are concerned about the complexity of the proposed law and the potential it has for raising levels of uncertainty.

## 3 Central Consideration

3.1 As indicated in the First Submission, a major concern held by Master Builders is that the extension of the law would introduce new levels of uncertainty into the process of tendering and in dealings with and between small businesses in the building and construction industry. Relatedly, we are concerned that any uncertainties will fuel litigation.

3.2 Accordingly, where we identify that the proposed laws would create uncertainty, we have emphasised that concern.

## 4 Meaning of Small Business

4.1 Fundamental to the extension of the law is categorising those small businesses that will enjoy the protections of the unfair contract terms law. As indicated in the First Submission, there currently exists in Australian legislation no coherent or consistent definition of a small business. We note that Item 29 of Schedule 1 per proposed section 3A(1) of the Exposure Draft defines a small business as such where it employs fewer than 20 persons. As is evident from Table 1 of the First Submission which contains data on the number of employing building and construction businesses as of June 2012, the breadth of this definition will capture over 90% of employing businesses in the building and construction industry.

4.2 Proposed s3A(2) is important because it stipulates that in counting the persons employed by a business, a casual employee is not counted unless he or she is employed by the business on a regular and systematic basis.

4.3 There is a major difficulty with the definition in practice, in particular the extent to which a contracting party must find out employee numbers of a party or proposed party to the contract that they enter into. The question of whether the new laws will or will not apply to a party with which another business is negotiating is not answered by the substance of the new law. Consideration should be given to a requirement to disclose that status with the affected small business indicating such to the other party.

## 5 Meaning of a small business contract

5.1 Item 31 of Schedule 1 amends s23 of the ACL so that an unfair contract term contained in a standard form small business contract will be void. The current provision is confined to standard form consumer contracts. Item 32 defines a small business contract. This provision is layered. A contract is a small business contract if, at the time it is entered into, at least one party is a small business; with the subject of the contract relating to the supply of goods or services or sale or grant of an interest in land, and the upfront price payable under the contract does not exceed either $100,000, or $250,000 if its duration is more than 12 months.

5.2 Obviously the linkage with the definition of a small business discussed in section 4 of this submission is that the test time for the assessment of the number employed in the small business is set as the date the small business contract is entered into. This is clear but the uncertainty created by the element of due diligence required by the opposing party to be informed of that issue remains unclear. It is likely, for example, that in tender documents, there will be an obligation imposed on head contractors (or they will impose such an obligation down the contractual chain) to disclose the number of persons employed in the business as at the date when the tender is let. This figure could also be different once the contract is on-foot, given the fact that the successful tenderer may need to expand the workforce to undertake the work.

5.3 The issue of the number of workers employed may well affect those to whom a contract or subcontract is extended as tenderers choose not to deal with those so covered. Conversely, the issue may also translate to those covered by the extension to the law costing the transfer of contractual risk at a lower rate than those who do not obtain the benefit of the protection. In other

words, the legislative protection in that circumstance would mean that small businesses covered are provided with a market advantage.

5.4 The monetary threshold for the application of the law relates to the "upfront price" payable. Section 26 ACL governs the idea of an "upfront price." Currently, it is as follows:

> *26 Terms that define main subject matter of consumer contracts etc are unaffected*
>
> *(1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:*
>
> *(a) defines the main subject matter of the contract; or*
>
> (b) *sets the upfront price payable under the contract; or*
>
> (c) *is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.*
>
> *(2) The **upfront price** payable under a consumer contract is the consideration that:*
>
> *(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and*
>
> *(b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.*

5.5 The majority of building contracts will be completed with a final price that is different from the price initially disclosed in that contract, for fixed price contracts, or estimated for cost plus contracts, mostly because of the effects of variations. Variations are common place; their value may exceed the original contract price, although that is a rare occurrence. Master Builders notes that this may raise issues of whether the threshold test is able to be applied to building contracts because the value is not certain from the outset. The question arises as to whether the pro forma fixed price or the estimated price contained in a building contract will be considered to be a sufficient disclosure "at or before the time the contract is entered into" in order to qualify as an upfront price within the terms of section 26(2)(b) noting that items 39

and 40 of Schedule 1 clearly extend this test to small business contracts. The issue of a contingent event in section 26(2)(b) is unlikely to apply as variations are not triggered by an "event." Instead they are usually related to a choice by the principal to have work undertaken in a different form from that originally proposed.

5.6 Further, the provision generally is arguably not able to be used to cover building contracts given the use of the term "payable under the contract" in s26(1)(b). The term that establishes the fixed price in a building contract is not of itself the exclusive term that deals with price. The amount payable is obviously not the price disclosed at the time the building contract is entered into; this is always a greater or even lesser amount than that established at the outset.

5.7 This is also the case because of the prevalence of provisional sum or prime cost provisions in building contracts. Building contracts will very frequently contain adjustment provisions to take account of provisional and prime cost sums. The term 'provisional sum' is generally used in construction contracts to refer to work that may or may not be carried out at all or where the content or standard of the work is not completely defined. In essence, the parties will not attempt to price this part of the work accurately after they enter into the contract, but the preliminaries, time and other allowances have been made in the contract price for this extent of work. Accordingly, the provisional sum (plus GST) is often but not always included within the contract price. Prime cost sums cover foreseeable off the shelf items which were not identified at the time the contract was executed, such as kitchens where the bench surface is to be determined by the owner subsequently; that choice eg laminate or marble will affect the contract price. Prime cost sums also cover anticipated payment of fees or charges to authorities

5.8 In our understanding, there is no current decision on the reach of the term "upfront price" and we are concerned that there will be litigation required to test its application in the context of building and construction industry small business contracts under the law as proposed to be extended. At the nub of the matter is whether the disclosure of the terms and conditions that shape the final price is sufficient to meet the statutory definition, a matter doubted per the discussion in paragraphs 5.5 and 5.6 above. This question is vital so that the statutorily set monetary values have appropriate operation in the

building and construction industry to properly exempt contracts with a higher value than those referred to in paragraph 5.1 above.

5.9 A further uncertainty arises in the context of the frequency of the use of variations under building contracts. The extent of variations that are introduced during a building project will also very likely affect the date for practical completion under the contract so that the time periods of 12 months or more may only be ascertained ex post facto. This will cause further uncertainty about the application of the provision i.e. whether or not a small business contract as defined has been formed.

## 6 Application and Transition Provisions

6.1 The amendments would apply to varied terms, and contracts entered into or renewed on or after the day the legislation comes into effect. Proposed s294(2)(b) indicates that the test is "if a term of a contract is varied" then the new law applies. Master Builders reiterates the issue of the extent of variations made under building contracts discussed in section 5 of this submission. These are not generally the variation of a term of a building contract but are the application of mechanisms to vary the substance of the contract. A variation exercised under the contract is not a variation to the contract itself. To have the law apply to such variations would disrupt the market considerably as the new law would apply to virtually all building contracts on foot at the time of the introduction of the new laws.

6.2 There is therefore a substantial educative role required in this context particularly to bring home what is to builders an irrelevant legal distinction discussed in the prior paragraph. The Government should carefully consider the time period for transition given the need to educate the community about these new laws, for contracts to be modified to deal with any issues that might arise and for contracting, particularly tendering, practices to be examined in the light of the new laws.

## 7 Need to Remediate the ACL

7.1 Master Builders notes that the new laws are being grafted onto the ACL which, we submit, needs to be re-examined. Master Builders made a comprehensive submission to the Competition Policy review on this question

(see Attachment A). We are informed that a comprehensive review of the ACL will occur in 2016 and we look forward to participating in that review.

7.2 In this context, we note that under the proposed law, per Item 41 of Schedule 1, industry-specific laws are able to be exempted from the scope of the ACL's protection for small business. Master Builders urges the Government to extend this exemption to consumer contracts where equivalent protection exists, as argued in detail in Attachment A for domestic building contracts. This is a measure we recommend ahead of the 2016 review of the ACL.

## 8 Conclusion

8.1 Master Builders looks forward to discussing this submission with Treasury officials and we note that discussions will occur on 14 May 2015.

8.2 Master Builders will be seeking the assistance of Treasury and Australian Competition and Consumer Commission officials in planning education programmes about the new laws.

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Master Builders Australia

# Submission to the Competition Policy Review

On

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

10 June 2014

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1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

# 2 Purpose of submission

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

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

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

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

2.4 In other words, whilst the ACL is directed at consumer transactions, there are a number of implications for commercial contracts that arise from the breadth of the law and from the terms used. This submission highlights those issues and calls for further review.

# 3 The nature of the ACL

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

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

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

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

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

- State based domestic building contract legislation – see Table 1 below;
- The ACL guarantees discussed in section 6 of this submission;
- The Building Code of Australia (which is part of the National Construction Code) as a minimum contractual requirement[3] – see Table 2, and
- The unfair contracts provisions of the *Competition and Consumer Act*, 2010 (Cth) (CCA) discussed in section 5 of this submission.

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

**Table 1: Domestic Building Contracts Acts**

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

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

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

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

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

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

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

# 4 Who gets the benefit of the ACL

4.1 The Explanatory Memorandum for the Bill founding the ACL articulates that there are six areas where the definition of consumer is relevant.[5] For the purposes of this submission, we focus on the consumer guarantees regime and the unfair contracts regime. The difference in the coverage of protection between these two areas is illustrative of two distinct approaches. The first is the restriction of the remedies for unfair contract terms to consumers through the definition of consumer contract in s23(3) of the ACL – that is by reference to the type of transaction. On the other hand, the definition of a 'consumer' in s3 ACL is based on s4B of the former *Trade Practices Act* where the definition is by reference to the types or value of goods or services purchased.

4.2 It is via the definition of 'consumer' for the purposes of the statutory guarantees that small business is caught in the provisions of the ACL, potentially as an affected consumer as well as a supplier or manufacturer.

4.3 We now turn to an examination respectively of the unfair contract terms and the statutory guarantees provisions to highlight the differences in the way the definition of 'consumer' has varying practical effects, as well as exploring some of the issues which adversely affect businesses in the building and construction industry.

# 5 Unfair Contract Terms

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

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

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

*(1) A term of a consumer contract is void if:*

*(a) the term is unfair; and*

*(b) the contract is a standard form contract.*

*(2) The contract continues to bind the parties if it is capable of operating without the unfair term.*

*(3) A consumer contract is a contract for:*

*(a) a supply of goods or services; or*

*(b) a sale or grant of an interest in land;*

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

5.2 A contract is unfair for the purposes of s23(1)(a) if, pursuant to s24, it

- causes a significant imbalance in the rights and obligations of the parties;
- is not reasonably necessary to protect the interests of the advantaged party; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

5.3 Section 24 also sets out that a court must take into account the extent to which the term is transparent, and the contract as a whole, when looking at whether it is unfair. This impinges particularly on some of the domestic building legislation where the terms of the contract must be made clear to a consumer and there is a cooling-off provision as part of the statutory construct. Under the ACL a term is transparent if it is expressed in reasonably plain language; legible; presented clearly; and readily available to any party affected by the term: s24(2).

5.4 Section 25 then sets out a non-exhaustive list of the kinds of terms of a consumer contract that 'may be unfair'. One example will suffice to show how the provisions are novel in Australian contract law. Section 25(1)(m) provides the example of terms imposing the evidential burden on one party in proceedings relating to the contract. In most areas of the law, the party alleging loss and seeking compensation would bear the burden of proof. Master Builders considers that the applicant should bear the evidential

burden, and does not agree that the evidential burden should be shifted in this area of the law, particularly as the legislation presumes that where it is pleaded that a contract is a standard form that is the case and the onus is then on the respondent to prove otherwise – section 27(1).

5.5 In addition, Carter[6] has criticised a number of the factors set out in s25 as indeterminate in that they are too broadly stated and do not take a specific consumer protection focus, as reflected in the United Kingdom law on which they are based. This extract from his work that is highly critical of s25 is illustrative:

> *The example stated in s25(k): a term that limits, or has the effect of limiting, 'one party's right to sue another party'. That example would apply to any exclusion or limitation of liability. The impact would seem to be that a supplier must be in a position to justify any exclusion or limitation of liability. A corresponding example in the Unfair Terms in Consumer Contracts Regulations 1999 (UK) is:*
>
> *Excluding or hindering the consumer's rights to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.*[7]

5.6 Master Builders has serious concerns about the basis of the unfair contract terms law as it affects domestic building contracts. This is because its provisions introduce a high degree of uncertainty into the residential building sector where the large majority of transactions are undertaken using standard form contracts, contracts which are, in any event, constrained by the domestic building legislation. This uncertainty operates to the detriment of both business and consumers and brings into effect an unnecessary dual level of regulation.

5.7 In the building and construction industry even the 'standard' printed conditions can be – and routinely are – altered, added to or deleted. None of the major terms of building contracts such as price, quality, length of contract time, security for performance, insurances, dispute resolution methods, or liquidated damages are "standard", but are required to be individually

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

[7] Ibid at p11 print version

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

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

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

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

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

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

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

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

5.11 Generally, the current law regulating domestic building contracts recognises that some consumers may be vulnerable. It recognises suppliers may have a superior bargaining position to consumers. The law has more than overcome the problem of a supplier taking advantage of a domestic consumer through a superior bargaining position. It has swung the pendulum in favour of consumers, even where the consumer has greater marketplace power than, say, a small builder. Generally, the statutes protecting consumers in the domestic sector of the building and construction industry fulfil this function by ensuring they have sufficient information about the contract in a readily accessible form and they have an opportunity to 'cool off' after entering into the contract. They are given ample procedural fairness.

5.12 However, despite these requirements at the time of contract formulation, detriment for the purposes of the unfair terms law is not limited to financial detriment. A court is able to consider situations where there may be other forms of detriment that have affected or may affect consumers disadvantaged by the practical effect of an unfair term. Detriment may include inconvenience, delay or distress suffered by the consumer as a result of the unfair term, making the assessment of the notion of unfairness on the face of it a subjective notion. This ex post facto determination contrasts markedly with the approach under domestic building legislation which is to provide as much information as possible to a consumer before and as part of contract formation.

5.13 The ACL palpably moves away from a procedural fairness formulation which underpins the domestic building legislation into areas where Australia has embraced a new jurisprudence which sits uncomfortably with domestic building contracts legislation. Master Builders recommends the exemption of domestic building contracts from the unfair contracts regime.

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

# 6 New Statutory Guarantees

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

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

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

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

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

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

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

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

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

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

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

[12] Supra note 5 at pg 5, print version.

[13] Supra note 4 para 2.20

[14] [2006] FCA 682

[1414] Per McHugh J at 41

[14] Supra note 13 at para 114

[15] (1993) 179 CLR 15

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

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

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

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

6.9 A most novel characteristic of the new law is the consumer guarantees operate independently from contracts for sale of goods and services to consumers as defined by s3. They are independent statutory rights that cannot be excluded by contract: s64 ACL. A new basis for consumers to act on is the guarantee which mandates acceptable quality according to the usual purposes of the goods[18] and to any particular purpose for which the goods are

[16] Per McHugh J at 41

[17] Supra note 13 at para 114

[18] Section 54, *ACL*

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

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

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

6.11 Relevant to the current discussion is the guarantee a manufacturer of goods must comply with any express warranty[24] in a contract for sale.[25] This is a major change introduced by the ACL. Express warranties are expansively defined to include pre-contractual statements of facts which *might* induce the consumer to purchase the goods.[26] All consumer guarantees, including as to

[19] Section 55.

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

[21] Section 60,

[22] Section 61,

[23] Section 54

[24] Defined at section 3,

[25] Section 59,

[26] Section 3,

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

6.12 The consequences of a statutory guarantee of express contractual warranties are central to a number of concerns Master Builders has with the new regime. The remedy provisions are, like much of the ACL, rather complicated. The availability of particular remedies depends upon whether a breach of a consumer guarantee is a 'major failure',[28] the existence of which entitles the consumer to compensation for a reduction in value in the goods, to recover damages, or to reject the goods. The latter option depends on whether or not the 'rejection period' as defined[29] has lapsed. The ability to reject goods for breach of an 'express warranty', expansively defined under the ACL,[30] arguably extends to breaches of mere statements of fact, remedies previously available at common law only for contravention of essential terms.

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

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

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

6.14 As stated, the activities of builders will constitute both supply of goods and services[33] and will be subject to the consumer guarantee regime. It will also

[27] Section 64,

[28] See sections 259-260,

[29] See subsection 262(2),

[30] See section 3,

[31] Section 64,

[32] Supra note 5 at pg 14, print version.

[33] See definitions at section 3

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

# 7 Conclusion

7.1 Whilst Master Builders does not support the unfair contracts regime described in this submission, the definition of 'consumer' used in that part of the CCA is preferred to that used to frame the ACL scope.

7.2 Master Builders urges the Review to recommend the ACL be better integrated with domestic building contract legislation and domestic building contracts be excluded from the unfair contract terms law. Master Builders also submits the Review consider applying a consistent definition of 'consumer' to the ACL and to the other provisions of the CCA, one that does not randomly and inappropriately capture a large number of business transactions.

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[34] Carter supra note 5 at pg 6, print version