HOUSING INDUSTRY ASSOCIATION

Submission to the
Treasury

Enhancement to Unfair Contract Term Protections Consultation Regulation Impact Statement

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

The Housing Industry Association (HIA) refers to the Consultation Regulation Impact Statement released by The Treasury in December 2019 titled 'Enhancements to Unfair Contract Term Protections' (Consultation RIS).

During the passage of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Act) which extended the Unfair Contract Terms (UCT) regime to small businesses the Government committed to reviewing the Act within two years of its commencement. The Consultation RIS forms part of that review.

HIA takes this opportunity to respond to the Consultation RIS.

HIA has a number of concerns regarding the key position outlined in the Consultation RIS that *'UCTs are still prevalent'* with respect to the residential building industry, and in particular building contracts subject to state home building laws.

The purpose of the Act was to attempt to redress vulnerability experienced by small businesses when contracting with large businesses. Inherent to this is a need to change behaviours, which no form of regulation can completely address. It is irresponsible to expect that a regulatory approach alone can adequately influence the behaviour of commercial parties. Cultural change must form part of any approach.

What is considered an UCT is still being considered and developed. Therefore, the terms identified by, for example the Australian Small Business Family Enterprise Ombudsman or the NSW Small Business Commissioner are matters of opinion, not fact. Until tested and considered by a court, assertions that contractual terms are 'unfair' should be given little weight.

There is evidence that the current provisions of the Act are working well and as intended. The ACCC has commenced a number of actions and entered into a range of arrangements with businesses to redress UCT. HIA sees the continuation of this approach as preferred over any further regulatory change.

1.1 GENERAL COMMENTS

HIA did not support the expansion of unfair contracts laws to small businesses. Consistent with that position HIA does not support any expansion of the arrangements contained in the Act.

There are several key elements to HIA's opposition to the extension of these laws including that:

- Existing legal protections are adequate;
- The policy offends the principles of freedom of contract and limited government intervention;
- It is inappropriate to regulate businesses via a consumer orientated law;
- HIA does not support further laws or regulations that impose further unnecessary and inappropriate costs in business-to-business transactions; and
- Any change to the current arrangements will cause uncertainty for contracting and subcontracting arrangements in the residential building industry.

Specifically HIA opposes any changes that would:

- Make UCT illegal.
- Introduce penalties for a finding that a contract contained an UCT.

- Introduce a rebuttable presumption that a term that is the same or similar to a term considered to be an UCT would also be considered an UCT.

HIA considers the approach to enforcement and compliance, that does not include civil penalties, currently outlined in the *Modern Slavery Act 2018* is the most appropriate model when the focus of regulation is on changing attitudes and culture.[1]

HIA does see value in reconsidering the definition of a small business so that it is based on an annual turnover threshold and not headcount.

It is also important to note that standard form contracts are a long standing feature of the residential building industry. Many are developed through a process of negotiation and discussion. They are usually well understood by the parties and are often amended to reflect competing interests of the parties involved in the project type and the contractual value.

HIA drafts and publishes a number of standard form building contracts and trade contract (sub contract) documents. The terms of these contracts reflects the unique needs of the residential building industry and in HIA's view represent fair, reasonable and balanced conditions.

The extension of the UCT regime to small businesses has caused uncertainty, led to increased cost and created additional regulatory burden. HIA has seen little evidence that these costs are outweighed by the claimed benefits of such laws.

2. EXISTING LEGAL FRAMEWORK

The current unfair contract and competition laws, independent contractor and stated based security of payment laws are adequate to protect small businesses in the residential construction industry.

2.1 THE CURRENT COMPETITION AND UNFAIR CONTRACTS LAWS

The Consultation RIS outlines a number of matters the ACCC has responded to and taken action against in relation to UCT. From Table 1 on page 7 of the Consultation RIS, since the commencement of the Act, the ACCC has launched at least 14 actions, some of which have involved very high profile large businesses.

In contrast, the first case under the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* which commenced in 2017[2] took two years to finalise. It would seem that the ACCC have been very active in pursing UCT and that the Act is operating as intended.

Aside from the provisions of the Act, HIA considers that the Australian Consumer Law (ACL) and *Competition and Consumer Act 2010* (CCA) provide strong protections for small and medium businesses.

The ACL and CCA comprehensively regulates business dealings and provides protection for businesses with prohibitions on misleading conduct, anti-competitive conduct and unconscionable conduct.

There are additional protections at common law.

The unconscionability protections, in particular, provide understated protection for small business 'exploited' in commercial negotiation.

[1] See generally Explanatory Memorandum *Modern Slavery Act 2018*
[2] Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors [2019] FCCA 2259 (16 August 2019)

Section 21 provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the *'unwritten law'* of the Australian States and Territories. This provision takes into account the general non-statutory or common law as it evolves through decisions of the courts.

The ACL equally applies the unconscionability provisions to both business-to-consumer and business-to-business transactions, providing:

> *21 Unconscionable conduct in connection with goods or services*
>
> *(1) A person must not, in trade or commerce, in connection with:*
> *a) the supply or possible supply of goods or services to a person (other than a listed public company); or*
> *b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);*
> *engage in conduct that is, in all the circumstances, unconscionable.*
> *…*
> *(4) It is the intention of the Parliament that:*
> *a) this section is not limited by the unwritten law relating to unconscionable conduct; and*
> *b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and*
> *c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:*
> *(i) the terms of the contract; and*
> *(ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.*

According to Justice Finn, the listed indicators of statutory unconscionability that expressly refer to substantively unconscionable outcomes as heading 'in the direction of proscribing unfair dealing and unfair trading', especially 'unfair dealing in relational contracts'.

At the time when this section was introduced into Parliament, it was said that it was designed to protect small business, such as franchisees or small shopkeepers in large shopping malls when dealing with big business.

A number of factors are listed as to what may amount to unconscionable conduct:

- the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- the requirements of any applicable industry code (for example, the code applying to franchise contracts);
- the extent to which the supplier unreasonably failed to disclose to the business consumer;
- any intended conduct of the supplier that might affect the interests of the business consumer;
- any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;
- whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
- the extent to which the supplier and the business consumer acted in good faith.

Whilst statutory unconscionability had been historically difficult to prove, amendments to the legislation together with an expanding jurisprudence have enhanced the capacity of small businesses to rely on these protections.

In 2013 the Lux case signalled a significant development in the law, the Full Federal Court confirmed that unconscionable conduct should be given a broad interpretation.[3]

The case involved an ACCC prosecution against door to door vacuum salespersons. In upholding the ACCC, the Full Bench provided important clarity regarding the scope and operation of the unconscionable conduct provisions finding the conduct that is 'unconscionable' or 'against conscience' is a test of the norms and standards of today rather than moral judgment.

The implication of this decision is that it may not be necessary to show the conduct revealed a high degree of moral turpitude or moral tainting to prove unconscionability, elements that have been notoriously difficult to prove.

Unconscionability must be applied and understood in context. This significantly assists businesses seeking to rely on these protections.

In the same week as the Lux decision was handed down, the Federal Court in a case involving a business-to-business claim of unconscionable conduct granted an interlocutory injunction where there was a termination of a large commercial contract which, it was argued, amounted to unconscionable conduct, pursuant to clause 21 of Schedule 2 of the Australian Consumer Law.[4]

Given the ongoing development of case law on this topic, it is clear that the current unconscionability provisions are appropriate and are working well to protect the interests of small business. Any further extension of these protections risks destabilising markets through the inherent uncertainty they create in commercial relationships.

2.2 INDEPENDENT CONTRACTORS ACT

The *Independent Contractors Act 2006* (Independent Contractors Act) already regulates unfair contract terms for subcontractors in the building and construction industry establishing an unfair contracts jurisdiction.

Under the Independent Contractors Act, the Federal Court has jurisdiction to review a services contract if that contract is alleged to be unfair or harsh. When determining whether a contract is unfair or harsh, the Court may have regard to:

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

There is an expansive power for the Court to set aside in whole or in part the contract or make orders varying the contract. An order may only be made for the purpose of placing the parties as nearly as practicable on such footing that the ground on which the Court's opinion is based no longer applies. The Court may make interim orders to preserve the positions of the parties while the matter is being determined.

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[3] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90

[4] *One Pty Limited v Telstra Corporation Limited* [2013] FCA 23 the Federal Court (Justice Pagone) referred to in Professor Bob Baxt, *"Unconscionable conduct after the Lux decision", Company Director Magazine,* October 2013 accessed at http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2013-back-editions/October/Directors-Counsel-Unconscionable-conduct-after-the-Lux-decision

The Independent Contractors Act already represents a *'substantial level of protection'*[5] and the UCT regime continues to represent unwarranted regulatory duplication.

2.3 SECURITY OF PAYMENT LAWS

Since 1999, security of payment (SOP) legislation for the construction industry has been progressively introduced into all Australian jurisdictions.

The common objective of this legislation has been to improve cashflow down the contractual chain. It effectively establishes a default entitlement to payment.

Under these laws:

- the subcontractor has a statutory right to a progress payment;
- the builder/principal is liable for claimed amounts irrespective of what the contract provides;
- the subcontractor may suspend work or supply without liability, and, if the principal removes any part of the work or supply from the contract as a result of the suspension, the principal is liable for any loss or expense the contractor suffers;
- the subcontractor can exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied;
- there is an expedited dispute resolution procedure (adjudication) by which disputes concerning payment are resolved, usually by way of written submission, within a very short period of time;
- if a principal becomes liable for an amount under SOP laws, then, in addition to recovering the amount as a debt due to the contractor, the adjudication determination may be enforced as if it were a court judgment; and
- there are very limited appeal rights or rights of judicial review in respect of an adjudication decision materials supplied by the contractor for use in connection with carrying out construction work.

The remedy of rapid adjudication is also not available for a residential builder in dispute with a client.[6] This has potentially undesirable implications for payment arrangements throughout a residential builders contacting chain.

Clauses in building contracts that offend the SOP legislation are void – contracting out is prohibited.

SOP legislation makes certain 'unfair' provisions void. There are time limits for payments to subcontractors and a principal contractor/builder cannot require that payment to a subcontractor be withheld or delayed due to payment from the client not yet being received. This has codified the common law position that 'pay when paid' and 'pay if paid' clauses are void in respect of contracts for construction works performed or related goods and services supplied in Australia.[7]

In HIA's experience SOP legislation has provided an effective mechanism for payment for those subcontractors who have availed themselves of the laws. However and notwithstanding the existence of SOP laws some subcontractors continue to work for builders and principals when they have not been paid for a number of outstanding progress claims. This choice to continue to work even when substantial sums are already outstanding and when there is therefore an increased exposure to greater losses in the event of insolvency, is often based on a balanced assessment of risk and essentially is a commercial decision of these firms.

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[5] Decision Regulatory Impact Statement (2015) *Extending Unfair Contract Term Protections to Small Businesses*, Consumer Affairs Australia and New Zealand

[6] Except in Tasmania

[7] See eg *Ward v Eltherington [1982] QdR 561*; *Sabemo (WA) Pty Limited v O'Donnell Griffin Pty Limited (1983)* (unreported, Court of Western Australia); *Crestlite Glass & Aluminium Pty Ltd. v. White Industries (QLD) Pty Ltd* (Unreported, Federal Court of Australia).

There also are a number of building firms who continue to undertake work for a consumer or home owner notwithstanding a failure to pay current or previous progress claims by that owner. As noted above, unlike subcontractors they do not have access to SOP or rapid adjudication to remedy cashflow issues in this regard.

Below is a table setting out the security of payment protections:

State	Legislation	Maximum time period for payment of progress claims	Paid when paid clauses
ACT	*Building and Construction Industry (Security of Payment) Act 2009 (ACT)*	*10 days after a payment claim*	Void
NSW	*Building and Construction Industry Security of Payment Act 1999 (NSW)* (NSW SOPA)	*20 days to a subcontractor, 15 days by a principal to a head contractor.*	Void
SA	*Building and Construction Industry Security of Payment Act 2009 (SA)*	*15 days after a payment claim*	Void
NT	*Construction Contracts (Security of Payments) Act 2004 (NT)*	*28 days*	Void
Qld	*Building Industry Fairness (Security of Payment) Act 2017* *Queensland Building and Construction Commission Act 1991 (QLD)*	*25 business days after submission of a payment claim for construction management trade contract or subcontracts.* *For commercial building contracts, 15 business days after submission of a payment claim.*	Void
Tas	*Building and Construction Industry Security of Payment Act 2009 (Tas)*	*10 days*	Void
Vic	*Building and Construction Industry Security of Payment Act 2002 (Vic)*	*20 days*	Void
WA	*Constructions Contracts Act 2004*	*42 days*	Void

Recent changes in Queensland also mean that a failure to respond to a claim for payment can result in the imposition of penalties and/or disciplinary action and may have consequences for a contractor's license. Further, compliance with minimum financial requirements in Queensland are a license condition and require that:

> *'a Licensee must at all times pay all undisputed debts as and when the debts fall due and within industry trading terms'.*

In NSW under the *Contractors Debts Act 1997* subcontractors (or supplier of building materials) who have not been paid by a contractor can sometimes obtain payment directly from the principal. The rights under this legislation are expansive. For instance, the subcontractor is able to freeze monies in the hands of the principal (client) so that the principal does not pay the money to the contractor (builder) until the subcontractor has had the opportunity to obtain judgment of the amount owed by the contractor to the subcontractor.

The laws in NSW also enable subcontractors to earmark money which may become payable by the principal contractor to the subcontractor through rapid adjudication under the security of payment legislation [8] and require a head contractor to submit a supporting statement with a payment claim to a principal. A supporting statement requires that a head contractor declare that all payments due and owing to subcontractors have been paid and identifies any disputed amounts that have not been paid.[9] Penalties apply for failing to provide a supporting

[8] See Division 2A NSW SOPA

[9] See section 13(7) NSW SOPA and Schedule 1 *Building and Construction Industry Security of Payment Regulation 2008*

statement and making a false declaration.[10] The Queensland Government has recently made moves to adopt similar measures.[11]

3. RESPONSE TO KEY QUESTIONS

3.1 LEGAL AND PENALTIES

Option 1 – status quo

HIA supports Option 1.

As outlined above HIA is of the view that the existing unfair contract laws and the broader regulatory environment provide adequate protections for small businesses.

If Option 1 is not to be progressed, HIA provides a response to Option 2, 3 and 4 below.

Option 2 – strengthened compliance and enforcement activities

HIA does not oppose Option 2.

The current approach of the ACCC has resulted in a number of cases regarding UCT and there is value in building on and expanding that work.

HIA would be willing and able to assist in any targeted education campaigns or activities relating to UCT in the residential building industry.

Option 3 – making UCT's illegal and attaching penalties

HIA opposes Option 3.

Not only is it inappropriate to impose civil penalties on commercial parties, there is no evidence that making UCT illegal and attaching penalties will better assist the Act achieve its objectives. In fact, HIA is concerned that any moves of this nature will have a range of unintended consequences such as:

- Encouraging a move away from standard form contracts. This will ultimately increase costs for all contracting parties.
- Motivating larger businesses to move away from dealing with smaller businesses due to the increase risks and uncertainty involved in dealing with businesses captured by the Act.
- Exacerbating the existing uncertainty regarding what is considered an UCT. Without greater clarity regarding what is, and what is not, an UCT it would be considered manifestly unfair and unjust to attach illegality and penalties to such terms. Businesses are entitled to know the law i.e. to know what is considered an UCT, if they are to be charged with penalties for breaking it.
- The imposition of penalties may jeopardise a business's ability to trade and may even impact the small businesses ability to be paid.
- The consideration of this matter by a state based regulator responsible for the licensing or registration of builders. In most jurisdictions, to hold a license or registration to carry out residential building work the regulator must issue a license. Criteria that may be considered when issuing that licensing includes, for example, compliance matters.

[10] See sections 13(7) and (8) NSW SOPA

[11] Government response to the Building Industry Fairness Reforms Implementation and Evaluation Panel Report

Option 4a – strengthened powers for regulators – infringement notices

HIA does not support proposals that would strengthening the power of the regulator so they can issue infringement notices. However, Option 4a is preferred over Option 3. If progressed, infringement notices would send a strong signal and act as a strong incentive to businesses to engage with the ACCC regarding possible UCT.

Option 4b – strengthened powers for regulators – regulator determinations

If the powers of the regulator are to be strengthened, whether that relates to the ability to issue infringement notices, or the ability for a court to impose civil penalties for breaching the unfair contracts laws, greater guidance and clarity regarding what an UCT is necessary.

Therefore HIA sees that regulator determinations go hand in hand with any changes to compliance and enforcement mechanisms. It is a general legal principle that a person cannot be expected to comply with a law that was incapable of being known and therefore unable to be complied with. While there is guidance, case law and case studies regarding what an UCT is if penalties are to be imposed, the regulator must be available to offer binding advice on those matters.

The ATO has successfully been issuing binding determinations for many years. HIA sees that the ACCC could take significant learnings from that approach with a view to implementing something similar. These determinations could be made publically available (as is done with the ATO private rulings). This satisfies the need for both specific and general deterrence rebutting the premise outlined in the Consultation RIS that such deterrence can only be achieved through public court proceedings and detailed public judgements. Just like court decisions, the publication of private rulings can act as a guide to other businesses seeking to avoid UCT.

3.2 Flexible Remedies

Option 1 – status quo

HIA supports Option 1.

In the matters that have been brought the issues identified in the Consultation RIS do not seem to have surfaced therefore there seems little evidence to support any changes.

Option 2 – UCTs not automatically void

If Option 1 is not adopted, HIA sees that there may be value in exploring Option 2. Parties who wish to continue to deal with one another, despite an UCT should be able to do so.

HIA does query how this would work in practice. Would there be further arguments regarding the appropriate course of action in these cases? Dealing with these matters may unnecessarily lengthen litigation and/or cause delays in proceedings.

Option 3 – align remedies for non-party small business

HIA opposes Option 3.

It would seem that what is being proposed would allow the ACCC to bring a class action on behalf of small businesses, who all claim that an UCT has caused or is likely to cause the class of small businesses to suffer loss or damage. This goes well beyond the original intention of the laws which was principally to redress any vulnerability experienced by small businesses when contracting with large businesses; it was not to allow the regulator to bring class actions against large businesses on the basis of UCT.

Option 4 – UCTs used in similar circumstances

HIA opposes Option 4.

In HIA's view Option 4 represents a significant overreach and is unnecessary.

Deeming 'substantially similar terms' to contract terms held to be unfair and determining that a term found to be unfair to be an UCT across a whole industry is clearly problematic. What would 'substantially similar' mean? What would the 'same industry' mean? How would this work in practice?

It is also unlikely that a business would repeatedly use a contract term that has been declared void under the unfair contracts laws. Common sense would dictate that as case law develops regarding terms that are considered to be UCT businesses would review their contracts and if another of their standard form contracts contains the exact same term the business is likely to remove it. There is little evidence that this would not be the case.

3.3 Definition of a Small Business

Option 1 – status quo

Option 2 – replace head count threshold with turnover threshold

Option 3 – headcount threshold or turnover threshold

HIA supports Option 2.

HIA does not support the current headcount approach. This approach does not target the clear objective of the legislation to displace the perceived inequality of bargaining power between 'big' and 'small' business. In fact there may be many businesses of 20 employees or less that are not and should not be considered 'vulnerable'.

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

Further it is clearly difficult, if not impracticable, for any business to know whether or not the business they are contracting with is a 'small business' for the purpose of the laws. The number of employees a firm has is rarely common knowledge.

Small business should be defined by turnover. The turnover threshold should be based on a rigorous cost/benefit analysis.

HIA also submit that small businesses be required to disclose that they are small businesses and therefore covered by the laws.

3.4 Related Bodies Corporate

Option 1 – status quo

Option 2 – aggregation

HIA supports Option 2. Related bodies should be considered relevant when determining whether an entity meets the criteria in order to be captured by the Act. Where a small business is part of a larger corporate group, that small business should not benefit from the unfair contracts laws.

3.5 VALUE THRESHOLD

Option 1 – status quo

Option 2 – increase the value threshold

HIA supports Option 1.

In light of the substantial regulatory change brought about by the Act and the expansion of a consumer protection mechanism to business transaction HIA preferred the thresholds originally proposed in the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015*. As originally proposed the value threshold was $100,000 or if the contract runs for longer than 12 months, $250,000.

Noting commentary that the thresholds now in the Act would capture 95% of small businesses[12] HIA sees no need for any change to these thresholds, particularly a change of the significance proposed in the Consultation RIS of an increase to $5 million.

The proposed increase is also at odds with the original intention of the Act. The explanatory materials to the Act indicated that:

> *'Small businesses differ from consumers in that they also engage in high value commercial transactions that are fundamental to their business and where it may be reasonable to expect that they undertake appropriate due diligence (such as seeking legal advice). Limiting the extension of the unfair contract term protection to low-value, standard form small business contracts will support time-poor small businesses entering into contracts for day to day transactions, while maintaining the onus on small businesses to undertake due diligence when entering into high-value contracts.'*[13]

HIA also continues to advocate for the need for the cumulative value of multiple contacts to be taken into account when calculating the value threshold. Such an approach becomes particularly important if an increase in the value threshold is progressed.

In residential building, subcontracting parties are often engaged by a principal contractor/builder on a 'period' basis under which the same terms and conditions under the 'master' contract may apply for multiple projects. Separate 'work orders' are then used for each project reflecting the rates, scope of works and special conditions that might apply. For example, if the contractor is engaged on 3 projects at a combined value that exceeds the $300,000 threshold then the Act should not apply.

Option 3 – remove the value threshold

HIA opposes Option 3 and the proposal to remove the value threshold altogether.

To simply rely on one factor in determining the application of the Act (currently being head count) for such an important classification fails to account for:

- Changes in economic conditions that will impact the expansion or contraction of a business.
- The way a business may structure themselves in order to either be (or not be) considered a 'small business'.
- Incentives (or disincentives) for business growth.

[12] Peter Whish-Wilson, Senator (14 September 2015) *Parliamentary Debates* (Hansard). Commonwealth of Australia: Senate, pg. 6652

[13] Pg.8

There are legitimate, reasonable and sensible reasons why a multi-factor test is the most appropriate way of identifying a small business. This approach seeks to balance the needs of all businesses in the interests of the broader economy.

3.6 Clarity on Standard Form Contracts

Option 1 – status quo

HIA supports Option 1.

HIA does not see any need to alter the current list of factors outlined in section 27 of the ACL. HIA's main concern is the application of a reverse onus of proof when it comes to whether or not a contract is a standard form contract for the purposes of the application of the UCT regime.

Option 2 – repeat usage

HIA opposes Option 2.

HIA disagrees that this factor provides a 'more objective' test when determining whether a contract is a standard form contract. This also raises a number of questions including, what is meant by the 'repeated use' of a contract? The number of times a contract is used with the same party? The number of times a contract is used with different parties? HIA sees that this type of criteria will just add further complexity.

Option 3 – clarifying 'effective opportunity to negotiate'

HIA opposes Option 3.

The Consultation RIS proposes that the law be amended to clarify the types of actions that would not constitute an 'effective opportunity to negotiate'. HIA sees that the actions outlined in the Consultation RIS would simply muddy the waters when it comes to determining what this phrase means. Further, such specificity unreasonably impinges on how commercial parties may operate when negotiating contractual terms.