



## Unfair Contracts (Business to Business)

### Policy Background

- Unfair contract laws are part of the consumer protection framework and attempt to remedy an imbalance between parties, based on the perceived strength of the bargaining power of businesses versus the public. Under the Australian Consumer Law (ACL) an unfair term is defined as one that causes an imbalance in the parties' rights and obligations that go beyond what is reasonably necessary to protect the legitimate interests of the party relying on the clause.
- The ACL applies to standard form contracts, including contracts for gym membership, telecommunications agreements and home building contracts. It is proposed businesses be treated as consumers too.
- There are a number of arguments against extending consumer protection rights to business dealings.
  - Intruding in commercial contracting undermines the principle that businesses should be free to contract with whom they choose and be bound by the terms they agree to.
  - It increases the unnecessary compliance burden (red tape) on businesses.
  - All states and territories have already introduced security of payments laws to protect the cash flow of 'down the chain' contracting parties.
  - Unconscionable conduct laws already provide protection for exploitation of the 'special' disadvantage of parties in commercial relationships.

### HIA's Policy Position on Unfair Contracts (Business to Business)

1. *The current competition and independent contractor laws are adequate*
  - HIA supports effective competition laws. Such laws should be focused at improving productivity, increasing market efficiency and delivering better prices for consumers.
  - The Competition and Consumer legislation comprehensively regulates business dealings and provides protection for businesses with prohibitions on misleading conduct, anti-competitive conduct and unconscionable conduct.
  - Further the Independent Contractors Act 2006 already regulates unfair contract terms for subcontractors in the building and construction industry.
2. *Freedom of contract and limited government intervention*
  - To ensure the efficient operation of the market for all businesses operating in the residential construction industry, HIA supports the general principle that parties should be free to contract and agree upon their own terms and conditions, including the terms and conditions of payment.

- Businesses are established as part of the market economy, and with the expectation of their dealings being subject to the principles of 'buyer beware'. Businesses recognise that there are risks involved with all commercial activities and that it is up to them to assess these risks before proceeding.
- Only where there is an overwhelming case for regulation, such as clear evidence of market failure, should governments interfere in commercial arrangements between contracting parties.

3. *It is inappropriate to regulate businesses via a consumer orientated law*

- Business owners are not 'consumers'. Businesses are more aware of their legal rights, understand the consequences of entering into contracts and are generally more sophisticated than consumers. Business have the capacity to make an informed decision based an assessment of risks, including trading risk against return.

4. *HIA does not support further laws or regulations that impose further unnecessary and inappropriate costs in business to business transactions*

- If the laws are introduced the direct costs of doing business will naturally increase as a result of having to review existing standard form contracts for compliance, potential reallocation of risk and a consequent repricing of goods and services.