



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to Treasury
in response to the

Australian Consumer Law Review
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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 industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

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.”

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.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

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 member committees before progressing to the Association's 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 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary and industry awards for excellence.



1. EXECUTIVE SUMMARY

1.1 Introduction

The Housing Industry Association (HIA) welcomes the opportunity to comment on the review of the Australian Consumer Law (ACL) provisions of the *Competition and Consumer Act 2010*.

HIA is the largest building industry organisation in Australia. A majority of HIA's members are small businesses operating exclusively within the domestic or residential construction market and directly contract with and provide services to the general public.

In HIA's submission, whilst the ACL is generally sound, it is important that consumer protection laws strike the right balance between consumer and business interests.

HIA notes that the ACL commenced on 1 January 2011. It applies in all states and territories, is mirrored by Commonwealth and state laws, and applies to all Australian businesses.

The ACL generally:

- prohibits misleading and deceptive conduct, together with a range of specific types of prohibited conduct;
- prohibits unfair contract terms in standard form consumer contracts;
- provides guarantees of consumer rights when buying goods and services (except at auction where the consumer must pursue their own legal action to enforce such a claim);
- provides for product safety law and enforcement;
- regulates unsolicited consumer agreements, door-to-door sales, telesales and layby agreements; and
- provides penalties, enforcement powers and consumer redress.

Whilst the ACL replaced around 20 different Commonwealth, State and Territory laws addressing consumer protection, there remain sector-specific consumer protection laws in all state and territory jurisdictions dealing with residential building work. These laws include:

NSW	<i>The Home Building Act 1989</i>
Western Australia	<i>The Home Building Contracts Act 1991</i>
Queensland	<i>The Queensland Building & Construction Commission Act 1991</i>
Tasmania	<i>Housing Indemnity Act 1993</i> (shortly to be replaced by the <i>Residential Building Work Contracts and Dispute Resolution Act 2016</i>)
South Australia	<i>The Building Work Contractors Act 1995</i>
Victoria	<i>The Domestic Building Contracts Act 1995</i>
ACT	<i>Building Act 2004</i>
Northern Territory	<i>Building Act</i>

These laws were introduced to redress the perceived inequality in bargaining power between the home owner and building contractor. Common features of these laws include:

- mandatory contract terms and conditions;
- home owner's warranty insurance;
- warning statements and checklists;
- implied/ statutory warranties of materials and workmanship specific to home building requiring a building contractor 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 South Australia to 6 years in New South Wales;
- limits on deposits and bans on up front progress payments;
- limits on cost escalation and "rise and fall" clauses;
- outlawing and/or voiding unfair or unconscionable contractual provisions; and
- cooling-off periods during which a consumer may withdraw from a contract without penalty.

In addition all jurisdictions require builders to be licensed, and Queensland, New South Wales, Victoria and South Australia also license other building trade contractors.

In Queensland, New South Wales and Victoria the regulators have strong powers to adjudicate or arbitrate consumer complaints and to direct the builder to rectify allegedly defective building work. In these jurisdictions and in Western Australia, there are also dedicated appeals tribunals that hear building disputes.

1.2 Duplicated regulation needs to be addressed

A key issue for the residential building industry is the complexity of operating under a variety of industry specific state-based regulations in addition to the ACL and the associated costs of complying with these intersecting regimes.

The ACL was adopted against the backdrop of the Productivity Commission's review Australia's Consumer Policy Framework that recognised the problems arising from inconsistent consumer policy frameworks at the State and Territory level and recommended the establishment of a national consumer policy framework, underpinned by a single national regulator.

But there remain many examples of inconsistent laws that overlap and duplicate pre-existing state based regulation. As a result, for the residential building industry the ACL largely resulted in red tape and regulation imposed at the Commonwealth level imposed over the pre-existing state scaffolding.

The review presents an opportunity to address this overlap.

1.3 HIA's submissions

The Issues Paper accompanying the review is broad, comprehensive and covers a range of topics from definitions to financial penalties and enforcement mechanisms. HIA's submissions to the review focus on the following specific topics:

- Addressing the objectives of consumer protection policy
- Statutory warranties and the ACL consumer guarantees (Part 2.3.3, 2.3.4 of the ACL)
- Unfair contract terms (Part 2.2.3 of the ACL)
- Non-conforming building products, "consumer goods" and product safety
- Itemised bills and section 101 of the ACL
- Online Product Reviews and Ratings



2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry, including the home improvements and alterations market, is a key component of the Australian economy.

ABS figures also show that during the full 2015 calendar year, dwelling construction – new home building as well alterations and additions – was worth \$84.6 billion, equivalent to 5.2 per cent of GDP. The upturn in residential building has helped ease some of the pain associated with the natural resources downturn and has become a significant contributor to GDP growth overall. Within the housing industry, expenditure on new dwelling construction in 2015 was worth \$54.2 billion, with renovations valued at \$30.4 billion.

The residential industry is principally comprised of small businesses and self-employed independent contractors.

HIA estimates that more than 90% of the residential building industry is comprised of small businesses and sole traders.

With such a high number of small businesses, this sector is particularly vulnerable to the negative impact of additional red tape and government regulation.

Independent research by the Centre for International Economics has confirmed that new housing is one of the most heavily and inefficiently taxed sectors of the Australian economy. Typically the taxation on a new home constitutes around 40% of the purchase price.

Similarly there is a large red tape and regulation burden imposed on the industry.

At a state level the regulatory environment includes extensive occupational licensing controls, industry specific home building laws, compulsory warranty insurance, a planning and building approval system that is complex and unpredictable, payroll tax compliance, training regulations that apply to apprentice employees and workplace health and safety management requirements.

Commonwealth laws and regulations include industrial relations obligations, superannuation and taxation reporting requirements and many other rules and regulations that do not apply to other businesses in the economy.

These regulatory measures impose high costs and often impose artificial barriers to entry that impede competition.

Regulations impose cost, barriers and administrative burdens on firms that distract them from their principal objective of growing and running a profitable business.

The overwhelming burden of excessive red tape and regulation is often cited by HIA members as the number one reason they leave the industry.

As the OECD has stated:

“ in general the adverse impact of regulations on SMEs can be particularly harmful. This is because SMEs are less equipped to deal with problems arising from regulations since they have less capacity than larger firms to navigate through the complexities of regulatory and bureaucratic networks. SMEs are more likely to be hampered by regulations because their strength stems from their flexibility...”



Furthermore, due to its “fixed cost” nature, the cost burden of regulation is larger for small firms than for larger firms: i.e. administrative costs entailed in compliance have a disproportionate effect on small firms. In many cases compliance is based on an initial fixed, standard cost for all firms, irrespective of size, followed by a sliding scale, related to increasing size. This means that average compliance costs per employee are much higher for small firms.”



3. ADDRESSING THE OBJECTIVES OF CONSUMER PROTECTION POLICY

HIA acknowledges that the main rationale for government intervention in consumer policy is to redress the perceived disparities in bargaining power, knowledge and information and resources between consumers and businesses and suppliers of goods and services.

In particular, the overarching objectives for the ACL are contained in the 2009 COAG Intergovernmental Agreement for the Australian Consumer Law (IGA).

The IGA states that the objective of the national consumer policy framework is 'to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly'.

Enhancing consumer confidence and trust is a cornerstone for success in a dynamic and complex residential building marketplace. Government consumer policies and the regulatory environment can play an important role in enabling this to occur:

Regulation may be necessary for the proper functioning of society and the economy. The aim is to deliver effective and efficient regulation: effective in addressing problems; efficient in maximising net benefits.¹

The challenge is to avoid regulatory overreach and regulation begetting regulation.

Governments and regulators often find it difficult to resist populist urges to intervene to address the behaviour of a small minority of businesses even when there is existing regulation that is not being properly enforced and the additional laws and regulations merely have the effect of penalising businesses that already comply with their obligations. There is also net consumer benefit as these new compliance costs are usually passed on in the form of higher prices.

HIA notes that classical theory suggests that the decentralised nature of information available in a modern market place limits the ability of governments to apply consumer theory to inform policy design because, by definition, governments are likely to possess less information about an individual's behaviour than the individual themselves.

They also have insufficient knowledge to be able to identify the causes of all problems, to design solutions that are appropriate, and to identify non-compliance.

As scholar Gunther Teubner has argued the practice of government's drafting and implementing increasingly elaborate regulation faces a trilemma of 'circumvention, perversity and negative feedback' which ultimately leads to the law being either ineffective or produces "disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself'.

¹ *The Australian Government Best Practice Regulation Handbook June 2010; pg. 4*



Against this backdrop, any further regulatory change to the ACL and Australia's consumer policy framework should be based upon evidence and demonstrable market failure, with due consideration given to the impact or burden that the proposed changes place on businesses in terms of compliance.

Further the objectives of regulation should also acknowledge the responsibility of consumers for checking the prices of alternative goods or services, reading any terms and conditions, assessing packaging, considering warranties and generally making enquiries regarding aspects of a potential purchase they do not understand.

The basic premise is that buyers exercise some degree of due diligence before they acquire particular goods and services.



4. SPECIFIC ISSUES

4.1 Statutory warranties and the ACL consumer guarantees

There is a significant duplication between the statutory warranties for residential building work contained in the various stated and territory based building laws and the generic guarantees contained in the ACL relating to acceptable (merchantable) quality and fitness for purpose.

In every state and territory various statutory warranties are implied into every domestic building contract including warranties regarding the manner in which the work will be performed and the materials to be used.

These statutory warranties cannot be excluded and apply for the benefit of successors in title (subsequent owners of the property).

As an example, South Australia's *Building Work Contractors Act 1995* (SA) ("the BWCA"), implies into the contract between the owner and the builder warranties that include that:

- the building work will be performed in a proper manner to accepted trade standards and in accordance with the plans and specifications agreed to by the parties;
- all materials to be supplied by the contractor for use in the building work will be good and proper; and
- the building work will be performed in accordance with all statutory requirements.

The *Home Building Act 1989* (NSW) similarly implies warranties into every contract to do residential building work. The relevant warranties in relation to fitness for purpose for goods and services are extensive and include that:

- the work will be performed with due care and skill;
- the work will be in accordance with any plans and specifications set out in the contract;
- all materials supplied will be suitable for the purpose for which they are to be used;
- materials will be new, unless otherwise specified;
- the work will be done in accordance to, and will comply with, the *Home Building Act 1989* or any other law;
- the work will be done with due diligence and within the time stated in the contract, or otherwise in a reasonable time;
- the work will result in a dwelling that is reasonably fit to live in, if the work includes:
 - (i) construction of a dwelling
 - (ii) making of alterations or additions to a dwelling
 - (iii) repairing, renovation, decoration or protective treatment of a dwelling
- the work and any materials used in doing the work will be reasonably fit for the specified purpose or result that the owner has advised the contractor, while indicating that the owner relies on the contractor's skill and judgment.

Builders must warrant their work for 2 years after completion and for 6 years for 'major defects'.

Similar warranties apply in other states and territories, although the timeframes may differ.



If a builder breaches the warranties by performing defective work on the home, the owner will have a claim against the builder for breach of contract, including breach of the implied warranties.

Possible remedies include the issue of a rectification order against the licensed builder.

Builders then have to seek redress from other wrong doer (such as subcontractors performing defective works or engineers who provided erroneous instructions) but in the first instance are liable to the owner under their contract.

Whilst the statutory warranties are the primary source of obligations for builders, the ACL consumer guarantees also apply.

This causes considerable uncertainty regarding the application of the ACL over and above the consumer's rights under the statutory warranties, including the alternative remedies and rights of redress.

"Acceptable quality" is defined in section 54 of the ACL to include 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.

These guarantees cannot be excluded by contract.

Unlike the express time periods for statutory warranties the consumer guarantees under the ACL contain no specific timeframe that goods be defect free. Rather goods or services must be free from defects for a reasonable period of time.

The remedies available when a guarantee is not met largely is complicated and confusingly depends on whether the breach amounts to a major failure or a non-major failure. A major failure occurs where the relevant goods:

- Would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- Are substantially unfit for their disclosed purpose and cannot easily be remedied within a reasonable time to make them fit for that purpose;
- Depart significantly from their description, sample or demonstration model;
- Are not fit for a purpose that was disclosed to the supplier; or
- Are unsafe or the supply of services creates an unsafe situation.
- On the other hand, a "non-major failure" is any failure to comply with a guarantee which can be remedied and is not a "major failure".

Where the breach amounts to a major failure or where the defect in the goods cannot be remedied, the consumer is entitled to reject the goods by notifying the supplier of that fact and the supplier is obliged, in accordance with an election made by the consumer to either refund monies paid by the consumer or replace the rejected goods.



On the other hand, if the failure to comply with the guarantee can be remedied and is not a major failure, a consumer who wishes to pursue a remedy must first give the supplier the opportunity to remedy the failure and only if and when the supplier refuses or fails to so remedy the failure can the consumer reject the goods.

For all failures, the consumer is also entitled to recover from the supplier loss or damage suffered by the consumer because of the failure if it was reasonably foreseeable that the consumer would suffer such loss or damage.

In HIA's view, the ACL results in unnecessary duplication of rights and obligations.

For works and contracts covered by the state based statutory warranties, additional coverage by the ACL guarantees is unnecessary and confusing.

4.2 Unfair contracts

For many years standard form building contracts for use between builders and their clients in the residential construction industry have been required to comply with significant regulation as to form and content and have been subject to regulatory reviews for fairness, avoidance of unfair/ unjust terms.

To this end, since the introduction of unfair contract provisions in the ACL in 2010, HIA is unaware of decision that the terms in standard form building contracts produced by industry associations for the building industry, such as HIA or the Master Builders Association (MBA), are unfair.

This reinforces HIA view that the imposition of these generic unfair contract laws on the residential building industry was unnecessary and merely duplicated more targeted protections already available to consumers under state specific building laws.

The new obligations under the ACL have only served to add an additional compliance burden on the industry with no additional consumer benefit.

HIA reiterates its long standing submission that contracting for residential building contracting should be the subject of a specific exemption from the ACL.

In response to the various proposals on pages 15 and 16 of the Issues Paper:

HIA does not agree that the regime should extend to capture contracts that are unfair as a whole (as opposed to just individual terms within a contract). Such a proposal is unworkable and further undermines the principles of a free-market economy and the longstanding doctrine of freedom to contract.

For good reason the current legislation provides that consumers should not, at a later date, be permitted to challenge the basic price of the goods, services or land that they agreed to or challenge the main subject matter of the contract.

The laws of unconscionability, duress and undue influence already enable a court to intervene in circumstances where the conduct and behaviour of the stronger party is such that it would be unfair or unjust to uphold the contract.



HIA also opposes the suggestion that regulators take representative actions against systemic unfair contract terms on behalf of consumers and suggestion that regulators should have the power to seek monetary penalties against businesses (as opposed to a Court just being able to declare the terms void).

The Issues Paper presents no evidence to justify that the powers of the ACCC and other fair trading regulators need to be expanded in this way.

HIA does however consider that the term “standard form contract” should be expressly defined in the ACL. It still is not precisely clear when a contract or document is in “standard form”, particularly when it is simply used as a template.

Further under current laws if a client purchases a standard form building contract and presents it to a builder then arguably it is not in standard form, but if a builder provides the same document to a client it is standard form for the purposes of the law.

This illogical approach deprives business of certainty and means that users of standard form documents need to wait until they are the subject of a claim under the ACL before they know whether or not their contracts are covered.

4.3 Non-conforming building products and “consumer goods”

In HIA’s view, there is a gap in the ACL as it relates to non-conforming building products in the Australian building products supply chain.

Under the ACL, the Commonwealth, states and territories each have legislation aimed at protecting consumers when they purchase consumer goods and product-related services.

Whilst concerns may also arise under the ACL where false or misleading representations are made by suppliers that their products meet a standard and they do not, naturally the ACCC is not in a position to pursue every complaint it receives. It focuses on those circumstances that harm the competitive process or result in widespread consumer detriment.

Otherwise the regulatory focus relates to ‘consumer goods’ and product safety.

Consumer goods are defined as goods:

- ordinarily acquired for personal, domestic or household use or consumption, or
- acquired for less than \$40,000 (or such higher sum as may be prescribed)

but were not acquired for resupply, repair or use in a production process in trade or commerce.

Product-related services are services for or relating to:

- installation of consumer goods,
- maintenance, repair or cleaning of consumer goods,
- assembly of consumer goods, or
- delivery of consumer goods.



These provisions do not easily match up with non-conforming building products. These are products that either:

- do not conform with required Australian building regulations and technical standards including incorrect certification; or
- are counterfeit copies of legitimate conforming products; or
- are supplied with fraudulent certification or documents attesting to their conformance; or
- are substituted for the original product at the point of sale or installation.

ACL Product safety

Under the ACL's product safety provisions, the Commonwealth, state and territory governments regulate consumer goods and product related services to ensure they are safe.

The Issues Paper states that the intention of Australia's product safety regime is to:

- deliver appropriate levels of consumer safety
- maximise benefits and choice for consumers
- minimise regulatory burden for suppliers and provide certainty about their obligations
- foster competition in the supply of regulated products
- ensure that regulation is efficient, appropriate and responsive.

The regulatory measures available include:

- imposing mandatory safety standards or information standards on goods or product related services;
- banning goods or product related services, either on an interim or permanent basis; or
- issuing a compulsory recall notice requiring suppliers to recall a good.

They also regulate what a supplier has to do, including:

- responsibilities if a Minister bans a product or imposes a safety or information standard on a good or product related service;
- when to recall a good and how to do this;
- what to do if a Minister issues a compulsory recall notice;
- when to report an incident associated with a good to the Minister; and
- when a manufacturer may be liable for loss or damage caused by a good with a safety defect.

As noted earlier, under the ACL, building products do not generally fall within the scope of a consumer good.

As a result, the ACCC has little authority to take action in relation to non-conforming building products, either by instigating a recall or adopting a safety standard.

The responsibilities for supplying a product that is 'fit for purpose' is shared across several players in the supply chain. This can make identifying who is ultimately responsible for the failure of a particular product and seeking a remedy a difficult process.

Many product sectors such as plumbing and sanitary ware, electrical fittings, windows, engineered wood and steel reinforcing have numerous examples of fraudulent certification and product marking



being used. In most instances, these products also fail the primary test to be 'fit for purpose' and therefore safe to be used in building and construction work.

The recall of Infinity Cable in 2014 provides an example of how poor or fraudulent material testing of a building product with significant consumer safety implications can enter the supply chain. This example also highlights the limitations under the ACL for the ACCC to act.

Infinity Cable

During the period 2010 to 2013, around 4,000 kilometres of electrical cables branded Infinity and Olsent were sold for use in electrical work in buildings, including residential buildings. The cable was later confirmed to be non-conforming with Australian standards for electrical products.

The importer, *Infinity Cable Co Pty Ltd*, was deemed to be the manufacturer for the purposes of ACL and instigated a first recall of the cable in August 2013.

After further tests and negotiations, led by NSW Fair Trading, Infinity Cable Co Pty Ltd went into liquidation and a mandatory recall in NSW followed in October 2013. Consumer protection agencies across Australia subsequently acted to halt the supply and installation of the product. The cable was sold in all jurisdictions other than the Northern Territory.

While authorities deemed that there is no immediate danger from the cables, testing has found that the cables will degrade prematurely and if disturbed, the insulation could break and expose live conductors, resulting in possible electric shock or fires. This renders the cable non-compliant with the electrical safety standard, AS/NZS 5000.

In August 2014, the ACCC announced a national voluntary recall of the cable, which included provision for the retail suppliers of the product, being companies that had purchased the product from Infinity Cable Co. Pty Ltd in good faith, to assist with the costs of inspecting and the costs of removal and making safe the cable in residential buildings.

In June 2015, the ACCC launched a national awareness campaign to promote the recall due to the low response rate. The campaign is targeted at consumers, and carries the message '*act now before it's too late – get your cable checked*'. The campaign encompasses radio, online and YouTube coverage.

By July 2015, 27 suppliers had announced recalls of cables sold through their outlets although more suppliers are expected to be added. It is estimated that up to 40,000 households and businesses may have been affected across the country.

The previous recall in 2013 did not address the safety of all of the installed cables. The 2014 recall was designed to address the safety of all of the affected installed cables across Australia, and to prevent these cables from causing electric shocks or fires in the future. It is forecast that failures due to the cables could appear as early as 2016 in NSW, where the products were first sold.

The national recall requires the removal and replacement of the cable that is in proximity to heat sources, and that are accessible to building owners, tradespeople or the public, including roof cavities and under floor spaces. Cable left installed due to being inaccessible or embedded into a masonry wall must have an electrical safety switch (residual current device) installed, and an appropriate warning sticker affixed to the metering box.



If the scope of the definition of consumer goods was expanded to include building products, which are used in residential building work, then the ACCC would have a clearer power to act. This change could include mirroring the adoption of reference standards in the NCC as safety standards under the ACL. The ACCC would also then have authority to carry out a recall of products found to be defective either before or after installation in a building.

4.4 Itemised bills – Section 101 of the ACL

Several components of the ACL reforms have increased the administrative burdens for small businesses without striking a fair balance between the needs of consumers and those of businesses.

For instance, under Section 101 the ACL a consumer can request an itemised bill outlining prices, labour hours, cost and use of materials. The supplier must give the consumer the itemised bill, within seven days of the request, or face fines of up to \$15,000 for a company and \$3000 for an individual.

Whilst HIA understands the intention of the provision is to provide information to the consumer on how the price for the services was calculated, as the ACL requirement is expressed in unqualified terms, it has generated uncertainty for builders and contractors in the residential building industry.

Specifically there is uncertainty as to the level of detail reasonably expected in such an itemised account. There is also concern with the administrative burden in complying with the request in such a short timeframe.

Contracts for domestic building work are executed often after a lengthy negotiation period, including discussions on not only cost but the design and type of house and materials to be used in construction.

Most contracts are then entered into under a fixed price arrangement and via a written contract. The fixed contract price is progressively claimed by the builder after the various stages of construction are completed.

Under this contract the builder is obliged to complete the works within the specified construction period. As it is a fixed contract price, the risk of contingencies such as trade delays or unforeseen increases in the cost of building supplies and building materials are at the builder's risk.

Each stage of works involves the engagement of multiple trades and over 1000 different product components are included in the construction of a new home.

In HIA's view the requirement that builders additionally give clients an itemised breakdown of all costs, labour and materials is onerous, unnecessary and assumes a "do and charge" invoicing practice rather than fixed price contracting.

4.5 Online Product Reviews and Ratings

The Issues Paper notes the increasingly important role of online review platforms in influencing consumer choice and affecting market behaviour.

In recent years HIA Members have expressed concern about the use of specific consumer product review and rating websites, including the inability of member's to respond to adverse reviews or ratings because of the use of 'anonymous complaints'.

Suspicion that in some cases, negative reviews are uploaded by disgruntled former employees or their competitors, amplify member concerns.

Some websites operate for the sole purpose of disparaging certain builders and their services.

Review rating websites that measure and report on individual services providers, and ultimately count the number of negative reviews across review forums, are even more problematic.

Reviews may mislead consumers if they are presented as impartial, but were written by:

- The reviewed business;
- A competitor;
- Someone paid to write the review who has not used the product;
- Someone who has used the product but written an inflated review to receive a financial or non-financial benefit.

HIA notes that in 2013 the ACCC undertook a review of online review platforms and published best practice guidelines.

The core principles of the Guidelines that businesses must abide by are:

- being transparent about commercial relationships, such as relationships between a business and the reviewer and any payment that is exchanged;
- not publishing or posting misleading reviews. If the business knows the review to be fake or itself posts a misleading review, it should remove the review
- ensuring that the business is aware that omitting negative reviews can be as misleading as posting fake reviews.

The Guidelines also set out that disparaged or criticised businesses be given an opportunity to post a public response to negative reviews.

HIA notes that the ACCC has recently prosecuted a number of businesses for incentivising fake reviews. HIA supports this action.

HIA believes it is equally important that disparaged or criticised businesses be given the opportunity to protect their reputation and post a response to negative reviews or feedbacks.

In turn they should be able to take action against websites and businesses that deny unreasonably them this opportunity.

5. CONCLUSION/ SUMMARY OF RECOMMENDATIONS

Enhancing consumer confidence and trust is a key element of a successful residential building marketplace. Government consumer policies, including the ACL, can play an important role in enabling this to occur.

At the same time, consumer protection laws must strike the right balance between consumer and business interests.

Whilst the ACL is generally sound, a key issue for the residential building industry remains the complexity of operating under a variety of state-based regulations specifically targeted to home owners and residential construction clients in addition to the overarching provisions of the ACL. The rights and obligations under these intersecting regimes are often duplicated imposing unnecessary costs and uncertainty upon industry.

In summary, HIA recommend that:

- The objectives of the ACL should additionally reflect the principle that consumers are responsible for exercising some degree of due diligence before committing to a purchase of goods and services of a particular class.
- The ACL consumer guarantee and unfair contract term provisions should not apply to contracts and transactions already regulated under state and territory residential building industry specific laws.
- HIA specifically opposes proposals to further extend the ambit of the unfair contract laws.
- The requirements of Section 101 of the ACL impose uncertainty for the residential building industry. It is unfair and onerous to expect building contractors to additionally provide a detailed breakdown of all hours of work, costs and components. The obligations should be clarified and should not apply where clients are charged under fixed price contractual arrangements and invoices/ progress claims are delivered in accordance with that contract.
- There is a gap in the ACL as it relates to non-conforming building products in the Australian building products supply chain. The scope of the definition of consumer goods should be expanded to include building products, which are used in residential building work.
- HIA supports an ongoing review of product review and rating websites. It is important that disparaged or criticised businesses be notified of and given the opportunity to post a response to negative reviews or feedbacks.