



August 20th 2018

Easy and Transparent Trading Consultation
Paper Regulatory Policy
BRD Department of Finance, Services and Innovation
Level 5, McKell Building 2-24 Rawson Pl, Sydney NSW 2000

We are writing in regards to questions 11 and 12 on page 18 of the Easy and Transparent Trading - Empowering Consumers and Small Business Consultation Paper July 2018.

The painting industry, including the Master Painters Association of NSW, representing employers; Aussie Painters Network representing contractors, and the National Institute of Painting and Decorating, representing contractors, manufacturers, trainers and accredited colleges in the industry; all oppose the proposed changes.

On behalf of the painting industry, we are requesting that any policy changes commit to amending the legislation to *re-install licensing requirements for painting work on home interiors*, including work under \$5000, and remove painting and decorating from the proposed list of licenses to be removed. The proposed changes pose an *unacceptable risk* to the industry, and to the wider community.

The consultation paper fails to provide any research or data to support the claim that the new legislation provides adequate consumer protection, and that it will result in a net benefit for the community and the building industry.

The Consultation Paper states; "The trades and occupations identified [for removal of licensing] do not appear to justify the pre-assessment, the additional revenue raising (to pay for the regulation of the industry) or knowledge which requires refreshing through training. These trades appear to involve less complex tasks, which, if done badly, are not likely to give rise to major safety risks or risks of significant financial detriment (for example because other building work is badly damaged)."

This assumption is incorrect. Preparation of surfaces containing asbestos and/or lead paint can be *highly dangerous* to the consumer, and faulty painting maintenance can

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cost tens of thousands of dollars to rectify. That is why painting and decorating is a licensed trade in New South Wales, Queensland and South Australia, and a regulated trade under legislation in Western Australia.

The proposed changes would have grave consequences for the painting industry, and risks the health of the NSW public.

Loss of Licensing Leads to Loss of Ability for Consumers to Make Applications About Defective and Incomplete Work.

The claim that adequate consumer protection standards remain under the Australian Consumer Law is illogical and has no evidence to support it. If the Department of Fair Trading had sufficient evidence to support this claim, there would be no need for licensing for *any* trade. The fact that the Department *has kept licensing for most trades* demonstrates that the Department believes Australian Consumer Law provides *inadequate* consumer protection for most trades. The Department has failed to provide any research, data or evidence that the removal of licensing for paintwork is of benefit to the economy or the community.

The provision of licensing for building tradespersons makes it possible to make an application about defective or incomplete work under the *Home Building Act 1989*. Applications can only be made about licensed persons; if licensing were abolished, it would not be possible to make an application. The *Home Building Act 1989* emphasises the importance of written agreements for residential building work (including painting). A written contract is necessary for all but “small jobs”, which are contracts where the contract price (including GST) is less than \$5,000.00. An important requirement is that approved consumer information, which must explain the operation of this Act and the procedure for the resolution of disputes under the contract and for the resolution of disputes relating to insurance, must be provided to the consumer by a licensed contractor. The consumer information safeguard is lost if licensing is abolished.

The Consultation Paper in its discussion of the Home Building Act refers, very briefly, in passing to Part 2C of *Home Building Act 1989*, which contains the Statutory Warranties, but does not explain or recognise the value to the consumer of that Part, which would become empty if licensing were disposed of.

The Consultation Paper suggests that the Australian Consumer Law ("ACL") covers the same ground as the NSW *Home Building Act* 1989. This is incorrect. The *Home Building Act* 1989 focuses on the quality of the work carried out by the tradesperson: doing work with due care and skill, compliance with plans and specifications, use of materials that are good and suitable for the purpose, doing work within the time set by the contract and, if no time is set, a reasonable time, doing work that results in a dwelling that is reasonably fit for occupation. These are specific task-related objectives. They are based on the contract between the parties.

The ACL does not do this. It focuses on procedural issues such as misleading and deceptive conduct. There is some limited overlap, but the ACL does not deal directly with building services in the way the *Home Building Act* 1989 does. For example, although there are guarantees in the ACL about the supply of services, when the Court or Tribunal is looking at a claim under the ACL, it does not simply consider whether the work was properly done. It must also look at issues such as the relative bargaining powers of the customer and the tradesperson. This provides avenues for creative argument whereby a tradesperson can avoid responsibility for breach of contract. It means that a consumer cannot assume that, having signed a contract, the tradesperson is bound to comply. This is an interesting sociological inquiry, but it is not about whether a painting job has been done competently.

The statutory warranties under the *Home Building Act* 1989 are set out in a succinct, straightforward manner. They make sense to the lay reader. This is not the case with the ACL. The ACL is expressed in an extremely complicated ornate manner which makes it hard to see what the meaning of an expression is. The task of wading through the language of the ACL is not easy, and would be particularly difficult for a lay consumer, or even for a tradesperson without legal training.

For example, section 23 of the ACL does not simply outlaw unfair terms in contracts. It provides (in part) that "A term of a consumer contract or small business contract is void if:

the term is unfair; and

the contract is a standard form contract."

The ACL then proceeds to spend 4 sub-sections and 9 sub-sub-sections defining “unfair” (section 24). It then spends 14 sub-sections giving examples of unfairness (section 25). The ACL then says (section 26) that section 23 does not apply to a term of a consumer contract or small business contract to the extent that the term defines the main subject matter of the contract or sets the upfront price payable under the contract. So the upfront price may be unfair, as may the description of the main subject matter of the contract, and the ACL cannot deal with the unfairness.

The Consultation Paper suggests that a consumer’s primary protection is due diligence. But this is not always possible for a consumer. Unless a consumer has trade qualifications, it is unlikely that the consumer can tell whether work done by a tradesperson on other buildings is competent or not. References supplied by a tradesperson may not reflect the overall view of previous customers. The licensing system and the ability to check some aspects of a tradesperson’s history by a simple licence check of the Register kept pursuant to s120 of the *Home Building Act 1989* and available for no fee on the OFT website are valuable safeguards. Imposing on the consumer the duty of ascertaining the skills of a tradesperson is unfair and unrealistic.

In fact, there is evidence to suggest the removal of licensing will cost the NSW economy millions of dollars in defect rectifications, pre-mature paint failure, and health costs associated with lead paint exposure, un-safe work practices, and exposure to asbestos.

The National Institute of Painting and Decorating receives over 200 complaints per year from home owners who have had defective work performed by a contractor. The complaints from Victoria, (where there is no licensing), out-number complaints from NSW by a factor of four. The majority of these complaints are due to inadequate training and regulation of the industry. Many of these cases end up going to the Victorian Consumer Affairs Tribunal, costing thousands in court costs, and millions of dollars in rectifications of paint defects. That is one of the reasons why the Victorian government is currently drafting legislation to introduce *increased regulation* of trades people in that state.

Deregulation of the Painting Industry Poses an Unacceptable Safety Risk to Consumers and Workers

It is a requirement in NSW that painters who become licensed receive training in safe lead paint management. Under previous legislation, it was a requirement that only licensed painters can carry out painting on the interior of NSW homes, and this should be reintroduced to protect the health of the NSW home owners.

Studies conducted on the cost-benefits of correct lead abatement procedures show that the costs to the economy of enforcing lead abatement are far less than the combined costs of lead poisoning on the community. - Korfmacher, K.S. and M. Hanley. 2013. Are local laws the key to ending childhood lead poisoning. *Journal of Health Politics, Policy and Law*. 38(4):757-814.

According to the World Health Organisation, “The economic costs associated with childhood exposure to lead are substantial (Landrigan et al., 2002). The economic benefits of successful interventions against lead poisoning have also been shown to be enormous (Grosse et al., 2002; Gould, 2009). These benefits far outweigh the costs of creating a national programme for screening, surveillance and prevention of lead poisoning. . . .A recent cost–benefit analysis suggests that for every US\$ 1 spent to reduce lead hazards, there would be a benefit of US\$17–220. This cost–benefit ratio is better than that for vaccines, which have long been described as the single most cost-beneficial medical or public health intervention (Gould, 2009)” – World Health Organisation, *Childhood Lead Poisoning*, Geneva, 2010

According to the NSW Department of Environment, there are approximately 3.7 million homes in Australia that contain lead paint with concentrations of lead that exceed 1%. We estimate that this means lead paint with high concentrations is found in approximately 25% of homes in New South Wales.

According to the Federal Government Department of Environment, “Paint containing lead was used in many Australian homes prior to 1970, but those built more recently may also present a risk to your health. Exposure to lead is a health hazard. Even small amounts of dust or chips of paint containing lead, generated during minor home repairs, can be a health risk... Ideally, *homes with paint containing lead should be assessed and remediated by trained professionals.*” (Italics ours)

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According to the booklet “Lead Alert: The six step guide to painting your home”, 5^h Edition, Commonwealth of Australia 2014, which was published in consultation with State and Federal health and environment agencies, the National Health and Medical Research Council, Safe Work Australia, the National Painting and Decorating Institute, Aussie Painters Network, the Australian Paint Manufacturers’ Federation, CSIRO, Master Painters Australia, the NSW Public Works Department, CTI Consultants Pty Ltd;

“Exposure to lead can affect the health of children, unborn babies and adults.. .Young children are at the greatest risk. They absorb the lead when they touch contaminated dust or soil and then put their fingers or toys in their mouths. Children are still growing and they can absorb up to 60 per cent of the lead that they swallow. Adults absorb approximately one tenth. . . If it is necessary to disturb surfaces with paint containing lead, *it is recommended that a contractor with lead paint management training do the job.*” (Italics ours)

In addition, Safe Work Australia recently released research that shows that painters are the occupation with the second highest risk of exposure to lead, a carcinogenic substance. According to The Australian Work Exposures Study (AWES):Lead and Lead compounds, published by Safe Work Australia in November 2014, “Lead has been implicated as being a risk factor for lung, stomach, kidney and brain cancer in workers exposed to lead in a work-related context. . . The main lead exposure circumstances identified in the AWES project were soldering, painting (old houses in particular). . . There is an opportunity to prevent work-related exposures to lead, and reduce the potential for work-related cancer cases, through efforts to increase the number of workplaces that eliminate the use of lead where possible or consistently use high order controls and good work practices to eliminate or reduce exposures to lead when relatively common activities are carried out. This may simply require initiatives that raise awareness or educate PCBUs and workers about using lead-free alternatives or known controls to prevent exposures to lead.”

The International Agency for Research on Cancer identified the main industries in which work-related exposure to lead occurs as “lead smelting and refining industries, battery manufacturing plants, steel welding or cutting operations, *construction, painting and printing industries*”. (IARC Monograph 87, italics ours)



Allowing unlicensed and untrained people to work in the industry will result on more workers being exposed to lead paint, and will only heighten the risk of exposure to toxic substances.

In addition, asbestos containing materials are found in many buildings built prior to 1989. These highly toxic materials must be identified and treated by trained and licensed trades people, including painters. Painting of home interiors containing lead paint or asbestos by untrained and unlicensed persons poses significant health risks to children, babies, and adults exposed to lead paint dust and asbestos fibres during preparation. The consumer is usually unaware of the potential danger, and it is therefore vital that the government act in the public interest and enforce regulation of the industry through a robust licensing scheme.

According to Environmental Health Standing Committee (enHealth), Asbestos: A guide for householders and the general public, Australian Health Protection Principal Committee, Canberra, 2013, published by the Department of Health, “ Inhaling asbestos fibres may cause asbestos-related disease and death. Houses built before 1990 are likely to contain asbestos cement products. . .Householders should engage *experienced and licensed professionals to undertake home renovations* and asbestos removal. . . frequent exposure to a larger number of asbestos fibres (e.g. builder or tradesperson using unsafe techniques) is much more likely to pose a risk to your health. . . Householders may be exposed to asbestos fibres during accidental damage to asbestos materials in the home, or as a result of unsafe handling of asbestos material by tradespeople or by the householders themselves.” (italics ours)

To become licensed in NSW, painters must receive training in safe lead paint and asbestos work practices, working safely at heights, erection of scaffolding, and elevated work platforms. *These are all classed as 'high risk' work* under current legislation. Removing licensing requirements is an unacceptable risk to the public and to the industry.

Licensing protects the public from unqualified and untrained contractors, and protects the public from faulty workmanship that is often not apparent immediately on completion of the work.. It provides a level playing field for all painters, and leads to safer work sites, safer NSW homes, and a better industry.

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Removal of Licensing for Painting is an Unacceptable Economic Risk

The removal of the licensing requirement for painting would also disadvantage tradespersons. If there is no requirement for licensing, there is no incentive for a tradesperson to gain the necessary skills, and to upgrade those skills over time. Without licensing, trades people who have completed trade painting apprenticeships, and businesses who employ qualified trades people would have to compete with unqualified handymen, who offer no consumer protection, and who operate in the black economy.

The licensing system is directly related to the need to have a written contract for all but the smallest of jobs. The importance of a contract cannot be over-emphasised. It is the place where the consumer and the tradesperson can state their intentions, expectations and promises.

Since painter's licensing for interior paintwork was watered down in 2015, there has been a sharp jump in the number of consumers contacting the National Institute of Painting and Decorating seeking paint inspections for defective workmanship, or enquiring as to their consumer rights. In many cases no compensation can be pursued as the person conducting the work was unlicensed, and had no written contract. In addition, in most cases they operated in the cash economy, costing the government lost GST revenue.

In a recent year, Australians spent more than \$380 million on hiring tradesmen to put right botched home improvement projects.

The NSW painting industry supports competition, but not as a result of lowering standards of workmanship, or safety. The painting industry is already suffering from intense competition with *qualified and licensed painters being the lowest paid of all trades*, so the argument that more competition is needed is not viable. According to a poll of over 250 painters, conducted by the National Institute of Painting and



Decorating, ninety-two percent of painters support licensing for all painting. At the time of writing, over 1400 painting businesses have signed a petition opposing the proposed changes.

The NSW Government's Better Regulations Principles are:

Principle 1: The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

We have clearly demonstrated that it is in the public interest to maintain licensing for painting and decorating.

Principle 2: The objective of government action should be clear.

The assumption that painting and decorating is a low-risk activity has been shown to be false.

Principle 3: The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

The deregulation of the industry would have a negative impact on the economy.

Principle 4: Government action should be effective and proportional.

The building industry supports *increased regulation*, not decreased regulation

Principle 5: Consultation with business and the community should inform regulatory development.

No consultation with business has occurred on this issue until now. We trust that our submission will be taken seriously



Principle 6: The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.

The industry is calling for reform to the regulation to include all interior paint work

Principle 7: Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

We call upon the regulators to **reinstate licensing for all paintwork**, both interior and exterior, to provide adequate protection to the unsuspecting consumer, to lower the risks to safety and the environment, and to ensure the viability of businesses who are adequately trained to perform painting and decorating works in accordance with safety legislation and accepted industry standards.

We look forward to your response to this urgent matter.

Yours Faithfully,

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