Unfair Contract Terms in Building Contracts and Extensions of Time

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1. Introduction

1.1. This paper provides an analysis of the *Unfair Contract Terms* regime under the Australian Consumer Law as it relates to Building Contracts and extensions of time.

2. Elements of an unfair contract term

2.1. A term of a *consumer contract* will be void if it is:[1]

2.1.1. *unfair*;

2.1.2. and the contract is a *standard form contract.*

2.2. A term will be "*unfair*" if:[2]

2.2.1. it would cause significant imbalance to the parties' rights and obligations under the contract; and,

2.2.2. it was not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and,

2.2.3. it would cause detriment (whether financial or otherwise) to a party if it were applied or relied on.

2.3. Where a (**Homeowner**) enters into a (**Building Contract**) with a (**Builder**), it is not controversial that most standard form building contracts used by members of its peak body organisations are *consumer contracts*[3] and a *standard form contracts*.[4]

[1] Section 23(1), *Australian Consumer Law* (**ACL**).
[2] Section 24(1), ACL.
[3] Section 23(1), ACL.
[4] Section 23(1)(b), ACL.

3. Example of potential unfair contract term

The Unfair Term – Clause 12.4

3.1. An example of a potential unfair contract term used in a Western Australian standard form contract (**Unfair Term**) is found in clause 12.4 of that contract and provides as follows:

> *In the event of a delay caused by or resulting directly or indirectly from any of the clauses listed in clause 12.3 above, the time for the completion of the **Works** will be extended by the period of such delay. It is not a condition of the time for completion being extended that a Homeowner make a claim for extension. A Builder must however provide a Homeowner with details of the extended time for completion upon request.*

Relevant Law – General

3.2. The plain wording of Section 24(1) of the ACL establishes that in order for a term of a *standard form contract* to be unfair, the term must meet each of the three elements listed in Section 24(1) of the ACL.

3.3. Once a term is found to meet each of the three elements contained in Section 24(1) of the ACL, the impugned term will, without further order, be void pursuant to Section 23(1) of the ACL.[5]

3.4. "Unjustness" and "unfairness" are lower moral or ethical standards than "unconscionability", but the characterisation of unjustness or unfairness is an evaluative task to be carried out with close attendance to the statutory provisions.[6]

3.5. In ***Carnival plc v Karpik (the Ruby Princess)*** [2022] FCAFC 149, His Honour Justice Allsop made the following observations with respect to the 'unfair contracts' regime:[7]

[5] ***ACCC v Fuji Xerox Australia Pty Ltd*** [2021] FCA 153, [59].
[6] ***Paciocco v Australia and New Zealand Banking Group Ltd*** [2015] FCAFC 50, [356], [363]-[364].
[7] ***Carnival plc v Karpik (the Ruby Princess)*** [2022] FCAFC 149, [3].

> Whether or not a term of a consumer contract is "unfair" is not left to the unconstrained moral or social judgment of the Court…its judgments and evaluations to be made within the consideration of s 24(1)(a) and (b) that limit the definition to the broader task of evaluative characterisation…it is contractual fairness, rooted in the importance of the contractual bargain, that is at work in the statute. True adhesion, is protected and strengthened, not undermined, by the protection of the consumer from abuse of position or power or substantive unfairness, by reference to the legitimate commercial interests of the stronger party. It is within this frame of reference that the balance of the practical and reasonable commercial interests are to be assessed.

3.6. In determining whether or not a contract term is unfair, it is useful to compare the effect of the contract with the impugned term and the effect it would have without the impugned term.[8] This being said, assessing whether a contract term is unfair is an evaluative process and the approach suggested in ***CLA Trading*** may not always be appropriate.[9]

3.7. The legislation proceeds on the assumption that some of the terms in consumer contracts, especially in standard form contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention.[10]

3.8. In considering "*the contract as a whole",* not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.[11]

[8] ***ACCC v CLA Trading Pty Ltd*** [2016] FCA 377, [54(b)] (***CLA Trading***).
[9] ***ACCC v Ashley & Martin Pty Ltd*** [2019] FCA 1436, [160].
[10] ***Jetstar Airways Pty Ltd v Free*** [2008] VSC 539, [115].
[11] ***Jetstar Airways Pty Ltd v Free*** [2008] VSC 539, [128].

3.9. The point in time at which a determination of unfairness is to be made, and, therefore, whether or not events following the making of the contract may be taken into account would seem to be the relevant point in time when the contract is made.[12]

3.10. The above is made clear by the express wording of Section 24, which contains numerous contextual indicators which indicate an intention that the enquiry as to whether or not a term of a standard form contract is unfair is intended to be prospective in nature rather than reflective as to how the clause has been applied in practice:

3.10.1. for the purposes of Section 24(1)(a), it is necessary that the impugned term *'**would** cause a significant imbalance in the parties' rights and obligations arising under the contract'.* The use of the phrase "*would cause"* as opposed to "*has caused"* is indicative of an enquiry which is to take place at the outset of entry into the relevant contract looking forward rather than one which is reflective of how the clause has been applied in practice;

3.10.2. for the purposes of Section 24(1)(b), it is necessary that the impugned term '*is not reasonably necessary in order to protect the legitimate interests of the party who **would be** advantaged by the term'.* The use of the word "*would be"* as opposed to "*has been" or "is"* is, again, reflective of a prospective enquiry;

3.10.3. for the purposes of Section 24(1)(c), it is necessary that the impugned term '***would cause** detriment…to a party **if it were to be applied or relied upon**'*. The use of the words '*would cause'* and '*if it were to be applied or relied upon'* as opposed to '*has caused detriment'* and/or *'in the manner that it has been applied or relied upon'* is, again, truly reflective of a Parliamentary intention that the tests are to be applied from the point of

[12] ***Jetstar Airways Pty Ltd v Free*** [2008] VSC 539, [67].

entry into the contract rather than reflective at the point in time of the contest with respect to the impugned term, looking back on how it has been applied.

3.11. Against the relevant principles set out above, each of the three conjunctive, disparate criteria will be considered in turn.

4. Significant imbalance to the parties' rights and obligations

"Substantive unfairness" – Relevant Law

4.1. The following principles are relevant in the consideration of this issue:

4.1.1. this is an enquiry which is geared to direct attention to substantive unfairness.[13]

4.1.2. the "*significant imbalance"* requirement is met if a term is so weighted in the favour of one party so as to tilt the parties' rights and obligations under the contract significantly in its favour.[14]

4.1.3. this enquiry is one of fact, meaning "*significant in magnitude"* or "*sufficiently large to be important"*, being "*a meaning not too distant from substantial"*.[15]

4.1.4. the assessment of whether the relevant term causes a significant imbalance in the rights and obligations under the contract requires consideration of the relevant term together with the parties' other rights and obligations arising under the contract.[16]

4.1.5. a consideration of the following factors summarised in ***ASIC v Bendigo and Adelaide Bank Ltd*** [2020] FCA 716 will be relevant to the determination of the issue:

(a) whether the consumer can 'opt-out' of an unfair term;

[13] ***CLA Trading***, [54(b)].
[14] ***CLA Trading,*** [54(d)].
[15] ***CLA Trading,*** [54(e)].
[16] ***ACCC v Ashley & Martin Pty Ltd*** [2016] FCA 377, [45].

(b) whether or not the contract gives one party a right without imposing on that party a corresponding duty or without giving any substantial corresponding right to the counterparty;

(c) whether or not the party advantaged by the term is better placed to manage or mitigate risk imposed by the term than the consumer.

"*Substantial Unfairness" – Disposition*

4.2. The Unfair Clause (Clause 12.4), in its substantive operation, permits a Builder:

4.2.1. to extend the date by which the Builder was required to cause the Works to reach practical completion without issuing written notice to a Homeowner of the intention to claim an extension of time; and,

4.2.2. to legitimately withhold information relating to the matter causing the delay, obligating a Homeowner to provide "*details of the extended time for completion* ***upon request*****"** (emphasis added).

4.3. The state of affairs set out in paragraph 4.2 above which are permitted to perpetuate by virtue of the Unfair Clause (Clause 12.4) results in substantive unfairness to a Homeowner in the following ways:

4.4. **First,** Clause 12.4. permits a Builder to extend the date for practical completion in a manner which lacks transparency with respect to its dealings with a Homeowner, notwithstanding that any extension/s to the date for practical completion stands to impact a Homeowner in a potentially significant way.

4.5. Section 24(2) of the ACL provides that in determining whether a term of a contract is unfair under Section 24(1), the Court may take into account such matters that it thinks relevant but must consider whether the term is *transparent* and the *contract as a whole*.

4.6. Open-ended statutory provisions (such as Section 24(2) of the ACL) which rely on broadly expressed concepts such as what is "unfair", '*naturally and indeed*

necessarily attract a more purposive mode of construction'.[17] It has also been said that *'the legislative concept of unfairness in s 24, with elaboration through the three elements of unfairness might be described as a guided form of open-ended legislation."*[18]

4.7. Section 24(3) of the ACL provides, in assessing whether a term is *transparent* that a decision maker is to consider whether the term is:

4.7.1. expressed in reasonably plain language;

4.7.2. legible;

4.7.3. presented clearly; and,

4.7.4. readily available to any party affected by the term.

4.8. The lack of transparency in the term itself does not give rise to a conclusion that the term is unfair. A Homeowner will be required to show that the lack of transparency contributed to a significant imbalance in the Parties rights and obligations and would cause a detriment if relied upon.[19]

4.9. A term to a consumer contract may not be *transparent* notwithstanding the fact that it is clearly apparent to the Parties within the confines of the contract if there is a lack of transparency in how the clause is to operate or be applied by the party relying on it.[20]

4.10. In ***Perera*****,** the Queensland District Court found that a term of a building contract which permitted a Builder to amend the contract price, without disclosing "*any explanation or formula to justify the increase"* or "*any guidance as to how a higher base price may be determined"*[21] was not transparent notwithstanding the fact that the clause itself was freely available to the Homeowners in that case.

[17] ***ACCC v Chrisco Hampers Australia Ltd*** (2015) 239 FCR 33, [40].
[18] ***ACCC v Chrisco Hampers Australia Ltd*** (2015) 239 FCR 33, [40].
[19] ***Perera v Bold Properties (Qld) Pty Ltd*** [2023] QDC 99, [77] (***Perera***).
[20] ***Perera***, [76].
[21] ***Perera***, [75]-[76].

4.11. The essence of the reasoning in ***Perera*** is submitted to be apposite to the present circumstances because Clause 12.4, on its plain wording, stands to operate in such a way which would:

4.11.1. permit a Builder to extend the time to complete the Works without providing justification or explanation to a Homeowner as to the *basis for seeking the extension of time to complete the Works*; and,

4.11.2. permit a Builder to extend the date for practical completion of the Works without informing a Homeowner that it intends to claim an extension of time in respect of the Works.

4.12. The extent of any obligation which is conferred by Clause 12.4 on the Builder is limited an obligation to give a Homeowner "*details of the extended time for completion* ***on request.***"

4.13. The notable lack of transparency arises as a result of the fact that under Clause 12.4, it is only the details of the *"extended time"* for completion, i.e. by how many days the date for practical completion is to be extended, which needs to be provided and only upon request by a Homeowner.

4.14. In circumstances where a Builder is not obligated to issue a written notice claiming an extension of time, unless there is some irregularity over the course of the Works that is identified by a Homeowner which was to put them on enquiry, the first time that an owner may recognise that there is a need to request details associated with the date for practical completion is if it were to become apparent to a Homeowner that the Works would not be completed by the date for practical completion so as to trigger a potential request for those details.

4.15. Clause 17 entitles a Homeowner to refer a dispute with respect to any claims for extension of time (which, in this case, would be limited to a notification as to how many days the date for practical completion would be extended by) by referral of the issue to an arbitration.

4.16. Although at first blush the right in Clause 17 to refer a matter to arbitration may balance the entitlement to extend the date for practical completion under Clause 12.4, that right is significantly eroded by three key issues:

4.16.1. **First,** by the time that a Homeowner may first receive notice of the intention to claim an extension of time, the event which relates to the extension may have occurred a considerable period of time in the past with respect to the construction of the Works;

4.16.2. **Second,** at the time of receiving notice of a Builder's intention to claim an extension of time, the limitations on the extent of the information which must be provided to a Homeowner to assess the validity of the claim promotes uncertainty as to whether a Homeowner should exercise the right to challenge the claim for an extension of time under Clause 17; and,

4.16.3. **Third,** Clause 12.4 leaves the entire machinery and procedure of Clause 12 susceptible to abuse by the Builder in that, if the Builder is only required to provide details relating to the magnitude of the extension but not the basis upon which it is sought, it is conceivable that a Builder may or *"would'* abuse Clause 12.4 by illegitimately claiming extensions of time which do not relate to the events in Clause 12.1.1. to 12.1.13. of the same contract purely to avoid prospective liability under the liquidated damages clause.

4.17. Additionally, whilst the details as to the magnitude of the extension must be provided, the entitlement of a Builder to withhold information from a Homeowner relating to the cause and extent of the delay as well as any supporting evidence would necessarily enable the Builder to claim extensions of time upon the occurrence of an event in Clause 12.1. of an inflated duration without any need to justify the amount of time which has been claimed to a Homeowner.

4.18. In the circumstances, Clause 12.4 would operate in a manner which stands to perpetuate a lack of transparency which stands to tilt the Builder's rights to seek an extension of time and its obligations to complete the Works by the date for practical

completion significantly in the Builder's favour so as to undermine the entitlement to challenge any claims for an extension of time under Clause 17.

4.19. Turning to the issue that any imbalance created by Clause 12.4 need be significant or of sufficient magnitude, it is noted that Clause 12.4 and associated provisions surrounding Clause 12.4 relate to the Builder's obligation/s to cause the Works to reach practical completion by the contracted date. In any building contract, there will be three key terms: the scope of the works, the price and the completion date.[22]

4.20. The significance of the imbalance arises not only from the manner in which Clause 12.4 stands to operate but also from the fact that it relates to a material clause in the Building Contract which is accepted to be a key term in any construction contract.

4.21. **Second,** on a consideration of the factors referred to in the case of ***ASIC v Bendigo and Adelaide Bank Ltd,***[23] on balance, an analysis of Clause 12.4 relative to those factors demonstrate Clause 12.4 as being unfair for the following reasons:

4.22. As to the first consideration, the Builder cannot 'opt-out' of the operation of Clause 12.4 For the reasons which have been provided above, although there is a basis to challenge extensions of time under Clause 17, that right is 'watered down' by the fact that:

4.22.1. the Builder need not provide notice of the intention to claim an extension of time before the date that the Works are required to reach practical completion is extended;

4.22.2. the Builder need not provide details of the circumstances relating to claim for an extension of time, leading to uncertainty on the part of the Builder to assume the risk in terms of exposure to legal costs and expenditure associated with any challenge to the claim for extension of time.

[22] ***Skilled Group Pty Ltd v CSR Viridian Pty Ltd*** [2012] VSC 290, [163].
[23] [2020] FCA 716.

4.23. As to the second consideration, for the reasons provided above, Clause 12.4 confers a significant right on the part of a Builder to claim extensions of time in a manner that is all but unconstrained without conferring any corresponding right to a Homeowner or duty on a Builder to balance the conferral of rights.

4.24. By way of illustration, building contracts commonly include a term which permits a Builder to claim extensions of time. For example, Clause 9(c) of the Standard Form Housing Industry Association *Lump Sum Building Contract* provides:

> The Builder shall give to the Owner a notice of any extension of time to which the Builder is entitled within TWENTY (20) working days of the Builder being aware of both the cause and extent of the delay.

4.25. Although not stated explicitly, Clause 9(c) has been construed as requiring a Builder claiming an extension of time to provide evidence of both the cause and the extent of the delay, not simply giving notice of what caused a Builder to seek the extension of time.[24]

4.26. In the case of Clause 9(c) of the Standard Form Housing Industry Association *Lump Sum Building Contract*, although the contract confers a right to extend the date for practical completion, it is balanced with:

4.26.1. an obligation to provide notice to the owner;

4.26.2. an obligation to provide notice within a point of close temporal proximity to the Builder being aware of the cause and extent of the delay on the completion of the Works; and,

4.26.3. an obligation to provide the owners with sufficient evidence relating to the claimed delay to justify the claim for an extension of time;

[24] ***Vadakkumkaraputhaveedu v Kulowall Construction Pty Ltd*** [2023] WASAT 29, [30], [31], [32] and [33].

which creates a system of 'checks and balances' with respect to the Builder's entitlement to seek an extension of time and ensure that the builder is not illegitimately claiming extensions of time where it is not warranted.

4.27. The conferral of the right in Clause 12.4 to the Builder is not, however, balanced with any duties or corresponding rights of a Homeowner.

4.28. As to the third consideration, the Builder is better placed to mitigate any risk associated with Clause 12.4, than a Homeowner.

4.29. The consequences to a Builder of overrunning the date for practical completion is for a Homeowner to incur delay damages until the actual date of practical completion.

4.30. In the circumstances, where a Builder has full control over the manner the Works are to be carried out and the schedule to which the Works are carried out, a Builder is said to be better placed to mitigate the risk contemplated by Clause 12.4 than a Homeowner.

4.31. **Third,** Clause 12.4 operates in such a way so as to, in effect, permit a Builder to unilaterally vary the terms of the Building Contract relating to its obligations to practically complete the Works by the contractually prescribed date.

4.32. We repeat our comments which have been made above in paragraph 4.2 and 4.26 in that Clause 12.4 creates a system by which a Builder is effectively able to unilaterally vary the date for practical completion. The fact that a Builder's entitlement to claim an extension of time is limited the occurrence of certain events is offset by the fact that within those limited items, Clause 12.4 allows a Builder to operate with relative impunity.

4.33. Section 25 of the ACL contains a non-exhaustive list of the types of clauses which may be found to be unfair for the purposes of Section 23(1) of the ACL.

4.34. Arguably Clause 12.4 falls within the parameters of the clause contemplated in Section 25(d), constituting a "unilateral variation" clause. For the reasons that have been disposed of above in paragraph 4.26 to 4.27 above, although clauses which

permit a builder to extend the time to reach practical completion are common, clauses of that nature are balanced with a system of obligations which relate to how the right is exercised.

4.35. Where those 'checks and balances' are not present in respect of Clause 12.4, the right conferred to a Builder is tantamount to a clause that would permit a Builder to unilaterally vary the Building Contract in terms of its obligations to construct the Works by the contracted date for practical completion.

"Substantial Unfairness" – Conclusion

4.36. In the context of the Building Contract, Clause 12.4 purports to provide considerable rights to a Builder in respect of its obligations to cause the Works to reach practical completion by the contract date without imposing any commensurate duty or conferring any sort of counter-right to a Homeowner to balance that extensive right.

4.37. For the above reasons, Clause 12.4 does operate to substantively imbalance the rights and obligations of the Parties.

5. Reasonably necessary to protect legitimate interests

5.1. For the purposes of this element, it is presumed that an impugned term is *not* reasonably necessary to protect the party who would be advantaged by that term.[25]

5.2. The authorities establish the following relevant principles:[26]

5.2.1. It is not appropriate to attempt to define the term "*legitimate interest*". Its meaning will depend on the nature of the particular supplier's business and the context of the contract as a whole;[27] and,

5.2.2. What is *'reasonably necessary'* usually involves an analysis for the proportionality of the term against the potential loss sufferable and may take into account other options that might be available to the party in terms of

[25] Section 24(4), ACL.
[26] ***Australian Securities and Investment Commission v Auto & General Insurance Co Ltd*** [2024] FCA 272, [86].
[27] ***ACCC v Ashley & Martin Pty Ltd*** [2019] FCA 1436, [48].

protecting its business and which are less restrictive to the other party to the contract.

5.3. When Section 24 of the ACL was introduced, the *Explanatory Memorandum* stated that although it is ultimately a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interests of the respondent, Section 24(4) requires the "*respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer or a class of consumers, and that therefore the term was 'reasonably necessary'".*[28]

5.4. A legitimate interest may not be purely monetary. A party may have interests in contractual performance which are intangible and unquantifiable.[29] A legitimate interest may be of a business or financial nature.[30]

"Protect legitimate interest" – Disposition

5.5. In the circumstances of this case example, the Builder would bear the onus of establishing that Clause 12.4 is reasonably necessary to protect its legitimate interests. This involves a Builder to first, establish its interests and, second, that Clause 12.4 is reasonably necessary to protect those interests.

5.6. As to the first issue, a Builder may reasonably assert that it has a legitimate interest in extending the date for practical completion on account of events which are beyond its control to influence.

5.7. A reasonable Homeowner would accept that it would be within the genuine commercial interests of a Builder to extend the date for practical completion on account of events which were beyond its control in order to avoid exposure to liability under the liquidated damages clause in the Building Contract.

[28] House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill No. 2 2010,* Explanatory Memorandum, 64, [5.28]; ***Karpic v Carnival plc*** [2023] HCA 39, [30].
[29] ***Paciocco v Australia and New Zealand Banking Ltd*** [2016] HCA 28.
[30] ***Paciocco v Australia and New Zealand Banking Ltd*** [2016] HCA 28.

5.8. Whilst a reasonable Homeowner would accept that it is in the legitimate interests of the Builder to extend the date for practical completion on account of unforeseeable events, Clause 12.4 goes beyond what would be reasonably necessary to protect the legitimate interest which has been articulated above.

5.9. **First,** it is difficult to see any legitimate reason why, in the protection of the interest referred to above, it is necessary to enable a Builder to exercise its right to extend the date for practical completion in circumstances where:

5.9.1. it is not required to give notice to a Homeowner that it has claimed an extension of time as a result of an event which is beyond its control;

5.9.2. it is not required to give notice of the intention to claim an extension of time within a reasonable period after it becomes aware of both the cause and extent of the delay; and,

5.9.3. it is not required to provide details of the cause or extent of the delay along with supporting evidence in respect of the issue which is alleged to cause the delay.

5.10. In our experience, a Builder may defend its entitlement to claim an extension of time without giving notice of that intention to a Homeowner, so that a Builder can:

5.10.1. reduce the administrative workload on a Builder associated with the administration of its contracts; and/or,

5.10.2. to fetter the entitlement of a Homeowner to challenge or contest any claim/s for an extension of time by limiting the information available to a Homeowner and entitling a Builder to claim an extension of time without having to give notice of that intention to the Homeowner.

5.11. If the above was to be accepted, it is submitted that Clause 12.4 purports to protect a legitimate commercial interest that a Builder may have but goes about doing so:

5.11.1. in an illegitimate way by reference to illegitimate or unreasonable factors which do not relate to the legitimate commercial interest of ensuring that it

is not adversely affected by the liquidated damages clause on account of factors that are not in a Builder's control; and,

5.11.2. in a manner which goes beyond what might be reasonably necessary to protect that commercial interest without unnecessarily undermining any entitlement to challenge a claim for extension/s of time under Clause 17.

5.12. **Second,** there are alternatives to the regime established by Clause 12.4 that would protect a Builder's interest in ensuring it is able to extend the time to cause the Works to reach practical completion on account of events which are outside of its control in a way that is more transparent and would not undermine a Homeowner's ability to contest any claims for an extension of time, which adopt the approach of Clause 9(c) of the HIA Contract, which requires:

5.12.1. the builder to give notice to the owners of an intention to claim an extension of time;

5.12.2. the builder to give said notice within a reasonable period of time upon the builder becoming aware of both the cause and the extent of the delay; and,

5.12.3. the builder to provide the owners with adequate information that would enable the owners to assess the reasonableness of the claim for an extension of time.

5.13. A Builder may object that Clause 12.4 is necessary to protect the legitimate interests of the Builder because it would be too onerous to provide claims for extension of time because, potentially, of the large number of dwellings the Builder is constructing whilst the industry is in a "construction boom". As in the case of ***Burnett v BGC Construction Pty Ltd,***[31] ***Campeanu v BGC Construction Pty Ltd,***[32] and ***Chapman v BGC Construction Pty Ltd***,[33] that argument should not be accepted.

[31] [2005] WABDT 96, [2.5.3].
[32] [2005] WABDT 97, [2.5.3].
[33] [2005] WABDT 98, [2.5.3].

5.14. A Builder should have the necessary complement of staff needed to handle such matters and "*the larger the order book the larger has to be the office staff to be efficient to keep within estimated periods of construction".*[34]

5.15. **Second,** Clause 12.4 is silent as to *when* a Builder would be required to make a claim for extension of time. Clause 12.4 provides that it is not a precondition for the extension of time to reach practical completion that a Builder issues a notice claiming the extension of time, but only that a Builder need provide "*details of the extended time"* if requested by an owner.

5.16. The obligation to provide details of the extended time if a Homeowner were to ask for said details is mitigated and "watered down" where in circumstances of the Building Contract, a Builder is not required to make a formal claim for extensions of time before the date for practical completion is extended.

5.17. In effect, Clause 12.4 is submitted to, on its face, "*give with one hand"* but then "*take with the other"* with respect to the right to request for details of the extension.

5.18. There is no obligation on the part of a Builder to provide details of the delay, within a reasonable time of it becoming aware of the cause of the delay. Accordingly, at the time of notifying a Homeowner of any potential delay, the cause of the delay may date back many weeks or months but is nonetheless entitled to claim an extension of time with respect to a delay without even providing a Homeowner with notice of its intention to do so.

5.19. The intent behind Clause 12 generally is to establish a procedure whereby an owner is to be notified of circumstances giving rise to delay on the part of the construction of their dwelling. The Building Disputes Tribunal recognised that one such reason to provide an owner with said notice is to give the owner an indication of the length beyond the original construction period that the owner will have to pay rent.[35]

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[34] ***Burnett v BGC Construction Pty Ltd*** [2005] WABDT 96, [2.5.3]; ***Campeanu v BGC Construction Pty Ltd*** [2005] WABDT 97; [2.5.3]; ***Chapman v BGC Construction Pty Ltd*** [2005] WABDT 98, [2.5.3].
[35] ***Burnett v BGC Construction Pty Ltd*** [2005] WABDT 96, [2.5.2]; ***Campeanu v BGC Construction Pty Ltd*** [2005] WABDT 97; [2.5.2]; ***Chapman v BGC Construction Pty Ltd*** [2005] WABDT 98, [2.5.2].

5.20. In the circumstances created by Clause 12.4, a Homeowner is entirely "in the dark" with respect to how much longer they will be required to rent whilst their dwelling is under construction, depriving them of the ability to make informed financial decisions.

5.21. As above, a Builder being "busy" (if that claim was to be made) serves as no justification for the inclusion of a term in the Building Contract by a builder who is "consumer facing" which legitimises the withholding of information for a Builder's own benefit.

5.22. **Third**, there is no justifiable reason for Clause 12.4 to limit the information which a Builder is obligated to provide to a Homeowner and relieve a Builder of the obligation/s to actually issue a notice to a Homeowner before it is entitled to claim the extension of time where the interest which is protected by Clause 12.4 is a Builder's interest in extending the time for completion of the Works as a result of matters which were not the fault of a Builder.

5.23. The document giving notice of a potential claim for an extension of time is or would be the catalyst for a Homeowner to take steps to consider whether or not the claim is justified in the circumstances and, therefore, whether to challenge the claim for an extension of time.

5.24. Where the above does not occur because a Builder is not obligated to provide a notice claiming an extension of time, a Homeowner is unable to make informed legal decisions which effect their financial wellbeing.

"Protect legitimate interest" – Conclusion

5.25. For the reasons which have been provided above, a decision maker should find that although there is a reasonable interest in extending the date for practical completion on account of events over which a Builder has no control, Clause 12.4 goes beyond what is reasonably necessary in that respect.

6. Detriment

Detriment" – Relevant Law

6.1. Although more than a hypothetical case is required, a Homeowner does not need proof of actual detriment or that a term has been enforced.[36] Detriment is not limited to financial detriment; it extends to other forms of detriment that would affect the party disadvantaged by the term's practical effect.[37]

6.2. The test is not one of "significant detriment" although the nature and extent of the detriment is not irrelevant.[38]

6.3. In ***Karpik,*** it was accepted that a clause of a contract which prevented the claimant from participating in a class action, thereby depriving the claimant of the benefits of the regime under Part IVA of the *Federal Court Act* was a detriment in the circumstances.[39]

6.4. In ***Perera***, it was accepted that if 'special condition 7' which entitled the builder to increase the contract price was relied upon, that would result in the owners needing to choose between either repudiating the building contract or paying a higher price.[40] Detriment was found in that case notwithstanding any choices available to the claimants where the circumstances created by special condition 7 created a state of affairs where there was an absence of practical choice if special condition 7 was to be relied upon.

"Detriment" – Disposition

6.5. The point has been made in the preceding paragraphs that if Clause 12.4 was to be relied upon, it would enable a Builder to claim an extension to the date for practical completion in circumstances where the Builder would not be obligated to:

6.5.1. notify a Homeowner of the Builder's intention to claim an extension of time;

[36] ***Karpik v Carnival plc*** [2023] HCA 39, [30] (***Karpik***).
[37] ***Karpik***, [30].
[38] ***Karpik***, [57].
[39] ***Karpik***, [57].
[40] ***Perera***, [85].

6.5.2. provide any details relating to the claimed extension/s of time (other than in relation to the details as to the magnitude of the extension); and,

6.5.3. provide limited details to a Homeowner other than on the Homeowners' request.

6.6. In the circumstances, if Clause 12.4 was to be relied upon by a Builder to seek an extension of time in circumstances where no notice had been provided to a Homeowner, the Homeowner will suffer detriment in that they will be deprived of the opportunity to:

6.6.1. contest the claimed extensions of time under Clause 17;

6.6.2. claim liquidated damages as a result of any claims for an extension of time not being upheld following a challenge to the claimed extension under Clause 17.

6.7. In the circumstances where Clause 12.4 was to be relied upon by a Builder to provide only limited details relating to the issue of how many days the date for practical completion would be extended by, a Homeowner would be placed in a position where he or she would need to choose to either:

6.7.1. "let the matter slide"; or,

6.7.2. challenge the claim for an extension of time under Clause 17 in circumstances where:

(a) they are unable to make an informed decision or obtain informed advice relating to that challenge because insufficient documents or information is provided to a Homeowner to allow them to determine whether or not there is merit in the challenge;

(b) if the challenge was made and proved unmeritorious because on the face of documents that exist, the claim for an extension of time was merited, a Homeowner would expose themselves to:

(i) a claim of legal costs on account of the unsuccessful outcome of the proceeding; and,

(ii) a liability to pay their own legal costs associated with the unmeritorious challenge.

6.8. The predicament on the part of a Homeowner which Clause 12.4 permits to perpetuate places the Homeowner in a position where there is an absence of practical choice between the two outcomes above so as to give rise to a detriment for the purposes of Section 24(1)(c) of the ACL.

"Detriment" – Conclusion

6.9. For the reasons which are outlined above, in our view, a decision maker may find that if Clause 12.4 was to be relied upon, it would cause a detriment to a Homeowner.

7. Conclusion

7.1. On the above basis, in our view, Clause 12.4 is an *unfair contract term* for the purposes of Sections 23 and 24 of the ACL.

7.2. Accordingly, a Homeowner should seek that Clause 12.4 is declared to be void, unenforceable, and severed, from his or her Building Contract.

8. Action

8.1. Seeking to set aside a clause in a Building Contract that is an unfair contract term is a complex affair that requires sound legal advice.

8.2. If this paper has provided useful insights into the practical operation of the Unfair Contract Terms regime in the Australian Consumer Law that may assist you in any matter that you have against your Builder, please call Vogt Legal on 9328 5662.

The views expressed in this paper are those of Vogt Legal and do not in any way constitute legal advice.