Caravan & Camping INDUSTRY ASSOCIATION NSW

Manufactured Housing INDUSTRY ASSOCIATION NSW

Land Lease Living INDUSTRY ASSOCIATION NSW

15 March 2020

Manager, Consumer Policy Unit
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKS ACT 2600

By email also - uctprotections@treasury.gov.au

Dear Manager

SUBMISSION IN RESPONSE TO ENHANCEMENTS TO UNFAIR CONTRACT TERM PROTECTIONS CONSULTATION REGULATION IMPACT STATEMENT, DECEMBER 2019

The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW Ltd (CCIA NSW) is the peak industry body in New South Wales (NSW) representing the interests of holiday parks, residential land lease communities (residential parks, including caravan parks and manufactured home estates), manufacturers, retailers and repairers of recreational vehicles (RVs, including motorhomes, campervans, caravans, camper trailers, tent trailers, fifth wheelers and slide-ons), suppliers of camping accessories and equipment, manufacturers of relocatable homes and service providers to these businesses.

We currently have as members over 700 businesses representing all aspects of the caravan and camping industry and land lease living industry. Of these, over 200 are manufacturers, retailers and repairers of RVs, camping equipment and accessories.

Standard Form Contracts in the Caravan and Camping and Land Lease Living Industry

Standard form contracts are commonly used in the caravan and camping and land lease living industry. Members of our Association can be issuers of standard form consumer contracts, as well as small businesses that are parties to standard form contracts issued by their suppliers or other larger businesses.

Examples of standard form contracts can include:

Standard form consumer contracts -

- Residential site agreements under the *Residential (Land Lease) Communities Act 2013* [1]

[1] *We note that although the unfair contract terms laws do not apply to terms of contracts that are required or expressly permitted by a law of the Commonwealth, or a state or a territory, residential site agreements can have additional terms so long as they are separated from the statutory terms and do not conflict with the specific legislation.*

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- Occupation agreements under the *Holiday Parks (Long-term Casual Occupation) Act 2002*[2]
- Accommodation agreements
- RV sale contracts

Small business contracts -

- Goods and services supply agreements
- Equipment hire agreements
- Retail leases
- Agreements between insurers and RV repairers

As a result, our feedback on the options to enhance the unfair contract term protections for small business, and applying any enhanced protections to consumers, is from the perspective that members of our Association can be either party to a standard form contract.

Our Association strives to create a better business environment for our members, and to encourage more people to enjoy the active lifestyle options offered by caravan and camping experiences and residential land lease community living.

Working in partnership with members, consumers and government to grow and sustain our industry, we support a regulatory environment that strikes the correct balance between consumer protection and business interests. We welcome the opportunity to comment on the proposals set out in the *Enhancements to Unfair Contract Term Protections Consultation Regulation Impact State, December 2019* (Consultation RIS) as relevant to our membership.

Feedback on Options in the Consultation RIS

Legality and Penalties

The Problem

The Consultation RIS asserts that the 2018 review of the unfair contract terms regime for small business indicated that, despite improved protections in certain sectors, unfair contract terms are still prevalent due to two main factors -

1. The unfair contract terms regime does not provide a strong deterrence against businesses using unfair contract terms in their standard form contracts.
2. A lack of awareness among small businesses of the existence of the unfair contract terms protections.

We would suggest that a lack of certainty about what could constitute an unfair term may also be a contributing factor. Regulators, including ASIC and the ACCC, undertook education

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programs on the unfair contract terms protections for small business before and after the regime commenced in 2016. It is important that this education continues to be available.

Options

We agree that by maintaining the status quo (Option 1), small businesses may still face detriment from unfair contract terms and making no improvements to remedies, education, or compliance activities by regulators, is not appropriate. There is a need for better education and increased engagement between regulators and industry to improve knowledge of the unfair contract terms regime, as proposed in Option 2.

The feedback we receive from industry is that businesses want clear guidance and advice from regulators to help them meet their consumer law obligations. Not having appropriate access to such assistance is a challenge that they experience.

Additional resources to strengthen compliance and enforcement activities by regulators, as well as better and ongoing education and awareness campaigns, would likely go a long way to addressing some of the problems identified in the Consultation RIS. We support Option 2 to improve the awareness of unfair contract terms protections among small businesses.

As an industry association we would be happy to collaborate on any industry specific initiatives or forums or both to raise awareness and encourage best practice. The success of Option 2 lies in compliance and ongoing education, rather than one-off campaigns.

In relation to the regime not providing a strong deterrence against businesses using unfair contract terms in their standard form contracts, we agree that very large businesses may be undeterred by the remedies available under the current regime. This due to the potential for their gains to be on a scale that far outweighs the consequences of a challenge to unfair terms used in their standard form contracts. Making unfair contract terms illegal and allowing court to impose penalties, as proposed in Option 3, could present an incentive for large businesses to change their practices.

However, should Option 3 be adopted, it is imperative that courts be given the flexibility and sufficient guidance to determine the necessity of imposing a penalty against a contract-issuing party and the suitable amount, taking into account the circumstances of each case. Industries and accepted industry practices can differ widely and the ability for parties to enter contracts as they see fit, even ones where certain terms could be seen as unfair in another context, should be maintained.

We do not support Option 4, which proposes to give regulators the power to issue infringement notices and the power to determine whether a contract term is unfair and request the contract-issuing party to vary the term.

As indicated in the Consultation RIS, infringement notices are likely to be ineffective deterrents for big businesses against the use of unfair contract terms and, for the purpose of procedural fairness, determinations of whether standard form contract terms are unfair, and what to do about them, should remain the responsibility of a court or tribunal.

Whether contract terms are unfair depend on the particular facts and circumstances of a case and the relationship between the parties. Once a court declares a contract term unfair, it can make appropriate orders to prevent further systemic use.

Flexible Remedies

The Problem

We agree that in some circumstances the outcome of a court declaring that a particular term in a standard form contract is unfair, and therefore voiding that term, can be a worse outcome for small business than the impact of the term itself. Businesses want to avoid disruptions to their supply chains, as most disruptions have a financial effect. The law should be amended to provide for more flexible remedies.

Options

Amending the current law to provide that when a court declares a small business contract term to be unfair the court has the ability to determine the appropriate remedy, which may or may not be that the term is void, could be a more effective way of facilitating a better outcome for the parties. As such, we support Option 2.

We do not, however, support Option 3 which proposes enabling a regulator to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage.

Option 3 could be problematic, as the benefits of a regulator's ability to represent multiple consumers, and seek orders for redress for those consumers not party to a legal action, may not have the same benefits for non-party small businesses.

As small business contracts can be of much higher value than consumer contracts, and unfair contract terms can have different impacts for different businesses and different businesses have different risk profiles, small businesses should be able to determine for themselves whether or not they wish to bring an action and what the most appropriate remedy would be as relevant to their circumstances.

Similarly, we are concerned by Option 4, which proposes creating a rebuttable presumption provision where a contract term would be declared unfair if, in a separate case, the same or a substantially similar term has been used by the same entity or in the same industry sector and declared by a court to be unfair. Our belief is it would be too problematic and would over-complicate a regime that already presents uncertainties for parties.

Option 2 is sufficient to address the identified problem.

Definition of a Small Business Contract

The Problem

We agree that the current headcount threshold, which requires at least one party to the contract to employ fewer than 20 persons at the time the contract is entered into for the contract to be considered a small business contract, unduly restricts some small businesses from accessing the unfair contract terms protections.

As accommodation providers operating in a seasonal industry, caravan parks can employ large numbers of casual employees during peak holiday times. Even though many are small businesses, with limited financial resources and negotiation powers, this seasonal labour demand can cause them to become ineligible for the unfair contract terms protections during their busy periods.

Options

We support the views of other stakeholders that the employee number should be changed to define a small business as 'up to 100 employees.' This would align with the definitions applicable for the Australian Financial Complaints Authority and the Australian Small Business and Family Enterprise Ombudsman.

We also support the proposal that, as an alternative to the headcount threshold, a contract would be considered a small business contract if at least one party to the contract is a business that has an annual turnover of less than $10 million.

Option 3 should be adopted as it would extend the number of business captured by the unfair contract terms protections.

Related Bodies Corporate

The Problem

Drawing on the submission of the Shopping Centre Council of Australia, the Consultation RIS notes that a subsidiary or special purpose entity of a large business could be unintentionally covered by the unfair contract terms protections if they were to meet the headcount threshold.

Further, it is proposed that a large business could theoretically adjust its business structure to avail itself of the unfair contract terms protections for small business by having one corporate entity which employs all or most of its employees and another corporate entity (with less than 20 employees) that enters into contracts, thus dampening competitive negotiation.

Options

In response to this issue, Option 1 proposes maintaining the status quo and Option 2 proposes that any related bodies corporate would be considered relevant in determining employee numbers and annual turner.

Without any quantitative data, the argument that a large business could adjust its business structure to avail itself of the unfair contract terms protections identifies an issue that is too remote to warrant a change to the status quo. Taxation, liability, asset protection and record-keeping are the main factors that influence business structure, not a potential remedy in a contract should a dispute between the parties arise.

Further, Option 2 relies on the assumption that all related bodies corporates have the support of the large corporate group. This is simply not correct, because in many cases related bodies corporates operate as separate businesses, relying on their own financial resources, human resources and bargaining power.

Just because a business is part of a corporate group, does not automatically mean it has group support in contract negotiations. This can be seen in the caravan and camping industry, where there can be clear distinctions between operating entities and land holding entities, and some corporate groups can be comprised of as little as 2-3 businesses that operate completely independently from each other.

If a business operates as a small business, has the financial resources and human resources of a small business, and enters into standard form contracts as a small business, then it should have access to the unfair contract terms protections afforded to small businesses, regardless of its place in a larger group.

Value Threshold

The Problem

In applying to contracts that have an upfront price payable not exceeding $300,000, or if the contract runs for longer than 12 months, $1 million, we agree that the current value threshold is too low for certain industries. It should be amended to ensure that the unfair contract terms protections are extended to small businesses deserving of those protections.

Options

While increasing the value threshold to $5 million would align with that used by Australian Financial Complaints Authority (Option 2), removing the value threshold altogether as proposed by Option 3 would be the better amendment.

In many cases value thresholds are arbitrary, unnecessary and in the case of the unfair contract terms regime, the value of a contract is not necessarily an accurate reflection of bargaining power.

As indicated in the Consultation RIS, Option 3 would provide the most certainty that a small business contract would not be excluded from the unfair contract terms protections based on value threshold alone.

Clarity on Standard Form Contracts

The Problem

In determining whether a contract is a standard form contract, the Consultation RIS notes that it is not always clear at the time of entering into a contract whether an effective opportunity to negotiate has been given. We agree that this can present a challenge for contracting parties.

Options

Out of the two options presented to further clarify what is a standard form contract, we are more supportive of Option 3.

Option 2 proposes to make ‘repeat usage’ a factor a court must consider in determining whether a contract is a standard form contract, but this then raises the question of how many times ‘repeat usage’ needs to occur. Is one additional usage sufficient?

If the problem to be resolved is identifying an effective opportunity to negotiate, then amending the law to further clarify the types of actions which **do not** constitute an ‘effective opportunity to negotiate,’ as proposed in Option 3, provides a more targeted approach.

Minimum Standards

The Problem

The issue that minimum standards could be subject to the unfair contract terms regime does present an uncertainty that needs to be resolved. Industry best practice should be encouraged where fair and reasonable.

Options

We support Option 2 to amend to the law to clarify that minimum standards under state and territory laws would not be able to be declared unfair, so long as the exemption only applies to minimum standards that were already in force when a contract is signed. This would offer small businesses sufficient protection against the risk of more costly compliance with minimum standards that are amended or newly prescribed by states or territories during the contract period.

Application of Any Enhanced Protections to Consumer and Insurance Contracts

The Consultation RIS notes regulator and some stakeholder views that any strengthened protections for small business contracts should also apply to both consumer and insurance contracts, since otherwise there would be significant inconsistency.

Further, should any enhanced protections be applied to consumer contracts *"the regulatory costs for businesses are estimated to be small and a positive net benefit would be produced"* and *"contract-issuing businesses should have already reviewed their contracts to ensure compliance with the existing legislation"* (p44).

As noted above, we agree that very large businesses may be undeterred by the remedies available under the current regime due to potential gains of using unfair contract terms. Attaching penalties may incentivise them to change their practices.

However, in relation to small and medium sized businesses, our experience is that they generally want to do the right thing by their customers and if they wish to remain in the market, they have an intrinsic interest in supplying goods and services under fair and reasonable terms.

Many do not, however, have the resources to carry the burden of regulation that larger businesses do. This is an important issue to consider when determining whether any strengthened protections for small business contracts should apply to consumer contracts.

Making unfair contract terms illegal and attaching penalties may be the most significant deterrence against using unfair contract terms in standard form contracts, but it will come at a cost for small and medium sized businesses where they are the contract-issuing business.

Any increase in regulatory burden results in direct compliance costs to businesses. Even contract-issuing businesses that have done the right thing and already reviewed their contracts to ensure compliance with the existing legislation can face increased costs, because making unfair contract terms illegal and attaching penalties will likely cause an increase in cautiousness. This will result in increased compliance costs, due to:

- Familiarization with the new regime
- Conducting a further audit of contracts to ensure compliance
- Obtaining legal advice
- Updating and republishing contracts
- Educating staff.

In addition, the imposition of penalties will have greater impacts on small and medium sized businesses. We reiterate the need for better education and increased engagement between regulators and industry to improve knowledge of the unfair contract terms regime, so that small and medium sized businesses, which do not have the resources of larger businesses, can comply with certainty and do not inadvertently fall foul of the law.

Where businesses do make a mistake, it is imperative that courts be given the flexibility to determine the necessity of imposing a penalty against a contract-issuing party and the suitable amount, taking into account the circumstances of each case.

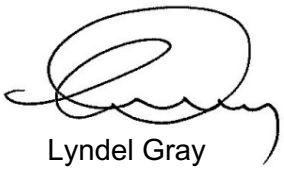
Conclusion

Thank you for your consideration of the issues we have raised.

As an important stakeholder in relation to the application of the unfair contract terms regime in the NSW caravan and camping and land lease living industry, we are keen to continue to participate in any further discussions and provide any assistance we can on the issues raised. We request we be noted as a stakeholder and continue to be included in all future consultation on this important review of the law and practice.

Should you wish to meet or discuss any aspect of this submission please contact Shannon Lakic, Policy, Training and Executive Services Manager on (02) 9615 9940 or email shannon.lakic@cciansw.com.au.

Yours sincerely



Lyndel Gray
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