HOUSING INDUSTRY ASSOCIATION

Submission to Consumer Affairs Australia and New Zealand

in response to the

Interim Report on the Australian Consumer Law Review

9 December 2016

INTERIM REPORT ON THE AUSTRALIAN CONSUMER LAW REVIEW

The Housing Industry Association (HIA) welcomes the opportunity to provide feedback to Consumer Affairs Australia and New Zealand (CAANZ) on the Interim Report on the review of the Australian Consumer Law.

The application of the ACL affects businesses of all sizes in the residential construction industry.

As set out in our submissions to the Review dated 27 May 2016, HIA considers that the ACL is generally sound.

However the generic Commonwealth ACL provisions often overlap and duplicate pre-existing state based laws that regulate the consumer-to-builder market in the residential building industry. This duplication can result in inconsistency and uncertainty as to the delineation of Commonwealth and state responsibilities and exposes the industry to unnecessary additional compliance costs.

Specific areas of concern relate to the unfair contract provisions, the ACL consumer guarantees and their interaction with state based implied warranty obligations and the requirement to provide clients with itemised bills in a fixed price contracting environment.

Whilst the terms of reference for the Review included "considering the interface between the national consumer policy framework and other legislation, its jurisdiction and reach, including whether there are legislative gaps, duplication or inconsistencies with industry-specific and other laws" these matters were not expressly addressed in the Interim Report. Even though HIA understands CAANZ focused on other priorities in the Interim Report, HIA encourages CAANZ to address these issues in its final report.

In its substantive response to the Interim Report, HIA's comments relate to the additional consultation on the unfair contract protections (pages 117-133).

HIA does not support the further changes to the unfair contract laws proposed in the Interim Report.

RESPONSE TO THE UNFAIR CONTRACTS PROPOSALS

In its Interim Report, CAANZ observes that stakeholders generally consider the ACL provides effective unfair contract term protections for standard form consumer contracts.

HIA agrees that the existing protections provide effective protection for consumers.

Further, the ACCC's 2013 industry review of standard form contracts referred to in the Interim Report, indicates positive levels of business compliance and cooperation.

In this regard, HIA specifically welcomes the findings of CAANZ that the law should not be changed to enable entire contracts to be declared void.

Whilst principles of caveat emptor and freedom of contract are no longer absolute, this does not avoid the fact that Australia operates with a choice based market economy that still requires the parties, both the seller and buyer, to take self-responsibility for their commercial decisions.

Declaring entire contracts as unfair and void would fundamentally alter this principle.

Further, as CAANZ observes, there other protections, such as prohibitions against unconscionable conduct, misleading or deceptive conduct, and false or misleading representations, and the cooling-off period for unsolicited consumer agreements, that can address unfair or offensive transactions.

The Interim Report does however set out several options to expand the law to address "systemic" unfair contract terms, including:

- Prohibiting the use of terms previously declared unfair by the courts
- Expanding the list of the kinds of terms that may be unfair (section 25 of the ACL)
- Enable regulators to investigate whether or not a term may be unfair.

HIA's primary submission is that sections 23 - 28 of the ACL should not be changed in the manner proposed.

It is unreasonable and unnecessary to introduce further such changes of this nature.

Firstly, the unfair contracts jurisdiction has only been recently expanded to capture "business to business" contracts. These new provisions commenced on 12 November 2016.

A number of businesses, including small businesses, have had to review their existing contracts, including their terms of trade to ensure compliance with the new laws.

Business should be given a reasonable opportunity to adjust to this new framework without being required to once again review their standard form documentation.

Secondly, there appears to be little evidence presented to the Review that the current laws are not working or being enforced effectively.

Rather the decided cases, including the decision in A*CCC v Chrisco Hampers Australia Limited* [2015] FCA 1204 referred to in the Issues Paper, demonstrate the preparedness of the Courts to declare as unfair terms in standard form contracts. In that case it was a provision that allowed Chrisco Hampers Australia Limited to continue withdrawing payments from consumers for potential future purchases.

The *Chrisco case* also demonstrates the preparedness of Courts to find as unfair, additional terms, to those set out in the list of examples at section 25 of the ACL.

As referred to in the Interim Report, in 2013, the ACCC reviewed a number of standard form consumer contracts through the lens of the unfair contract provisions[1].

The ACCC concluded that in most cases, the businesses under review voluntarily chose to make significant changes to some of their standard form contracts. Many businesses chose to delete or amend problematic terms.

<u>Specific response to questions raised</u>

In response to the specific questions raised in the Interim Report:

[1] Unfair contract terms - Industry review outcomes, Australian Competition and Consumer Commission. March 2013.

44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:

- **What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?**

HIA does not support an automatic prohibition of clauses declared unfair by the courts.

In HIA's view, in determining whether a contract term is unfair the Court should be required to take into account the specific circumstances of the transaction and the parties, not generic assumption.

Further, this proposal misunderstands the basis of judge made law (the common law) and potentially compromises the moral foundation for judicial decision making.

Under the doctrines of *stare decisis* and precedent, Courts already look to past, similar issues to guide their decisions.

The law is built case-by-case and on the facts and issues before the Courts. This enables fairness, flexibility and consistency.

Whilst precedent is binding on lower courts, as it is always developing, it does not operate as a "one size fits all" nor as an absolute principle or prohibition.

Section 25 of the ACL already expansively provides a list of terms that are prima facie unfair.

If it is the case that a Court makes a decision on a particular or systemic unfair term has significant value then Parliament can codify that decision through the usual statutory processes and amend section 25.

There should not however be an automatic codification of such decisions, nor should the Courts be bound by such decisions in any manner, other than via longstanding common law principles.

- **Would this increase the deterrent effect of the unfair contract terms provisions?**

No. It would simply mean that rather than each contract and transaction would no longer be considered on its merits.

- **What penalties and remedies should apply?**

HIA submits that the current penalties and remedies are sufficient and do not require change.

- **What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?**
- **Are there any unintended consequences, challenges or risks that need to be considered?**

For the reason articulated earlier, HIA does not support the proposal.

It is unworkable and inconsistent with the principles of common law and distinction between judge-made law and statutory law.

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?

HIA has concerns with this proposal.

The ACCC already has significant powers include with respect to unfair contract undertaking industry investigations, issuing infringement notices and seeking undertakings.

Section 155 of the CCA specifically confers wide powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the Act.

Under this section, the ACCC is empowered to compel individuals to appear before it to answer questions about a potential contravention and to compel corporations and individuals to provide information and produce documents. It can exercise this power, if it has reason to believe that the person or corporation is capable of giving evidence, furnishing information or producing documents relating to a possible contravention of the CCA. It is not necessary for the ACCC to have reasonable grounds to believe that a contravention has occurred before exercising those powers.

The ACCC can also commence representative court actions.

As it remains the role of tribunals and courts to determine whether a term is unfair and to order the appropriate relief if a contravention of the Act has occurred, it is unnecessary and inappropriate for the ACCC, as a potential litigant, to have additional powers to obtain evidence which would usually be obtained through the usual document discovery processes.

46. Are there any unintended consequences, challenges or risks that need to be considered?

HIA refers to its earlier response.

47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:

- **What examples should be added?**
- **Would this help address systemic issues or provide greater clarity for businesses and consumers?**
- **Are there any unintended consequences, risks or challenges that should be considered?**

HIA is unaware of any additional clauses that require banning.

As HIA submitted to this Review in May and on number occasions in the past to other reviews, residential building contracts are already subject to significant regulation as to form and content at a state and territory level.

These industry specific contracting laws are much better suited to addressing issues of alleged unfairness then further generic ACL provisions.