National Independent Retailers Association

Inc. No. AOO36928E Reg. in Victoria ABN 73 545 959 026
GPO Box 224
Hobart Tas Aust
Email: robert@thefrontman.com.au
Ph; 0408144884

The National Independent Retailers Association (NIRA) appreciate the opportunity to place before you, details of matters concerning many thousands of small business retailers in Australia.

In making this submission it is recognised that almost universally an independent retailer will be:

- A small business
- A sole trader or partnership and occasionally an incorporated organisation
- Totally committed to the enterprise – often seven days of every week
- Self-funded or if using borrowings, the loan will be supported by a residential property mortgage
- Typically engaged in the business up to eighty hours every week
- Most likely employing one or more family members either full or part time

It is almost inevitable that the independent retailer will have limited resources or lack commercial or mercantile experience. It is therefore imperative that the contractual relationships between the independent retailer and significant parties such as landlords, franchisors or banks are easily understood, fair and contain adequate processes for low cost dispute resolution.

It is sad to recognise that despite numerous reviews of unfair contracts in recent years there has been very little substantial change to achieve equity between the parties.

Use of the term “unfair” in the description of this review acknowledges that we have not yet achieved equity.

Asking the question: Why is it so? It appears that past considerations have been piecemeal rather that substantial and usually have failed to address the whole of the contract process.

This submission addresses the key questions:

- What are the essential elements of a fair contract?
- How is it possible to avoid subversion of a fair contract?

For the purpose of responding to key questions in the review papers we have chosen to use as an example the standard form contract which is most widely utilised by small businesses whether retailers or operating in other commercial activities. The bank lending agreement which underpins the provision of finance to the business is a vital element of almost every small business.

The standard form contract which is underpinned by the Australian Banking Association Banking Code of Practice is demonstrably unfair as will be shown in this submission.

Background

When small businesses sign loan contracts, there are three crucial documents: the banks facility offer, the banks standard terms and the '*banking code*'. These documents are essential as banks have ambitions and priorities which are considerably different to the strengths and weaknesses of small businesses.

In April 2004, the Australian Bankers' Association (ABA) and its members promised the leading banks would comply with the '*banking code*'. When making this promise, the ABA and banks appointed a '*Code Compliance Monitoring Committee*' (CCMC), because the governments allowed leading banks to be self-regulated.

The decision to self-regulate was introduced following the *Self-Regulation in Consumer Markets Report.* The report states:

> *The Taskforce considers monitoring is crucial to good practice in self-regulation. Monitoring ensures that the scheme is addressing specific problems within an industry. The Taskforce recognises that the role of government in monitoring will depend on the circumstances.*

We have identified relevant questions in the discussion paper and respond as below.

A; Legality and Penalties

NIRA considers making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts.

Kenneth Hayne dealt with this matter in his final report, stating "*Institutions and individuals need to obey the law, not mislead or deceive. Act fairly, provide services that are fit for purpose, deliver services with reasonable care and skill, and when acting for another [like the CCMC], do so in the best interest of the other [party]".*

B; Flexible remedies

NIRA considers a regulator should be able 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.

In August 2003, the ABA and its members published the first contemporary banking code. It required banks to comply with the IDR procedures in clause 35.1(a-d). The ABA and bankers then appointed a Code Compliance Monitoring Committee (CCMC) to investigate allegations by small business bank customers, in relation to whether their bank had breached clause 34(b(i)(ii)).

We have reviewed a number of cases where the ABA and banks appointed CCMC, who were indemnified by banks if they made false and misleading in relation to alleged breaches of the relevant code. In fact, the CCMC commonly relied on a secret constitution that could have been included in all earlier codes, but wasn't, or claimed small business customers had breached a different code.

These examples demonstrate the importance of regulators prosecuting banks that have used UCTs in order to appoint procedures and managers to sell small business properties and assets whilst in breach of the code and retain the proceeds.

C; Definition of a small business

NIRA considers $10 million annual turnover to be an appropriate threshold.

NIRA believes that $10 million annual turnover is an appropriate threshold, as it represents 98% of all small businesses as noted in Chart 2; Businesses by annual turnover on page 29.

D; Value threshold

NIRA has specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold.

We have reviewed UCTs and found that banks have hidden important documents from small business customers. We support the view that where banks have relied on UCTs they should be required to review cases, comply with ASIC Regulatory Guides 165, 168, 183, 209 and 256, and remediate damages caused to their customers.

E; Clarity on standard form contracts

NIRA believes regulators could better promote and enhance guidance on what constitutes a 'standard form contract'. We have provided suggestions around improvements to current guidance and areas where further guidance is needed.

NIRA believes standard form contracts must be clear and therefore, effective promotion of guidelines and standards are essential. Without access to a tribunal and rights under ACL, banks will continue to use courts to resolve disputes.

Summary

This submission has attempted to address each of the key questions in your *"Enhancements to Unfair Term Protections, Consultation Regulation Impact Statement"* dated December 2019.

Our contribution should be considered against the high-level concept of "fairness" which was among the findings of Commissioner Hayne in the recent royal commission.

We submit that a standard form contract with small businesses that has been developed by a dominant party must:

- comply with consumer law
- have full and complete disclosure with all the applicable elements provided
- have a dispute resolution process that complies with the relevant Australian standard.

Thank you for accepting this submission.

Yours truly

ROBERT MALLETT
EXECUTIVE OFFICER
5 APRIL 2020