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Chairman

Consumer Affairs Australia and New Zealand

By email: ACLReview@treasury.gov.au

The Australian Newsagents' Federation (ANF) is the peak national body, who along with affiliated state newsagent and lottery associations, represents some 3500+ small businesses in almost every rural town, regional centre, urban and metropolitan shopping centre in Australia.

Approximately 2.4 million Australians shop at their local community newsagent or lottery agent every day. We are well known and trusted within our local communities and make a significant contribution to Australia's economy, turning over \$2.1 billion annually and employing some 20,000 people. Newsagents' are one of the largest and most trusted independent retail channels in the country.

The ANF is committed to protecting the interests of our members around Australia, in order to ensure they continue to make a positive and sustainable contribution to the Australian community, as they have done for generations.

ANF submission to review of the Australian Consumer Law (ACL)

The ANF supports a strong and fair consumer policy framework and appreciates this opportunity to provide a submission to this important review of the Australian Consumer Law (ACL).

The ACL has in our view largely worked well for Australia and the ACCC has generally done a good job, however as there are other players in the ACL such as ASIC and Fair Trading authorities, our comments should not be interpreted as focusing solely on the ACCC.

The ANF has considered the options presented in the issues paper and sought to address below a range of issues of principle that affect our members, and that impact on small business and consumers generally:

Unfair contract terms (UCT)

The ANF has been concerned for a long time about the fairness of 'take it or leave it', or standard form contracts that our members are provided with by their major suppliers. Re-balancing that commercial contracting environment which our member small businesses exist in, has been a very important issue for us. The resources available, and capacity of our members to negotiate or understand unfair terms in contracts they enter into with large suppliers is not dissimilar to that of individual consumers. This is why over a long period we have been strong advocates for the extension of unfair contract term protections available to consumers in the ACL, to small businesses.

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The recent introduction of legislation and thresholds to achieve this, which will come into force later this year, will have a material and long-term impact on the contracting environment for Australian small business owners like Newsagents and their families, and will introduce greater levels of fairness and equity into our members contracting relationships. For this reason, it is an area of the ACL very important to us.

UCT

- The current B2B UCT legislation is a supplement to the ACL consumer provisions, and whilst welcome, needs review to accommodate some commercial issues that do not arise in the consumer environment.
- There is also a concern where there is 'unfair' conduct within the framework of a contract but does not point to any specific unfair contract terms.

Potential action

A section of the legislation in regard to UCT states that: *"The term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier"*; this is possibly onerous for small business, as in many cases there may not be a "significant" imbalance, a simple imbalance should be enough. We do not understand the need for this imbalance test in relation to consumers nor business, as is "unfair not unfair", especially as the law will have an objective test in relation to the overall interests of consumers. Further the "legitimate interests" issue may be a hard test to meet by a plaintiff in a business context.

Another section of the legislation in regard to UCT states that: *"A remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class)"*. We have a concern about the word "substantial" as that is a high test, why not use the word "reasonable"?

A further section of the legislation in regard to UCT states that: *"It would relate only to standard-form (i.e. non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard-form contract, then the onus will be on the supplier to prove that it is not"*? It is not at all clear what 'non-negotiated' means, what level of negotiation would take it out of the concept of standard form and what if there is negotiation on some parts of a contract but not the offending provision?

Is the underlying prohibition not focussed on contract terms, and not the whole contract? Consequently, if a term was not negotiated, that should be covered by the proposed law, whether or not other terms were negotiated. We are concerned that if it means that any negotiation takes the deal out of the law, then there will be a total stand-off, where one party wants negotiation of some sorts and the other wants none at all. Finally on this point, by way of clarity, the law should state that contracts/terms include unwritten arrangements and other non-documented arrangements,

Another section of the legislation in regard to UCT of concern, states: *"It would exclude the upfront price of the good or service"*. We do not understand why upfront price is excluded, it will cause loading of that price and issues that may be optional now, *for example*; insurance, may be loaded into the

upfront price. Critically in a commercial context the 'upfront price' should not be excluded in a renewal context as businesses will often be in a captive situation and can be gouged on the up front price.

The final section of the legislation in regard to UCT of concern states: *"It would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected"*. We agree that all the circumstances need to be considered but why take into account the broader interest. Contracts, even standard form contracts, are a party to party concept and why bring in the broader interest test?

Unfair conduct

This issue is all the more important in the now common situations where a small business main competitor is also a major supplier. There is then a real incentive for unfair conduct by the supplier against the small business.

Coverage of the ACL

- **Small business and guarantees** - small business transactions have a \$40,000 cap and some exemptions from guarantee rights such as exclusion of goods bought for resale or to be used up. This goes back to an era where people could fully inspect and assess products. There is also the fact that there is a limit on damages in relation to small business purchases.
- **Limitations on liability** - some classes of businesses such as Australia Post, energy suppliers, airlines, insurance providers, and architects have statutory limitations on their liability.

Possible action

There should be a comprehensive review of all exemptions or limitations of coverage or liability under the ACL as part of this review. Along the lines of the regulation review regime that was part of national competition policy, namely are the exemptions or limitation in the public interest or not?

In relation to consumer guarantees and small business.

- The \$40,000 cap is possibly ok for service only transactions, but should be substantially higher for goods transactions, or goods and service transactions.
- The exclusions in relation to products purchased for resale, or to be used up in some production process by the small business, should be repealed.
- The limitation on damages in relation to non-consumer transactions should be repealed.

Enforcement

- **Enforcement of remedies** - whilst consumers can take action in small claims Tribunals, it is hard to enforce orders where a respondent is recalcitrant.
- **Remedies generally** - there is still a huge void to resolving Small Business disputes short of going to a Court or Tribunal.
- **Cross border sales** - as all cross border sales involve a payment platform, the linked credit provider concept already in the ACL can be extended to cover all such sales.

Possible action

- The review should assess how Tribunal orders are complied with and what to do if they are not complied with. One suggestion is that consumer affairs authorities be able to assist in the enforcement of orders where the successful applicant has tried but has been unsuccessful.
- Cross border sales - the ACL be amended to make all payment platforms linked credit providers.
- State and Territory consumer affairs authorities be able to resolve both consumer and small business complaints. In addition, local mediators be appointed by business and regulators to mediate disputes.

Other consumer protection regimes

- **Holistic approach at national level** - there should be joint jurisdiction between ACCC and other agencies having consumer type roles. In particular ASIC, APRA, Therapeutic goods etc.

Possible action

- The ACCC as the preeminent consumer administrator should have co-jurisdiction with the other agencies.
- Specifically, the financial services carve out in the CCA should be repealed and ASIC and ACCC both have jurisdiction.
- The ACCC and relevant agencies to enter into MOU's to facilitate proper administration.

Thank you for giving consideration to these issues important to our member businesses. We appreciate this opportunity to provide our submission to this review of the Australian Consumer Law (ACL).

Yours sincerely,



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