

## **Australian Newsagents' Federation Ltd**

### **Submission**

## **Standing Committee of Officials of Consumer Affairs Australian Consumer Law Consultation**

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**[www.anf.net.au](http://www.anf.net.au)**

**AUSTRALIAN NEWSAGENTS' FEDERATION LIMITED**

Level 3, 33 - 35 Atchison Street, St Leonards NSW 2065  
Telephone +61 2 8425 9600 • Facsimile +61 2 8425 9699  
ABN 14 008 295 038

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## The ANF

The Australian Newsagents Federation (ANF) is the national peak industry body representing newsagents in Australia. The ANF's membership comprises some 2,100 newsagents Australia wide. Nearly all ANF members are small or micro businesses employing less than 20 staff.

The newsagent industry comprises of a network of approximately 5000 small businesses employing over 20,000 staff and having further direct commercial relationships with over 25,000 businesses and generates an estimated annual industry turnover in excess of \$7 billion per annum.

Newsagents serve 85% of Australians aged 14 years and over once to twice each week or 2.5 million customers face-to-face each day. Newsagents home deliver approximately 3 million newspapers daily.

## Introduction

The ANF welcomes the incorporation by COAG of a provision into the new national generic consumer law that addresses unfair contract terms in standard form contracts. The ANF's interest in this provision extends to its application in matters concerning small business as consumers and their relationship with larger suppliers through and acquirers standard form contracts.

While SCOCA in its discussion paper has recognised that:

“many businesses are required to use standard form agreements in the same was as individual consumers, and their interests are essentially the same in respect of the potential for unfair contract terms”,<sup>1</sup>

it is the ANF's primary concern that the definition of 'consumer' ought to be sufficiently broad to allow the majority of small businesses, including newsagents, to access the protections envisaged under the new unfair contract terms provision.

This paper will argue the merit of an expanded definition of a 'consumer' under a harmonised national consumer policy framework. Specifically, this submission will call for a new definition of 'consumer' to encompass:

1. a wider range of circumstances such as goods used in business contexts;
2. the specific treatment of small businesses as 'consumers';
3. the removal of the \$40,000 threshold from the definition of 'consumer';
4. a definition of 'consumer' that does not exclude purchases for business purposes;
5. an entitlement for business consumers to protections under Australian Consumer Law such as implied conditions and warranties; and
6. removal of the exclusion of 'resupply' from the definition of 'consumer'.

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<sup>1</sup> Standing Committee of Officials of Consumer Affairs (2009) *An Australian Consumer Law: Fair Markets – Confident Consumers*, pg. 32

In addition, to facilitate the improved access of small businesses to remedies and redress, the ANF requests the Committee consider the inclusion within the Act of a model dispute resolution provision which is transparent, cost effective and independent.

## Issues

### Small Business as 'vulnerable' consumers

The Productivity Commission recognised in its 2008 Review of Australia's Consumer Policy Framework that small businesses have the dual roles of suppliers of goods and services and as consumers in their own right.

The ANF felt that the Commission's report did not examine in sufficient depth the numerous and compounded difficulties that small businesses encounter as a result of the dual roles of consumer and supplier.

In their capacity as suppliers small businesses are often subject to expectations and fair trading obligations similar to those of larger businesses in the provision of goods and services. For example, small businesses – commonly in a highly competitive environment – cannot afford the reputation of a poor, unreasonable or 'unfair' supplier.

Further, in instances where small businesses offer products for resupply, they are exposed to a relatively more rigorous, rigid and less sympathetic set of contractual standards than would ordinary consumers.

As a result, small business proprietors are far less likely to engage in vexatious or opportunistic actions for compensation, nor are they in a position to readily defend against such claims in contrast to larger businesses.

The Productivity Commission's Report defines vulnerability with respect to ordinary consumers as:

"a particular susceptibility to detriment based on both their personal characteristics and the specific context in which they find themselves."<sup>2</sup>

This definition is equally applicable to many independent small business proprietors especially, sole traders and partnerships but also others that may be characterised as micro businesses that operate seven days a week and where the owner(s) are heavily involved in day-to-day operations.

Many of these proprietors lack sufficient time and resources to make fully informed decisions and are often financially at risk from the consequences of poor decisions or 'unfair' conduct through higher levels of debt and/or a high proportion of their net wealth invested in their business.

Consequently, in their role as consumers small businesses stand to lose significantly larger sums than ordinary consumers in the event of adverse obligations arising from unfair standard form contract terms.

These circumstances substantially increase the potential level of detriment that may be suffered by small businesses and as a result, the tolerance of small businesses to the consequences of unfair standard form contract terms is relatively lower than that of ordinary consumers.

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<sup>2</sup> Productivity Commission (2008) Volume 2 *Review of Australia's Consumer Policy Framework*, pg. 295

Accordingly, the vulnerability and lower tolerance of small business to detriment arising out of commercial relationships with larger corporate entities creates the potential for the burden of such detriment to be transferred to other participants in the supply chain.

Often the burden of detriment caused to small businesses is shifted to ordinary consumers, however corporate clients of small businesses can be affected by detriment created in other supply chain relationships, such as the 'knock on' effect of slow account payment and payment delinquency.

The ACCC in its submission to the Productivity Commission's inquiry acknowledged the need to consider whether current available regulatory protections are relevant to small business, stating:

"While the issues faced by consumers and small business in their dealings with larger businesses are similar – due to the inequality in bargaining power – the ACCC believes that small business considerations can differ from those of consumers. Accordingly, it is necessary to consider carefully whether the regulatory protections provided to consumers will be effective for small businesses on a case-by-case basis."<sup>3</sup>

The ANF submits that the broad inclusion of small businesses under the regulatory protections offered by the standard form 'unfair' contract term provisions adequately recognises the similarities raised by the ACCC between consumers and small businesses in respect of 'unfair' contract terms while also addressing risks identified in the Commission's report<sup>4</sup> regarding the inclusion of negotiated contracts.

Finally, the ANF would highlight that the ethical rationales used underpin values of fairness in commercial transactions, identified in the Productivity Commission's Report<sup>5</sup>, ought to apply to small business 'consumers' no less than it should apply to ordinary consumers.

The current consumer framework incorporates numerous explicit restrictions on specific unfair practices, highlighting the importance of ethical norms to all consumers especially small businesses.

The value to small business of such ethical questions, whilst important, is subordinate to the practical issues of defining the limits of unfair conduct and broadening access to remedies by addressing the wide range of conduct not currently proscribed in the Act.

### **Access to remedies, redress and enforcement**

The remedies available to small businesses in the context of product resupply through the current consumer policy framework are few and costly both financially and in time.

Relief for small businesses under the current consumer policy framework is characterised as difficult to clarify, uncertain, time consuming, costly and generally difficult to access; which has contributed to the recognised lack of case law and applicable precedent and the dearth of evidence to demonstrate examples of small business 'consumer' detriment.

Current unconscionability provisions are considered particularly difficult avenues for small businesses to seek redress as the Courts have insisted on a substantive interpretation and

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<sup>3</sup> Australian Competition and Consumer Commission (2007) *Submission to the Productivity Commission's Review of Australia's Consumer Policy Framework*, pg. 89

<sup>4</sup> Productivity Commission (2008) Volume 2 *Review of Australia's Consumer Policy Framework*, pg. 161

<sup>5</sup> Productivity Commission (2008) Volume 2 *Review of Australia's Consumer Policy Framework*, pg. 413-4

application of the unconscionability provisions, contributing to an unreasonably high legal threshold to be satisfied in order to obtain relief or remedy.

While uncertainty surrounds the definition and interpretation of unconscionability provisions, the only foreseeable avenue of practical redress for small businesses exists in the proposed standard form 'unfair' contract terms provision through an expanded consumer definition to include small businesses engaged in the resupply of business goods.

The ANF's main concern is the clarity, accessibility and extent the proposed unfair contract term provisions will apply to small businesses in respect of the proposed definition of consumer.

Irrespective of how effective the proposed provision may be in capturing the intended 'unfair' terms and conduct, the overall efficacy of the new provision will reside in its ability to act as a deterrent against 'unfair' standard form contract based terms and conduct.

The intended deterrent will provide its maximum effectiveness when a general perception exists of: the eligibility of small businesses engaged in the resupply of business goods under the provision, ready access to the provision, clarity in its application and significant sanctions in the event of proven detriment or the substantial likelihood of detriment.

Placing the onus of proof on the supplier in relation to whether a contract is standard form or not will minimise the potential for abuse and may improve accessibility to potential remedies.

However, only a broader definition of consumer within the ambit of the standard form contract provision will provide a reliable means of dissuading more powerful suppliers from engaging in unfair business practices in respect of small businesses.

Therefore the ANF respectfully requests that the Committee consider an expanded definition of consumer in respect of the standard form 'unfair' contract term provision to include:

- a wider range of circumstances such as goods used in business contexts;
- the specific treatment of small businesses as 'consumers';
- the removal of the \$40,000 threshold from the definition of 'consumer';
- a definition of 'consumer' that does not exclude purchases for business purposes;
- an entitlement for business consumers to protections under Australian Consumer Law such as implied conditions and warranties; and
- removal of the exclusion of 'resupply' from the definition of 'consumer'.

Further, to strengthen the deterrent against 'unfair' conduct and to enable access of small business to redress, the ANF requests the Committee consider the inclusion within the Act of a model dispute resolution provision which is transparent, cost effective and independent.

### **Additional considerations – market concentration**

The issue of market concentration and market power received only a brief mention in the Productivity Commission's Final Report. The ANF was concerned that the Report did not explore in greater detail the prevalence of unfair contract terms in situations of high market concentration among suppliers or acquirers.

While the ANF agrees with the Report that factors other than market power can account for 'unfair' terms; we would submit that it is often substantial imbalances in bargaining power characteristic of highly concentrated markets dominated by large firms that can be a potentially significant contributor to instances of 'unfair' terms.

The empirical evidence referenced in the Report<sup>6</sup> suggests that market power is exercised through prices rather than the erosion of fairness in standard form contracts.

It remains conceivable that firms capable of controlling prices and elements of contractual fairness would exercise both variables in their interest.

It stands that the use of prices in preference of unfair contract terms to manage risk within a market may occur, but only if the pricing mechanism was ultimately more efficient in providing for an adverse contingency rather than through unfair contractual terms.

However, in a market dominated by a concentration of larger and more powerful suppliers or acquirers, the pricing mechanism will not be the most efficient means of providing for adverse contingencies especially where a level of price control or price rigidity exists.

Price controls or price rigidity may occur as a result of regulation or can arise through other commercial considerations including competitive pricing considerations in a concentrated or oligopolistic market or through considerations of consumer demand elasticity.

### **Newsagent experience**

The newsagency industry is characterised by a large degree of market concentration across a number of different product categories.

Among the suppliers of newsagents' core product lines: newspaper publishing is dominated by News Ltd and Fairfax Media; magazine distribution is controlled by three large firms; approximately 80% of consumer magazines sold are published by Australian Consolidated Press and Pacific Magazines; greeting cards are dominated by Hallmark Cards and John Sands; and lotteries are highly regulated and generally licensed to no more than one or two organisations in each jurisdiction.

Each of the above supplier relationships are conducted through standard form contracts as are the majority of supplier relationships within the newsagency industry.

Newspaper and magazine supply agreements are typical of this type of arrangement, which together represent the largest proportion of turnover in the majority of newsagency businesses.

Publisher and distributor standard form supply agreements contain provisions rigidly specifying the maximum retail price, retailer margin and delivery (distribution) fee for all magazines and newspaper product. In fact, the standard margin of 25% the retail newsagent receives for the newspaper and magazine product has remained unchanged for decades.

It is generally accepted that issues concerning 'circulation' or the volume of product sales is the primary cause responsible for the rigidity in the margin or 'price' newsagents, in their capacity as small business consumers, receive from the suppliers of newspapers and magazines.

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<sup>6</sup> Productivity Commission (2008) Volume 2 *Review of Australia's Consumer Policy Framework*, pg. 421.

Consequently, newspaper and magazine suppliers have been obliged to use their superior bargaining power to resort to the use of non-core contract terms contained within the standard form contracts in order to mitigate any adverse contingencies that may arise.

The non-core potentially 'unfair' contract terms specific to newsagents include matters concerning product allocations (oversupply) of wanted and unwanted titles, the sale and return process (returning unsold stock), under allocation of stock and unreasonable commercial terms of trade.

However, there are a range of other common 'unfair' terms already identified in the discussion paper which appear in many newsagent standard form contracts such as: 'Entire Agreement Terms', provisions permitting a unilateral right to vary terms, terms allowing the set-off of disputed amounts and termination fees requiring the paying out of a contract.

Examples of newsagent contract terms obliging newsagents to accept all product supplied to them include:

"Company will deliver to Agent such titles and quantities of Magazines as Company reasonably determines are appropriate to Agent",

"Agent must accept delivery of all Magazines delivered to Agent under this agreement.",

"the Company shall have the right to allocate to the Distributor, such quantity as it considers appropriate".

While many of these terms reference 'reasonableness' in respect of quantities supplied, in reality newsagents are compelled to accept the quantity and range of products supplied regardless of the impact on their businesses.

Furthermore, the labour and freight costs of the returns process are further exacerbated by the oversupply of magazine product to newsagents who are compelled to accept delivery.

The process is complex and involved and the combined labour and freight costs have been estimated to cost the newsagency industry approximately \$100 million per annum.

When newsagents attempt to engage in dispute resolution over the above issues, the process is frequently one sided and occasionally characterised by intimidation, while remedies are temporary and often unsatisfactory.

The subsequent access of a dissatisfied newsagent to legal redress is generally beyond the financial and time resources of a small business person.

Standard form contracts and 'unfair' terms are not isolated only to the distribution and sale of newspapers and magazines within the newsagency industry but also appear in relation to the supply and sale of lottery, electronic commerce and telecommunication products.

One particular example includes, a major lottery supplier contractually requiring newsagents to assume additional insurance coverage in the event of supplier error or negligence.

Standard form contracts specifying the supply of electronic and telecommunication products through newsagents generally lack provisions outlining remedial or dispute resolution processes.

Prolonged shortages and supply irregularities of products or services has often been an issue in this product category, creating potential for detriment to ordinary consumers when newsagents are unable to promptly resolve issues and re-establish supply.

One such standard form contract from the electronic commerce category includes a term that requires the small business acquirer to:

“authorise[s] the equipment rental company to complete any blank spaces and to rectify any manifest error in data input fields within this Agreement”

This above behaviours, particularly magazine oversupply, place strain on the cash flow and time resources of the individual small business proprietor and is typical of the ‘unfair’ conduct placing many newsagents at risk.

### **A further note**

Should the SCOCA require a limiting criterion in respect of any definition of consumer which included small businesses, the ANF recommends a definition of small business which emphasises the size of the transaction involved, similar to the eligibility requirement under s51AC of the TPA.

Many small business industries, including the newsagency industry, are characterised by high transactional volume and low margin products. Accordingly, these small businesses acquire large volumes of product from up stream suppliers.

Should small businesses obtaining products for resupply gain inclusion within the definition of ‘consumer’, the current eligibility thresholds of \$40,000 in some jurisdictions would not be appropriate to capture types of economic activity relevant to small business consumers.

Alternative definitions that most appropriately capture the size, scope and vulnerability of small business relate to the number of full-time equivalent employees engaged in the business.

The Australian Bureau of Statistics (ABS) in 2000<sup>7</sup>, conducted rigorous research into a definition of small business concluding that: small business consists of those businesses which are not subsidiaries of another company and are neither public companies, unincorporated cooperatives nor incorporated associations and employ less than 20 Full Time Equivalent persons.

A weakness of an employee based definition to determine the eligibility of a particular business for consumer protection may prove less practical than a transactional based definition.

However, the ABS definition is more accurate, as the quantitative measure describes the entity, while the qualitative definition clearly articulates the key characteristics of independent management and decision making, by managers who are also the business owners and who operate under financial constraints.

## **Recommendations**

The ANF recommends to the SCOCA that in respect of any standard form ‘unfair’ contract term provision as part of the national consumer policy framework, a revised definition of ‘consumer’ be adopted to encompass:

- a wider range of circumstances such as goods used in business contexts;
- the specific treatment of small businesses as ‘consumers’;

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<sup>7</sup> Australian Bureau of Statistics (2000) *Small Business in Australia*, Cat. No. 1321.0, Canberra.

- the removal of the \$40,000 threshold from the definition of 'consumer';
- a definition of 'consumer' that does not exclude purchases for business purposes;
- an entitlement for business consumers to protections under Australian Consumer Law such as implied conditions and warranties; and
- removal of the exclusion of 'resupply' from the definition of 'consumer'.

Further, to strengthen the deterrent against 'unfair' conduct and to enable access of small business to redress, the ANF requests the Committee consider the inclusion within the Act of a model dispute resolution provision which is transparent, cost effective and independent.