

Australian Newsagents' Federation (ANF) UNFAIR CONTRACT TERMS CONSULTATION PAPER

THE NEWSAGENT INDUSTRY

The Australian Newsagents' Federation (ANF) is the peak national industry body representing Newsagents in Australia. The ANF has branches in Western Australia, South Australia/Northern Territory, Queensland and Tasmania, and through agreements with the Newsagents Association of New South Wales & ACT (NANA) and the Victorian Association for Newsagents (VANA); together we represent some 4000+ Newsagents who employ some 20,000 staff.

Newsagents make a significant contribution to Australia's economy and are one of the largest and most trusted independent retail channels in the country. The majority of Australians shop in a Newsagent every week.

The ANF is committed to protecting the interests of Newsagents around Australia, to ensure that they remain sustainable businesses, and so that they can continue to contribute to the Australian community, as they have done for generations.

The industry is currently going through significant structural transformation due to the changing economy and a changing market. Newsagents are adapting well to these changes and are developing an innovative direction for their future. They are diversifying into new markets such as parcel receipt & delivery and other e-commerce services. They are developing broader retailing capacity and they are expanding their competitive offering.

UNFAIR CONTRACTS IN THE NEWSAGENT INDUSTRY

Newsagents are mostly owner operated and family run small businesses located in almost every community in Australia. Nearly all Newsagents are small or micro businesses employing less than 20 staff. Newsagents are subject to a number of pressures that are distinct from those which affect large corporations and even many other small businesses.

Newsagents are particularly vulnerable to tough negotiations by powerful suppliers and landlords and costly changes to regulation, as their businesses are often characterised by modest margins. Their margins are largely set externally and they have a limited ability to absorb large increases in costs. Like other small businesses and consumers, they also have limited resources to devote to defending their interests through the courts. Accordingly, small businesses, particularly Newsagents, rely

heavily upon the deterrent effect of ordinary protections within the law.

Every Newsagent in Australia is subject to a number of standard-form contracts across each of their major product and service categories. On occasion minor variations are made to these contracts where industry suppliers deem it appropriate, however the overwhelming majority of key contractual terms are presented to Newsagents on a take-it-or-leave-it basis.

Counterparties to these contracts include major newspaper publishers, major magazine publisher/distributors, public and private lottery corporations, in addition to major global greeting card companies.

Standard-form or take-it-or-leave-it contracts afford parties to the agreement little opportunity to negotiate the terms involved, and are often presented in circumstances where a significant imbalance in the bargaining power of the respective parties exists.

Standard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented and it is invidious to suggest that the same term, which may be considered unfair in relation to a contract entered by a consumer, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.

Newsagents and other small businesses often play the dual role of suppliers of goods or services and as consumer in their own right, and as a result are no less vulnerable to unfair or harsh contractual treatment than individual consumers.

Newsagents in their capacity as supplier small businesses are often subject to expectations and fair trading obligations similar to those of larger businesses in the provision of goods and services.

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.

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.

It is critical for these businesses to have strong laws in Australia that respect and understand the value of their businesses to our economy and not just the interests of our larger and louder industry partners and competitors.

Frankly, existing laws do not help Newsagents to any real degree. Our industry is subject to a large amount of control by our major suppliers and it is very important that this consultation considers this. Appropriate reforms need to acknowledge this and ensure that no business should be able to use unfair terms in contracts to unfairly prescribe the actions of another business.

The extension of Unfair Contract Term protections in the Australian Consumer Law to Small Businesses is vital for our industry's future. We hope that this consultation will lead to only 'fair terms' being central to any standard form contracts offered to our member small businesses in future.

The ANF has highlighted in this submission issues of concern for Newsagents in relation to unfair contract terms.

THE POLICY

The ANF strongly supports the Government's policy of the regulation of unfair contract terms (UCT) and conduct related to such contract terms.

The ANF notes that an unsuccessful attempt was made in 2009 to legislate for UCT in business-to-business contracts and we are pleased that the issue is being pursued once more with apparent vigour.

It will be important as to what the law will cover and how it is to be enforced, including self-enforcement. The ANF is not seeking to punish partner businesses in our industry as such but for the UCT law to condition market behaviour and to create a more balanced commercial contracting environment.

ANF members are constantly required to enter into standard form contracts with little or no negotiation. ANF Members have many suppliers who are also competitors to our members and as such wish to dictate terms of operation of our members' business. The ANF has entered into collective bargaining arrangements with some suppliers but with limited success.

A list of terms that the ANF considers "unfair" is at **Appendix A**.

The ANF notes that there is some concern expressed about interaction between the Harper Review and the proposals in the Discussion Paper. It is the view of the ANF that that is not a

concern and that UCT laws should precede Harper as any outcome from Harper may take a while.

The ANF hopes that the business-to-business UCT will become law in January 2015.

The Discussion paper lists 4 Options for a policy response to the UCT issue, namely

- Option 1 — the status quo.
- Option 2 — light touch or non-regulatory responses.
- Option 3 — legislative amendment to extend the existing UCT provisions to standard form contracts involving small businesses.
- Option 4 — legislation to require small business standard form contracts to be negotiated on request.

The ANF strongly favours Option 3. — legislative amendment to extend the existing UCT provisions to standard form contracts involving small businesses.

Later in this submission we set out some concerns about the existing consumer focused UCT law and in particular exclusions.

DEFINITION OF “SMALL BUSINESS”

There have long been difficulties in trying to define "small business". This was an issue in relation to the fast track collective bargaining provisions of the CCA and section 20-21 of the ACL.

The NSW Motor Dealers and Repairers Act 2013 has unfair conduct provisions, as has the Commonwealth Independent Contractors Act. Neither defines small business as such but rely on the characteristics of the weaker party.

The ANF further notes the importance of transparency so that contracting parties know when they need to comply with the UCT provisions.

Some of the options include:

- **A definition based on transaction value.** The difficulty here is what value? Also with all such threshold there will be sterile arguments whether the UCT law applies or not and who is in and who is out; some will fall just in, others just out. The 2009 proposals had a monetary threshold of \$2 million contract value. The collective bargaining notification law has a suite of thresholds starting at \$3 million annual transactions.

- **A definition based on the characteristics of the "small business"** (for example, annual turnover or number of employees). For example, the Privacy Act defines a small business as being one that has less than \$3 million annual turnover. The difficulty here is transparency – how does a contracting party know the annual turnover, etc. of the party it is contracting with? Also the in and out issue arises as well.
- **An "opt in" approach.** The concept here was that if a business meets the defined characteristics that they can then inform a party that they are contracting with that they are a small business, and that they wish to invoke the UCT protections; if they don't expressly opt in, then the UCT provisions don't apply. However, there are difficulties such as: How do you avoid a large business refusing to deal with a business that seeks to opt in? How do you ensure small businesses are aware of the need to opt in?
- **No definition but exclude publicly listed companies** from being a claimant. This has some attraction as it will exclude most large companies and is easily identifiable.
- **No definition** as such and rely on the criteria for UCT to exclude those who do not warrant UCT protection. This was the initial approach in the 2009 proposals.

The ANF would favour either of the last two options.

WHAT IS A "STANDARD FORM" CONTRACT

The primary focus should be on just how much needs to be negotiable before it ceases to be a standard form contract?

The ANF agrees with what is in the current consumer focused UCT law and in particular the rebuttable presumption in relation to whether a contract is standard form or not.

WHAT MIGHT CONSTITUTE AN 'UNFAIR "PROVISION OF A STANDARD FORM CONTRACT

The ANF generally agrees with what is in the current UCT law but also see later comments. Again the rebuttable presumption in relation to the "protection of legitimate interests" is important.

SCOPE OF THE APPLICATION OF ANY NEW LAW

The questions to be addressed are as follows:

- *Should the extension of the UCT provisions apply to contracts involving the supply or acquisition of goods or services, or only contracts involving the acquisition of goods or services by a small business?*

Whilst this may be against the narrow interest of ANF members the ANF view is that all contracts should be covered, too many anomalies arise if there is not universal operation.

- *Should the extension of the UCT provisions apply to contracts between two small businesses, or just contracts where only one party is a small business (however defined)?*

See comment above.

- *Should the extension of the UCT provisions also cover financial products and services provided to small business so that the ASIC Act provisions remain consistent with equivalent ACL provisions, or should the ASIC Act provisions continue to apply only to standard form consumer contracts?*

Yes, most definitely. Again see comment above. It is also the ANF's view that there should be no exemptions but there should be a defence if a mandatory code or contract terms are being followed.

- *Should the "upfront price" of the good or service be excluded?*

This is an important issue for business, especially small business. Whilst at the outset of a contract when there has been a choice whether to enter into the contract or not, such exclusion is understandable. The exclusion should not apply to the ability to change the "upfront price" during the period of the contract and particularly upon renewal of a contract where one party is in a captive situation. **The renewal issue is one of critical concern.**

- *Should the "main subject matter" of the contract be excluded?*

Same comments as above.

- *Should contracts prescribed by law or contracts that mirror a mandatory Code be excluded?*

There should be no exclusions but contracts prescribed by law or mirroring a mandatory code should be a defence. Having said that once the new law comes into effect, contracts prescribed by law or those that mirror mandatory codes should be reviewed.

APPENDIX A- UNFAIR CONTRACT TERMS

The following are contract terms that the ANF, based on examples provided by members, considers as “unfair” in a small business context.

These include those that;

- Permit the supplier but not the customer to avoid or limit the performance of the contract, terminate it, vary its terms or renew or not to renew the contract.
- Permit the supplier to:
 - Change prices without the customer’s right to terminate the contract (lock in terms);
 - Unilaterally determine when the contract has been breached;
 - Unilaterally vary the characteristics of the goods or services to be supplied; and;
 - Assign the contract to the customer’s detriment without the customer’s consent.
- Penalise the customer but not the supplier, for breach or termination of contract.
- Limit the customer’s right to sue the supplier.
- Limit the supplier’s explicit liability for its agents.
- Limit the evidence the small business can use in proceedings on the contract.
- Impose the evidentiary burden on the customer in proceedings on the contract.
- Demand entry to business premises and seize goods owned by the business
- Deem the contract to be an agency relationship, yet force the property in the goods to pass to the so-called agent.
- Allow the supplier to push the full costs of meeting warranty obligations onto the other party.
- Include a term where there is third line forcing or full line forcing without the consent of the other party.
- Include a term that allows a party to demand to see the business accounts of another.

- Include a term that demands access to a party's bank account for the payment of moneys claimed to be owed.
- Include a term that allows one party to supply as much product as it decides and the other party must accept that product and pay for that product.
- Include a term that transfers costs from one party to another, without the agreement of the other party.
- Include a term where the sanctions for termination, voluntary or otherwise, are disproportionate.
- Include disproportionate security demanded in the case of non-payment of accounts.
- Include a term where a small business is credited for unsold product but the payment of the credits is unduly delayed or simply continually rolled over to pay for new product.
- Include a term that allows for inequitable dispute resolution.
- Limit equitable reviews of remuneration as costs rise.
- Include a term that prescribes payment by third parties to the small business that are less fair or favourable than the terms in the contract demanded for payment to the supplier.
- Include a term that allows the supplier to unilaterally change the remuneration model without ending the contract.
- Include a term that restrains the small business from competing with the supplier.