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**Australian Newsagents' Federation (ANF) submission on the Exposure Draft and Explanatory Materials for the extension of unfair contract term protections to small businesses**

The Australian Newsagents' Federation (ANF) is the peak body, who along with State Newsagent Associations, represent the Australian Newsagent industries 3500+ Newsagents.

The Federation commends Minister Billson and the Government for preparing legislation to extend unfair contract terms protections to small businesses.

As an industry, we have been concerned for a long time about the fairness of *'take it or leave it'* or standard form contracts our members are provided with by their major suppliers. We have sought protections to moderate any unfair contracting behaviour in our sector for many years so that there can be a more equitable contracting environment.

Our members have had high hopes for this important reform and it is the Federation's firm view that re-balancing the commercial contracting environment many small businesses like Newsagents exist in, will improve certainty and overall business confidence in our economy.

It is a very important issue for our members.

## ANF comments

### The transaction value thresholds

Our members are strong supporters of the overall aims of this legislation. However, like any good legislation it needs to be fit for purpose and effective. To achieve this, the legislation needs to significantly reduce the incentive for more powerful parties to include and enforce unfair terms in small business contracts. It also needs to cover the majority of small businesses who are likely to be vulnerable to the effects of unfair contract terms, especially in industries like ours where small businesses are fairly captive to main suppliers and are susceptible to this type of behaviour. This requires a transaction value threshold in the exposure draft that would encompass most small business contracts.

Whilst the Federation has participated in all of the consultations on the extension of unfair contract term protections to small business, it was only recently when the Minister announced that he had *'received confirmation of the necessary support from states and territories required under intergovernmental agreements to proceed with legislation to implement this important reform.'* that the Minister announced publicly the detail on the final transaction thresholds within which the protections will apply; *'the new unfair contract term protections for small business will be available for enterprises of less than 20 employees and for transactions under \$100,000 or for multi-year contracts totaling less than \$250,000.'*

The Federation welcomes this consultation process and to be able to comment on the exposure draft of the legislation, in particular the transaction value thresholds contained within it.

In the exposure draft explanatory material 'context of amendments', 1.13 it states that *"the consultation process indicated the preferred transaction value threshold would encompass most small business transactions."* The Federation questions what evidence from small businesses or small business representative organisations has been relied upon to arrive at this assessment? The Federation is not of the view that the preferred transaction value threshold will encompass most small business transactions. In our industry, the \$250k multi-year threshold on the 'upfront price' of goods rules out the vast majority of contracts our member Newsagents have with their main suppliers for

resale of goods. Ours is certainly not the only predominantly small business industry sector where this will be the case.

The majority of Newsagents have approx. 6-8 main multi-year contracts (3-5 year avg. terms). Sometimes these are multi-year contracts with an initial term and then rolling periods of renewal with no end date. These are with publishers, distributors and lottery operators as examples. They will often represent in the vicinity of 70 – 95% of all 'upfront price' transaction value in a Newsagent. These are the contracts that can often lack equity, that cause small business owners stress, and that can also restrict their control to manage their own businesses. For the vast majority of our members, these contracts will in almost all cases be excluded by the exposure draft thresholds. Terms that Newsagents may consider are unfair in these contracts, whether they ultimately are or not, may not be included and able to be examined. It is also unfortunate that the exposure draft legislation does not differentiate thresholds between the 'upfront price' of goods that are re-sold and services, this should be the case.

Further, in the exposure draft explanatory material 'context of amendments' 1.7, it argues a rationale that higher value thresholds should not be excluded on the basis that, *"it may be reasonable to expect that they (small businesses) undertake appropriate due diligence (such as seeking legal advice)"*, and that, *'the onus on small businesses to undertake due diligence when entering into high-value contracts'* should be maintained. It is overly simplistic and ingenuous to assume that by taking legal advice and doing due diligence that a small business operator will necessarily be able to inject equity into their contracting relationships with several multinational organisations who they contract with, or to easily walk away without losing their business, particularly on renewal. This is unrealistic when the more powerful party may use their market power to be particularly inflexible.

Newsagents and their Associations will do some due diligence on contracts but lack the significant resources that our powerful suppliers have. Negotiating a change individually or walking away from these *'take it or leave it' contracts* is nearly impossible in most cases without a member losing their business. So Newsagents put up with terms they may view as unfair in these contracts.

Our members also have little capacity to negotiate contract fairness with powerful long-term suppliers. Their suppliers are quite clear that they do not enter into a process of negotiation, they say they will listen to concerns including those expressed collectively by Associations and may make minor amendments based on these, but they are quite clear that this is not a formal negotiation. Their contracts are effectively *'take it or leave it'*.

Consequently, the legislation thresholds will not capture conduct that concerns our members. It will do nothing to moderate any established market culture and the relationships that our small business members are worried about with their main suppliers. Dominant parties will be able to have in place contract terms that might if in another contract at a lower threshold, be deemed unfair and struck out. It is extremely detrimental to small business that their contracts with key suppliers will be outside the range of the thresholds, particularly where a contract can be worth \$1 dollar more than the thresholds.

Accordingly, the thresholds should capture the majority of contracts our members enter in to, and it is also very important that the protections capture the majority of small businesses, not just micro businesses or minor contracts as would appear to be the case now. The majority of issues our members have are with their major supplier(s) of goods, not with minor service providers. Without capturing these contracts, and exposing their terms to the legislation, you risk the legislation not effectively scrutinising and thus conditioning market behaviour. It will not adequately support small businesses as our members thought was intended by the promised legislation.

It is the Federations strong view that the transaction value thresholds in the exposure draft, given no differentiation between the 'upfront' price of goods for resale and services, should be increased to at least \$1 million for contracts of 12 months or less duration, and at least \$3 million for more than 12 months in duration, or alternately no thresholds or different thresholds for different types of businesses.

As a comparison of small business thresholds, the ATO and small business tax cuts are \$2 million in turnover, the privacy act is \$3 million in turnover, unfair contract term protections for consumer purchases have no threshold limitation. As a further comparison, the small business collective bargaining notification regime provides a scale with a \$3 million basic threshold of annual transactions

or expected transactions. This is a somewhat different regime, however the differences to the current exposure draft on small business Unfair Contract Terms are stark. That scale also recognises that in different sectors there are different pricing influences.

#### **The employee number threshold**

Whilst the 20 person head count threshold in the exposure draft will satisfy most Newsagents inclusion in these measures, the Federation is of the view that a full time equivalent (FTE) model would have been a more appropriate and equitable model.

#### **Exempting the “upfront price” of the good or service**

At the beginning of a contract when there has been a choice whether to enter into the contract or not, this exemption would be reasonable. However, the exemption 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 such as often occurs with Newsagents. This is an important issue for Newsagents who are often subject to multi-year contracts that have rolling periods of renewal with no end date.

#### **Exempting the “main subject matter” of the contract**

As above, what if our main supplier substantially changes the main subject matter on renewal?

#### **The Ministers capacity to exempt contracts prescribed by law or contracts that mirror a mandatory Code**

The Federation is very concerned that there should be no Ministerial exemptions but contracts prescribed by law or mirroring a mandatory code should be a defence. The problem is that Codes do not prescribe an entire contract, to exclude a sector e.g Franchising causes anomalies. Commonly in our sector, where codes do apply they may only apply to a portion of a contracts terms.

#### **Summary**

The Federation is concerned that the thresholds in the exposure draft legislation appear to largely pit small acquirers to small suppliers, not the big suppliers of goods with market power who have always been our member’s main issue. Small businesses like consumers lack the resources to effectively

reduce risk or negotiate their main supplier contracts, so why limit them to only token protections on minor contracts when they stand to lose significantly larger sums than ordinary consumers through their main contracts?

The Federation urges the Federal Government and individual State and Territory Governments to consider supporting a more targeted approach in the exposure draft with adequately broad transaction thresholds applied in the legislation. This is what is required to achieve the long-term outcomes that small businesses like our members had expected from these reforms. This would lead to the more equitable contractual and working relationships with large suppliers expected. It would enable more small businesses to have improved confidence and certainty in their contractual agreements. This would improve small business confidence in our economy.

We appreciate this opportunity to share our views on the exposure draft and explanatory materials. We would be very happy to be contacted for further comment at any point during this consultation process if required.

Yours sincerely,

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