

Australian Newsagents' Federation Ltd
Submission to the Productivity Commission

Draft Report: Review of Australia's
Consumer Policy Framework

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INTRODUCTION

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.

ISSUES

The ANF will attempt to highlight issues of concern for newsagents in relation to the national consumer policy framework. Many of the concerns raised apply to small business retailers such as the treatment of small business as consumers, others will specifically relate to the newsagency industry.

In this submission the ANF focuses on the following issues relating to a national consumer policy framework:

1. Treatment of small businesses under fair trade and consumer law
2. Unconscionable conduct provisions
3. Unfair contract terms legislation
4. Improving access to remedies and improved enforcement tools
5. Industry specific measures
6. Generic fair trading and consumer protection laws

The thrust of this submission attempts to examine the potential affect of the most relevant of the proposed changes on small business retail, in particular the newsagency industry.

1. Treatment of small businesses under Fair Trade & Consumer Law

Upon reading the Commission's draft report it was immediately apparent that the treatment of small businesses in their role as consumers was provided a reduced emphasis under the proposed changes to the national consumer policy framework.

The consistent treatment of small businesses in line with consumers is a welcome first step however; the ANF considers that the protection offered to small businesses under the current consumer policy framework is insufficient.

While it is recognised by the Commission that small businesses have the dual role as suppliers of goods and services and as consumers in their own right, the ANF feels that the report does not examine in sufficient depth the numerous and compounded disadvantages that small businesses face from this dual role.

Small businesses as consumers are subject to issues outlined in the Commission's Issues Paper¹, but stand to lose significantly larger sums than ordinary consumers in the event of a poor decision. As a business consumer, small businesses are exposed to a relatively more rigorous, rigid and less sympathetic set of contractual standards. As a result, small businesses 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.

As suppliers, small businesses are often subject to similar expectations and obligations as 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 or 'unfair' supplier and must take all efforts to prevent the occurrence of such an event as the access to legal and market based remedies are usually beyond the reach of a small business proprietor.

Within the newsagent industry there is a very little risk of the unfair treatment of disadvantaged or vulnerable consumers by newsagents in their role as suppliers. The ANF would condemn any newsagent who engaged in conduct that sought to take advantage of this category of consumer.

The ANF does feel there is cause to classify a significant number of small businesses in their role as consumers, particularly independent small businesses, as 'vulnerable' with respect to the Commission's definition.

The Commission's draft report defines vulnerability with respect to ordinary consumers as:

"a particular susceptibility of consumers to detriment based on both their personal characteristics... ..and the specific context in which they find themselves."²

This definition is applicable to many independent small business proprietors especially, sole traders or partnerships but also others that may be characterised as micro businesses that operate seven days a week and where the owner is heavily involved on a daily basis.

Many of these proprietors lack sufficient time and resources to make fully informed decisions and are often financially at risk. These difficulties can be further exacerbated through the relative bargaining power of small business, industry specific circumstances, 'unfair' contracts, high levels of market concentration among suppliers and a lack of awareness or knowledge.

It is for these reasons that the ANF contends the category of the small business consumer demands greater levels of attention and assistance appropriate to its

¹ Productivity Commission (2007) Issues Paper *Consumer Policy Framework*, Box 3 p.14

² Productivity Commission (2007) Draft Report *Review of Australia's Consumer Policy Framework*, p.235.

needs. The ANF feels that the Commission's draft report was not sufficiently representative of the full range of issues affecting small businesses as consumers.

The Australian Competition and Consumer Commission (ACCC) in its submission to the Commission acknowledges the need to consider whether generally available current regulatory protections are relevant to small business,

"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."³

We would like to reiterate the merit of the suggestion made to the Commission by the Motor Traders' Association of Australia (MTAA) with respect to a 'Small Business as Consumers' Division within the ACCC⁴.

The evidence of detriment to small businesses as a result of unfair or unconscionable conduct is extremely difficult to obtain and those measures that exist such as industry and sector specific small business exit rates do not adequately reveal the level of stress or detriment that small businesses suffer.

The ANF is generally supportive of and welcomes the measures in the Commission's draft report that will assist small business through: the introduction of specific provisions covering the use of unfair contract terms; improvements to redress and remedies; more enforcement tools for regulators; improvements in disclosure requirements; increased funding for consumer advocacy & research and the promotion of a generic national framework for consumer policy.

2. Unconscionable Conduct Provisions

The s.51AC of the Trade Practices Act 1974 (TPA) has remained ambiguous and inaccessible to small business despite the clarification provided through the Second Reading Speech and Explanatory Memorandum for the *Trade Practices Amendment (Fair Trading) Bill 1997*. The guidance provided through the Memorandum intended to encourage a more 'substantive' application of a broader unconscionability definition proved largely impotent in assisting small business for a number of reasons.

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

⁴ Motor Traders' Association of Australia (2007) *Submission to the Productivity Commission's Review of Australia's Consumer Policy Framework*, p. 12.

The cost and length of pursuing legal remedies through the Courts, the general repudiation by the Courts toward a substantive interpretation and application of the unconscionability provisions, the resulting lack of case law to fully clarify unconscionability, the limited applicability of precedent and the dearth of evidence to demonstrate examples of consumer detriment inhibiting further intervention; are among the many reasons cited in the Draft Report as responsible for the inability of current unconscionability provisions in providing the adequate protection originally intended for consumers.

While uncertainty surrounds the definition and interpretation of unconscionability provisions, small business will remain without an effective or reliable means of dissuading more powerful suppliers from engaging in unfair business practices.

3. Unfair Contract Terms Legislation

The ANF welcomes the Commission's Draft Recommendation 7.1 for the incorporation of a provision into the new national generic consumer law that voids unfair terms in standard form contracts. The ANF's interest in this provision extends to its application in matters concerning small business consumers and their relationship with larger suppliers through standard form contracts.

The ANF advises that the required evidence of 'material consumer detriment' set out under the criteria of Draft Recommendation 7.1 include a broad definition of detriment to business consumers to cover any unnecessary and reasonably quantifiable cost, impost or burden that would interfere with the normal operation of the business - an example may include the administration, handling and return of repeated excess supply of stock.

The requirement to demonstrate an 'overall public benefit from remedial action' under Draft Recommendation 7.1 may in the case of business consumers prove difficult to establish. In instances where a particular unfair contract term exists, the detriment to an individual firm may be relatively small, but on an industry wide scale the detriment could be potentially large. Proving the relationship between the potential widespread benefits to an industry through efficiency gains and its affect, economic or otherwise, on the overall public benefit may prove tenuous and difficult to justify remedial action. The ANF recommends that in those circumstances where a business consumer is involved, that the broadest possible definition of public benefit be applied.

In circumstances involving business consumers, the historical context and the evolution of 'unfair' terms in standard form contracts is often important in determining the relative bargaining power of the parties to a dispute. The ANF's experience in an industry characterised by 'take-it-or-leave-it' contract based negotiation has highlighted a culture of acceptance where small business proprietors accept the 'unfair' or potentially 'unfair' terms offered as a matter of course. In this situation, potentially 'unfair' terms can 'creep' into standard form

contracts and accumulate over time. This has the effect of entrenching 'unfair' practices within the core processes of the industry. This dilemma raises further questions of the possible consequences were substantial sections of major supply contracts rendered void under unfair contract terms legislation.

The ANF recommends that the criteria requiring consideration of 'all of the circumstances of the contract' in determining the extent to which contract terms are judged to be 'unfair' should include the historical context of ongoing business relations.

The ANF recognises the need to properly evaluate the full set of circumstances pertaining to each contract in considering the 'fairness' of a particular contractual term. However, given the capacity of standard form contracts in neutralising the ability of both ordinary and business consumers to make choices in their best interests; the ANF recommends that all guidance provided for the interpretation of unfair contract terms place the greatest possible emphasis on the intrinsic elements of substantive unfairness.

Further considerations – Market Concentration

The issue of market concentration and market power received only a passing mention in the Commission's Draft Report. The ANF was concerned that the Draft Report did not explore in greater detail the prevalence of unfair contract terms in situations of high market concentration.

While the ANF agrees with the Draft 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 that is a significant contributor to the instances of 'unfair' terms.

The empirical evidence referenced in the Draft Report⁵ suggests that market power is exercised through prices rather than the erosion of fairness in standard form contracts, it is 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 concentrated 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.

As the Draft Report noted – through the example of an incumbent utility - contract terms may be subject to market power where markets are highly concentrated and prices remain rigid, as in large segments of the newsagency industry.

⁵ Previously cited, p. 359.

The newsagent experience

The majority of the supplier relationships within the newsagency industry are conducted through standard form contracts. Typical of this type of arrangement is the supply and distribution of newspapers and magazines, which together represent the largest proportion of turnover in most newsagencies.

Publisher standard form supply agreements contain provisions specifying the maximum price, margin and delivery (distribution) fee for all magazine and newspaper product, allowing powerful downstream distributors to utilise potentially 'unfair' non-core contract terms in another set of standard form contracts.

The Commission's Draft Report did briefly mention the possibility of situations arising where market power may contribute to 'unfair' contract terms⁶, but the example provided was not explored in its entirety.

The non-core potentially 'unfair' terms include matters concerning the oversupply of stock, the returns process (returning unsold stock), undersupply of stock and dumping of imported product.

The magazine returns process is an excellent example of an 'unfair' non-core contract term. The process is complex and involved and has been estimated to cost the newsagency industry approximately \$100 million per annum.

Newsagents are required, at their own expense, to administer and deliver unsold 'full copy' product (eg. Full magazines) back to the publishers via the major distributors as evidence of unsold stock. The major distributors require only magazine barcodes to verify unsold magazines and often levy a fee on publishers for the return of 'full copy' product, essentially double dipping both newsagents and publishers.

The ostensibly 'unfair' situation outlined above is yet another example of the high threshold of severity required in order to successfully activate the current unconscionability provisions. This limitation in the current consumer policy framework allows the proliferation of contractually based 'unfair' conduct which individually may not warrant remedy or intervention, but when collectively aggregated represents a substantial cost burden to business consumers and the economy.

Standard form contract 'unfair' terms are not isolated to the distribution and sale of newspaper and magazines and also occur in the supply and sale of lottery products, electronic commerce and telecommunications. One major lottery supplier contractually requires newsagents to assume additional insurance coverage in the event of supplier error or negligence.

⁶ Ibid.

Standard form contracts specifying the supply of electronic commerce and telecommunications products through newsagents generally lack provisions outlining remedial or dispute resolution processes. The prolonged supply shortages and irregularities of products or services is often an issue in this product category, which creates potential for detriment to ordinary consumers when newsagents are unable to promptly resolve issues and re-establish supply.

A more complete explanation of each of the mentioned magazine related 'unfair' non-core contract terms is provided in the form of an industry discussion paper accompanying this submission (**Appendix A1-A4**).

An additional magazine briefing paper will be provided with the supporting documentation offering an industry snapshot, detail of a number of related industry concerns and a comparison of examples demonstrating the role market power has played in avoiding 'unfair' non-core terms (**Appendix B**).

A newspaper supply discussion paper is also included with this submission to provide a background of a range of non-core issues associated with the delivery of newspapers (**Appendix C**). Almost all of these issues are contained within the standard form contracts offered to newsagents and are not subject to negotiation.

4. Access to Remedies, Redress & Enforcement

The remedies available to small business through the current consumer policy framework are few and costly both in time and financially. In addition, a number of other difficulties also exist which exacerbate the cost involved in seeking remedy through the Courts.

Relief under the current consumer policy framework is characterised as difficult to clarify, uncertain, time consuming, costly and generally difficult to access; which as contributed to a lack of case law, applicable precedents and the perpetuation of these factors.

The chief issue of concern to the ANF in this area is the clarity and accessibility of relief available for small businesses under the proposed unfair contract term legislation.

Irrespective of how effective the proposed provision may be in capturing the intended 'unfair' terms and conduct, the overall efficacy of the new generic national consumer policy framework will still rest on 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 ready access to the provision, clarity in its application and significant sanctions in the event of proven breaches.

In order to provide greater accessibility and clarity to small business consumers the ANF recommends and supports the following:

- Greater levels of regulator funding to assist in establishing sufficient case law for greater clarity in the application of the provision.
- The creation of a 'Small Business as Consumers' Division within the national consumer regulator to strengthen the regulator's role and understanding through the representation of small business issues.
- Provisions enabling greater facilitation of legitimate private collective and representative action. One of the few avenues available to small businesses and their representatives.
- Draft Recommendation 9.5 - Provisions allowing consumer regulators to take representative action on behalf of consumers not party to proceedings.
- Draft Recommendation 10.1 - A widening of enforcement powers of consumer regulators under the new consumer policy framework.
- Draft Recommendation 11.3 – Additional funding to support research of consumer advocacy and policy issues.

5. Industry Specific Regulation

The ANF has sought the introduction of industry self regulation, first through the notion of performance based agreements between newsagents and suppliers which subsequently evolved into the preference for a voluntary non-prescribed industry code of conduct. This progression should become apparent in the supporting documentation.

The concept of a voluntary Newsagent Industry Code of Conduct (NICC) is intended to identify and prevent commonly recognised unacceptable behavior in conjunction with the use incentives to improve the standard and productivity of both newsagents and major suppliers.

Self regulation through a voluntary non-prescribed industry code of conduct appeared to be the best avenue to obtain the potential benefits from reducing 'unfair' and 'unproductive' practices within the industry. This opinion was formed as a result of the apparent inaccessibility of small business to relief available under TPA, particularly the unconscionable conduct provisions. Accordingly, the NICC has been viewed as a substitute, rather than a supplement, to the protection provided by the generic provisions of the TPA.

The magazine segment of the industry was chosen as an appropriate first area capable of benefiting from a voluntary code of conduct and discussions began in May 2007. Although negotiations for a code of conduct began nearly nine months ago, discussions still remain in their preliminary phases.

Discussions with other sectors of the newsagency industry have revealed a general reluctance by suppliers to engage in any voluntary process. This reluctance appears to be a function of a lack of understanding by suppliers of the potential benefits, a condescending attitude toward small businesses and an awareness of the difficulties facing small business in pursuing remedies through the Trade Practices Act.

The ANF considers that voluntary measures such as industry self regulation would appear more attractive to reluctant parties if generic TPA relief were made more accessible to consumers and small businesses.

6. Generic Consumer Legislative Framework

As a national industry peak representative body the ANF fully supports all efforts to create a national generic consumer legislative framework enforced through a single national regulator.

A single national consumer policy framework simplifies the task of informing and advising small businesses of their rights and obligations under consumer legislation.

A generic consumer policy framework offers a single point of contact capable of facilitating the accelerated resolution of complex inter-jurisdictional matters arising from legislative obligations or through relationships with national suppliers.

The task of the ANF or any other national business peak body in representing and advising small business members is made far easier through the adoption of a single national consumer policy framework.

7. Recommendations

1. The ANF welcomes the Commission's Draft Recommendation 7.1 and makes the following additional recommendations:
 - a. That 'evidence of material detriment to consumers' include a broad definition of detriment to business consumers;
 - b. That the broadest possible definition of public benefit be applied to the requirement to demonstrate an 'overall public benefit from remedial action';
 - c. That the criteria requiring consideration of 'all of the circumstances of the contract' include the historical context of ongoing business relations; and,
 - d. That all guidance provided for the interpretation of unfair contract terms place the greatest possible emphasis on the intrinsic elements of substantive unfairness.
2. The ANF recommends and supports the following:
 - Greater levels of regulator funding to assist in establishing sufficient case law for greater clarity in the application of the provision.
 - The creation of a 'Small Business as Consumers' Division within the national consumer regulator to strengthen the regulator's role and understanding through the representation of small business issues.
 - Provisions enabling greater facilitation of legitimate private collective and representative action. One of the few avenues available to small businesses and their representatives.
 - Draft Recommendation 4.1-4.5 – Provisions enabling the development of a uniform national generic consumer legislative framework.
 - Draft Recommendation 9.5 - Provisions allowing consumer regulators to take representative action on behalf of consumers not party to proceedings.
 - Draft Recommendation 10.1 - A widening of enforcement powers of consumer regulators under the new consumer policy framework.
 - Draft Recommendation 11.3 – Additional funding to support research of consumer advocacy and policy issues.

Appendices

In Confidence