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Committee Secretary
Senate Economics References Committee
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Canberra ACT 2600

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**Australian Newsagents' Federation (ANF) submission to Senate Economics Legislation
Committee Inquiry into the Small Business and Unfair Contract Terms Bill 2015**

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

The Federation is supportive of the Commonwealth Government's proposal to extend Unfair Contract Term (UCT) protections to small businesses like Newsagents.

The Federation is of the view that many Newsagents are subject to UCT's in the standard form contracts which they enter into with their large suppliers and franchisors.

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 critical issue for our members.



ANF comments

The Federation welcomes the Senate Economics Legislation Committee Inquiry and report into the Small Business and Unfair Contract Terms Bill 2015. It provides a timely opportunity for us to comment further on the Bill, in particular the transaction value thresholds contained within it.

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 Bill 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 when the exposure draft was finally released 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.* This provided little opportunity for adequate consultation on these. State Governments who have agreed to the terms of this Bill, as best as we can ascertain did no consultation with interested small business stakeholders before agreeing.

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 major multinational newspaper publishers, magazine publishers and distributors as well as with lottery franchisors as examples. They will often represent in the vicinity of 70 – 95% of all ‘upfront price’ transaction value in a Newsagent. **These contracts will in most cases be**



excluded by the current bill thresholds. 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. 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.

Lease agreements are another area of real concern, as many of our members have multi-year agreements in shopping centres. Many of these service contracts will also be excluded by the current thresholds. As an example; a lease in a shopping centre will typically be 5-7 or even 10 years long. With a threshold of only \$250,000 for multi-year agreements, the threshold is \$50,000 or less. This is unrealistically low and will exclude most retail leases. Leases are an area that certainly should not be excluded.

We are also concerned that the multi-year threshold will encourage large suppliers our member's contract with to simply make contracts longer in order to remain outside the legislation threshold. Their risks are still mitigated by having terms in these contracts that will provide them with high levels of control and the ability to end contracts easily.

Our larger suppliers who are often the most difficult, will most likely fall outside the thresholds. Whereas our smaller suppliers with less power will fall within the thresholds. It is our view that this is not in the spirit of what was expected by small businesses of this legislation. If the two categories of supplier use the same possibly unfair terms, which is quite possible, one will be struck out, the other will not. What was hoped for was that the legislation would capture the majority of unfair terms in small business contracts and that this would moderate contracting behaviour and culture rather than requiring small businesses to test unfair terms in smaller contracts in court, which is unlikely and unaffordable for small businesses.

In the exposure draft explanatory material 'context of amendments', 1.13 it stated 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 was relied upon to arrive at this assessment and was this adequately broad? 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.

Further, in the exposure draft explanatory material 'context of amendments' 1.7, it argued a rationale that higher value thresholds should 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 and fairness 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 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, but they are quite clear that this is not a formal negotiation. Their contracts are effectively *'take it or leave it'*. Major suppliers have told us, they have uniform contracts with uniform clauses and they do not set about making variations to those contracts for individual newsagents or groups of newsagents, large or small.

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 into, and it is also very important that the protections capture the majority of small businesses, not just micro businesses, solo operators 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.

As a suitable 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.

What constitutes the “upfront price payable” – UCT Bill

A related issue is that what constitutes an “upfront price payable” in small business contracts is problematic and very unclear. The definition is taken from the business - consumer regime and not the business to business where there are a variety of fees and costs. “The upfront price payable” means the amount that is disclosed to the other party at or before the time the contract is entered into. This means any future payments will be included in the upfront price provided they are disclosed to the small business in a transparent way (e.g. it is made clear on what basis such payments would be determined) at or before the time the contract is entered into.

However, the upfront price will not include any amount that is conditional on an event happening or not happening. For example, terms that impose additional fees or charges as a consequence of the



other party breaching or exiting during the period of the contract would not be included in the upfront price.

The upfront price is arguably the known price or likely price at the time of entering into the contract. It is likely that in the future suppliers will put into a contract the likely price or at least the minimum annual price or the likely price over the whole contract.

A classic area is franchising, like lotteries in our industry. We would certainly not wish to see this exempted from this legislation. It is confusing what the 'up front price payable' actually covers and small business needs that to be clarified as it is likely that bigger businesses will use that confusion.

An example of the confusion with what will form the upfront price is highlighted by the following typical payments seen in a franchise agreement:

An upfront fee for the grant of rights - would be included. An ongoing franchise fee may form part of the upfront price unless it is considered "contingent". Many retail and service franchise agreements are based on a fixed percentage of gross sales (revenue or profit) for a particular trading period. Some agreements may have a minimum specified amount such as \$1,000 per month or a combination of both (e.g. the greater of 6% of Gross Sales or \$1,000). Those minimums may also be subject to review by CPI increases or another review mechanism which could be contingent. Other payments typically appear including a contribution to a marketing or cooperative fund controlled by the franchisor. It is usually calculated in a similar way to an ongoing royalty however but should a payment of that kind be included in the determination of the upfront price when it is essentially for a cooperative purpose.

There is also usually a "renewal fee" which is typically paid before the end of the term of the contract to secure a renewal, a transfer fee (usually based on a percentage of sale price). Many franchisors also control premises by holding the lease (or an associate holding the lease) which are leased or licensed by franchisees. Typically the rent and outgoings are "passed through" at the cost to the franchisee however those payments can be significant. Whilst they are usually part of a separate outlet licence agreement there is potential for a franchisor to include the obligation to pay in a



franchise agreement (with the effect that the value of a good or service supplied is higher) to get over the threshold. The same may apply to the acquisition of assets such as an existing franchise business as a going concern in concert with the supplies made under the franchise agreement. It is not uncommon for franchisees to acquire other goods and services through the franchise agreement from a franchisor (or associate). It will be necessary to determine if those amounts form part of the upfront price.

These examples of obligations to make payments during the course of the term of the agreement can complicate the process of determining if they are considered in or out of the upfront price. It is not clear if those payments are "contingent" because they are dependent on the sales occurring yet they are disclosed and known.

The upfront price payable is taken from the consumer provisions but there is no threshold in relation to those. Up front price payable has a different purpose there.

This issue demonstrated above is common in different ways to many contracts. "Up front" does not appear to be only up front but all known payments during the life of the contract.

It may be that in relation to business to business contracts the payments for the ongoing supply of the goods and/or services that are the basis of the contract should be excluded from the definition of "up front".

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 a critical 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?

Despite the Federations preferred view that the transaction value thresholds in the Bill be considerably higher, we recognise the need for sensible compromise so that the benefits of this legislation are not lost to small businesses.

Consequently, it is the Federations strong view:

- That the transaction value thresholds in the bill, should be at least \$300,000 for one year contracts and at least \$1,000,000 for multi-year contracts.
- That the threshold for employees could remain as is.
- That the Government needs to set up a small Committee to review the law in 12 months if unchanged, 24 months if thresholds are suitably amended.
- It may also be that in relation to business to business contracts the payments for the ongoing supply of the goods and/or services that are the basis of the contract should be excluded from the definition of "up front".



The Federation urges the Senate Economics Legislation Committee in its report to consider supporting this more targeted approach with adequately broad transaction thresholds applied that will at least capture a majority of conduct. 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. We would be very happy to be contacted for further comment at any point during this inquiry if required.

Yours sincerely,

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