



**Australian Lottery  
and Newsagents  
Association**

[www.alna.net.au](http://www.alna.net.au)

16<sup>th</sup> of March 2020

Consumer Policy Unit  
Market Conduct Division | Markets Group  
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**RE: Submission to the Enhancements to Unfair Contract Term Protections Consultation Regulation Impact Statement.**

The Australian Lottery and Newsagents' Association (ALNA) is the national industry body representing Lottery Retailers and Newsagents' who represents small businesses in almost every rural town, regional centre, urban and metropolitan shopping centre in Australia.

There are over 4000+ Lottery Retailers and Newsagents' in Australia. They are an important and trusted part of Australian communities and approximately 35% of the Australian population visit them at least once a week (source RDG Insights study). Our members therefore make a significant contribution to the Australian economy, employing over 20,000 people and generating an estimated annual turnover of \$6 Billion.

Retailers have commercial relationships with over 25,000 other businesses, further demonstrating their valuable contribution. We are one of the largest independent retail channels in our community.

ALNA welcome the Governments proposals to enhance UCT legislation and appreciates this opportunity to provide further insights in our submission on the proposal, as we have done in all previous consultations.

The extension to small business of UCT protections is in the view of ALNA one of the most valuable protections to small business. As a result, these protections were something that we strongly advocated for over several years and that we continue to focus attention on enhancing.

Many unfair contract terms have, or are, or will be eliminated. The ACCC has done a good job and our experience is, that the law has been used in a self-enforcing fashion. ALNA has used the law in relation to suppliers in the sector.

Our association would suggest that now that there has been regulatory and market experience of the law, it is time to move to not simply enhancement but to have universal application of the law. 'Unfair is unfair.'

Rather than respond to each issue raised in the Discussion paper, we have made the following comments on each class of issues raised.

**Legality and penalties**

Law is about conditioning behaviour. Litigation is a poor measure of the success of any law.

In the case of ALNA members, we are not aware of any Court action but there is an arbitration where UCT will be an issue.



ALNA has used the UCT law extensively to change supplier contracts and has initiated some ACCC inquiries.

The law has been welcome but has shortcomings which will be outlined in the following segments.

### **Flexible remedies**

The Court should be able to impose any relevant outcome in relation to UCT conduct. The association has some concern about criminal penalties as Court often read down criminal cases and this may limit the scope of UCT law.

The ACCC already does this through undertakings and that is often a great outcome.

Our association is strongly in favour of flexible outcomes, but Courts are a last resort.

The goal should be to foster market outcomes and not be bound by rigid doctrine.

### **Definition of small business/ Value Threshold.**

ALNA opposes any thresholds, they lead to sterile arguments.

UCT law already has substantive filters such as bargaining situation, standard form contracts and lack of negotiation.

Some ALNA members fall within current thresholds some do not.

There are many SME's that fall outside, especially those that resell product. Some ALNA members own multiple sites and some are supermarkets and they fall outside either the employee numbers or value threshold, yet they are essentially small businesses, yet a nearby newsagent ALNA member is within the thresholds, this is in its own way unfair.

If there are to be any thresholds, the employee threshold should be removed, and the value threshold should be substantially raised and maybe different thresholds for those business that resell and those that provide services only. Even that shows the messiness of thresholds.

### **Clarity on standard form contracts.**

We welcome clarity of what is a standard form contract but do not agree with adding 'repeat usage' as the issue is really whether there is 'effective opportunity to negotiate'.

What does "repeat usage" mean? Is repeat 2 times or 5 or 50?

ALNA favours a test for "effective opportunity to negotiate".

Some large entities in our industry have what we understand would be viewed as standard form contracts, and that apply to 000's of businesses, but those entities are of the view they are not standard form as they will negotiate one on one, this has not been our experience in practice.

### **Minimum standards**

If there are unfair State or Territory standards, or terms in contracts used by government business enterprises with small businesses, these should be challenged under UCT and captured by these



provisions unless the State or Territory can show that the unfair contract clauses are in the public interest and then exempted by regulation.

**Application of enhanced protection to consumer and insurance contracts.**

Such contracts should not be exempt in any way. ALNA members have for a long time been hurt by such contracts.

There are no downsides in this enhancement for ALNA members.

**Application to franchise contracts.**

Most ALNA members are franchisees.

Most of the contracts entered into by ALNA members are standard form.

There should be no thresholds for UCT to apply to franchise contracts.

Such contracts are inherently one sided and no matter the size of the franchisee the contracts are take it or leave it.

**Other issues.**

Evergreen or perpetual contracts, UCT law should apply immediately the law is enacted or such contracts are deemed to be for set periods and renewed say every two years.

Whole of contract is unfair? – ALNA reviews many contracts for our members and in some cases there may be no single term, or terms which can be potentially struck out, yet on balance the whole contract when read in its entirety is extremely unbalanced between the parties and so could be viewed as 'unfair'. ALNA is of the view that there should be provision in UCT Protections to strike out the whole contract where it is clear that it provides no fairness to the relevant positions of the parties to the contract.

The UCT law exempts the upfront price of contracts. The association has long suggested that that exemption does not apply to renewal of contracts. At a renewal stage, weaker parties cannot in many cases walk away. They have invested sunk costs and are really in a captive situation. In the renewal situation upfront price can be used to fold into that provision some possible unfair contract terms.

I hope that the above information is helpful, and we will be happy to discuss the submission.

As you can see ALNA is a major supporter of UCT law but is of the view that it is time to not just simply enhance UCT but to make it applicable to all - **UNFAIR IS UNFAIR.**

Kind regards

Ben

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