

9 July 2007

The Secretary  
Senate Standing Committee on Economics  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

The Australian Newsagents' Federation Limited (ANF) is pleased to provide the following submission on behalf of newsagents' regarding the matters currently before the Senate Standing Committee on Economics concerning Trade Practices Legislation Amendment Bill (No.1) 2007 and the Trade Practices Amendment (Predatory Pricing) Bill 2007.

Yours Sincerely



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**SUBJECT:**

Inquiry into the Trade Practices Legislation Amendment Bill (No.1) 2007 and Trade Practices Amendment (Predatory Pricing) Bill 2007.

**BACKGROUND:**

Following the Senate's Economics Reference Committees majority report of 1 March 2004 into 'whether the *Trade Practices Act 1974* adequately protects small business from anti-competitive or unfair conduct' the Australian Government responded to the committees recommendations pertaining to s.46 Misuse of Market Power and Part IVA of the Act containing laws prohibiting unconscionable conduct.

In February 2007, the Hon. Fran Bailey MP, Minister for Small Business and Tourism met with small business groups to consider their views concerning the proposed amendments to Sections 46 and 51AC of the Trade Practices Act. In late June, the Government introduced the proposed amendments to the Trade Practices legislation into Parliament, and at this time, Senator Fielding introduced a Trade Practices Amendment (Predatory Pricing) Bill.

The ANF has examined the proposed amendments to s.46 and s.51AC of the Trade Practices Act and this submission represents the position of the ANF and feels it appropriate to make the following recommendations for consideration by the Senate Economic Committee.

**RECOMMENDATIONS:**

1. The ANF supports the Australian Government's proposed amendments to s.46, however the ANF also supports the amendments proposed by Senator Fielding.
2. The Senate Economic Reference Committee Report 2004 proposed that subsections 51AC(9) and 51AC(10) of the Act regarding the \$3 million price protection cap, be repealed. In response, the Government conceded that a complete removal of the cap would broaden the focus of the supply and acquisition of goods in the 51AC(9) and 51AC(10) provisions in a way unintended by the Government.

It was recognised however that the \$3 million cap would prove to be too low for some small businesses. The ANF accepts the Government's concession and supports the Committee's recommendation to expand the threshold to \$10 million.

3. The Senate Economic Reference Committee Report also recommended that subsection 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in subsection 51AC(3)) or acquirer (in subsection 51AC(4)) has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of goods and services.

The ANF supports the Government's proposed amendments that the courts should have regard to the utilisation of contract terms that allow for the unilateral variation of clauses between supplier and small business consumer, or small business supplier and acquirer of goods or services, in determining if unconscionable conduct has occurred.

4. The ANF welcomes that subsection 2B(1) of the Act be amended so it is clear that the Commonwealth Government is bound by Part IVA of the Act, and that the Government consult with State, Territory and local governments to amend subsection 2B(1) to ensure that they too, are bound by Part IVA.

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The ANF would encourage and support the Government seeking to enact consistent legislation across all States and Territories, which align with the policy objectives of COAG reforms.

5. The ANF supports the Government's justification for rejecting proposed negotiations with State and Territory governments for the introduction of measures which could prohibit retail lease provisions, compelling tenants to keep their tenancy terms and conditions secret. Allowing these negotiations would violate the principles of contract law where it is fundamental that the parties involved are free to negotiate the terms of that contract.
6. The ANF welcomes a streamlined collective bargaining scheme however the ANF feels that the associated \$3 million threshold should be enlarged significantly to at least \$10 million.
7. The ANF would support the moves for the extension of coverage of s.51AC to address conduct that it considered 'harsh, unfair or unconscionable'. S.51AC should be amended to proscribe the following:
  - Unilateral variation of contract or associated documents;
  - The termination of contract by one party without just cause or due process (though it is not intended that the rights of parties to repudiate a contract be removed);
  - The bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement; and
  - The presentation of 'take it or leave it' contracts or agreements.
8. The ANF applauds the opportunity to collectively bargain with industry partners on Newsagents' behalf, however we feel that the process lacks a forceful arbitration mechanism and inevitably a satisfactory dispute resolution. Under the current collective bargaining provisions, it is all too easy for the target party to advise that it is unwilling to participate in a collective bargaining arrangement. The target is not compelled to provide substantive reasons as to why they refuse to participate. An arbitrator could determine by examination of the target's reasons for refusing to participate whether or not this is justifiable and ultimately encourage them to review their position.
9. The ANF would support the appointment of a second Deputy Chairperson at the ACCC with a particular focus on examining unconscionable conduct in small business. The ANF believes that this action would improve the strength of the collective bargaining process providing that the Deputy Chairperson was adequately resourced, funded and granted the appropriate powers to be effective in prosecuting possible breaches of the Trade Practices Act.

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Date: 9 July 2007

Signed:



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