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ALNA Submission to Treasury – Unfair Trading Practices Consultation

About ALNA

The Australian Lottery and Newsagents' Association (ALNA) is the national industry body representing Lottery Agents and Newsagents'. There are over 4000+ Lottery Agents and Newsagents in Australia. They are generally family run businesses and are an important and trusted part of Australian communities and approximately 2.5 million Australians shop at their local agency every day.

ALNA represents a network of trusted individuals and their small businesses within communities across Australia. They are deeply rooted in their local areas, offering convenience through their diverse products, services, and widespread distribution of information via newspapers and magazines, thereby supporting an informed society and supporting many community groups. Individually, their voices may go unheard, particularly for those with regional or remotely based businesses. However, when unified, ALNA members together support each other's long-term resilience and growth, making sure their local communities continue receiving the benefits of their supportive local newsagencies and lottery retailers.

Unfair trading practices

The Australian Lottery and Newsagents' Association (ALNA) is pleased that the Government is considering the issue of unfair trading practices.

We note that the ACCC has strongly supported such reforms and the Association supports the ACCC proposals.

Our members are essentially small businesses and are a pipeline of major companies. Conduct against our members does not substantially lessen competition and it is not unconscionable and may not be in a contract. Nonetheless, in many cases our supplier(s) can also be our main competitor, particularly when it comes to online sales. What this all means, is that conduct that concerns our members will usually fall outside existing laws.

The Association is concerned that any legislation in this area should not weaken any positive intentions and that it fully covers small business.

History shows that almost all attempts to assist small business have either been of little assistance, or of limited assistance.

In 1974, the Trade Practices Act was introduced including a division headed **Unfair Practices**. That included section 52 (now section 18 of the ACL) plus a significant number of specific prohibitions. Section 52 became a highly utilised provision in both regulatory and private enforcement action.

Fortunately, due to early action by the then TPC the specific did not confine the general, which is always a danger.

Ironically, in the GST period the Federal Government introduced specific provision to cover GST specific conduct, however the ACCC did not utilise those provisions in litigation, it used section 52 instead.

It is a pity that the 1974 Act did not prohibit misleading, deceptive, and unfair conduct. As is the case in some overseas jurisdictions.

Next **unconscionable** conduct was introduced in 1992. The threshold of what is unconscionable was simply too high to cover anything but the most extreme conduct. The recent Mercedes Benz dealers case demonstrates that where the Court said the conduct complained of might be unfair but not unconscionable.

Then unfair contract terms.

Unfair contract terms legislation was introduced initially for consumers and then in 2016 for small businesses. It was a positive initiative but is limited to contract terms and has thresholds and other limitations.

Misuse of market power.

The initial 1974 Act had provisions meant to assist small businesses, section 46 (misuse of market power) and 49 (predatory pricing), neither met that goal.

Section 46 is the most disappointing and the final change in 2017 was sold as pro small business but that was false. Sadly, small businesses supported that change. Adding a substantial lessening of competition test yet taking out all the damaging competitor provisions, has ensured its lack of value to small business. Time has shown that, with the ACCC now proposing unfair business practices law.

Unfair trading practices proposals

We strongly believe in the need for such law to cover small business and support a general provision without any specific provision. (Option 3). This lets the courts and regulators work out the detail and not get any arguments.

We do see the need to have some filter on what constitutes unfair business practices in an objective sense. Normal competition is unfair in some minds but not necessarily unfair. What is set out at page 19 of the Discussion Paper seems acceptable.

We are however against any threshold. They are discriminatory and lead to sterile arguments on thresholds. The changes to UCT thresholds demonstrate the futility of thresholds, Section 52 did not have thresholds.

We also suggest that as with section 52, the law be civil only and mainly aimed at stopping conduct and not punitive. It should cover likely conduct as well.

Systemic unfair practices may be subject to different rules and sanctions.

Hopefully, unfair trading practices law will close the circle and assist our members with genuine complaints. Proper working markets do not include unfair practices. Competition is unfair enough.

Yours sincerely,

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