



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

26 August 2022

Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

via email: morecompetition@treasury.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022

We welcome the opportunity to comment on the exposure draft legislation *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices* (the Bill). While we support the intent of the Bill to disincentivise large businesses from participating in anti-competitive behaviours, increased penalties alone may not achieve the desired outcome. As such we provide the following comments.

- 1. Consideration should be given to ensuring adequate resources are provided to undertake compliance and enforcement activities regarding anti-competitive conduct.** The increase in potential penalties will go some way to deterring large businesses. However, given the often-significant financial upside of this type of conduct, without appropriate enforcement of the legislation it is unlikely to sufficiently reduce anti-competitive behaviours amongst large business. The limited capacity of the Australian Competition and Consumer Commission (ACCC) to engage in individual small business disputes, results in them prioritising those cases where a broader systemic issue is apparent. Accordingly, many small businesses facing anti-competitive conduct are left to either accept this conduct or defend their own economic interests.

Further, the ACCC's focus on systemic issues results in any resolution and applied penalty occurring significantly after the anti-competitive conduct is experienced by the individual small business. This delayed action and any resulting penalties applied does little to rectify the relevant damage experienced by the small business.

- 2. We see value in activating a 'super complainant' mechanism for credible dispute resolution agencies that recognise potentially anti-competitive conduct through significant cases or recurring matters that individually would not satisfy the ACCC's enforcement criteria but represent significant harm to impacted parties, demonstrable non-compliance with Codes or a prima facie breach of competition and small business-related ACL provisions that have not been able to be resolved via ADR processes.** The ACCC's targeted use of enforcement resources means clear breaches of the law or Code non-compliance are not investigated as they are not considered to be material to economic harm, part of a systemic failure or of considerable public interest. Despite the matter not satisfying this criteria, it is of profound importance to the impacted party(ies) and the ACCC's decision to not investigate/pursue brings into question the value and utility of the law or Code itself. Further, this decision leaves the impacted business aggrieved and dissatisfied with the policy and regulatory settings, leading to calls for further regulation when in fact it is clearly a matter of enforcement. The 'super complainant' mechanism would see credible agencies with proper information exchange protocols able to facilitate at least some form of investigation.

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3. **We recommend that a Federal Small Business and Codes List (the List) be created in the Federal Circuit Court of Australia to provide affordable, determinative and timely access to justice for small businesses and regulators.** Small and family businesses who experience anti-competitive conduct would not be dependent on the regulator advancing their case due to the inherent costs, risks and hearing delays but would instead be empowered to defend their own economic interests quickly and effectively through the right-sized and accessible mechanism of the List. Currently, the time, cost, and complexity of using the existing formal legal channels to pursue even reasonably 'sure' actions deters small businesses from seeking compensation. Regulators are also dependent on expensive and delayed Federal Court process to secure fines, remedies and convictions, in most cases. The precedent value of Federal Court decisions can be diluted by the delay in the determination as a belated signal about what is acceptable commercial conduct and behaviours that need to be curtailed.

The List would present an opportunity for the ACCC to seek precedent-setting outcomes in many instances, increasing the organisation's capacity to quickly address instances of potentially anti-competitive conduct and to build case law on what is acceptable commercial conduct. This List would also support regulators seeking more timely remediation undertakings, provide a more ready access to harm reducing directions, remediation action that is more likely to be meaningful and useful to the injured party(ies), and more timely 'precedent' determinations that can support fairer commercial conduct and interpretation of laws, regulation and Codes, though clearer guidance support commercial behavioural change. This initiative would support efficacy of and confidence in the regulatory framework.

As previously highlighted by this Office, the introduction of the List would provide a low-cost alternative for small businesses who experience anti-competitive behaviour to seek redress in a cost effective and timely manner. Disputes appearing on the List would be capped at \$1 million (award or fine) and delivered via online hearings, significantly reducing the time and cost burden on a small business. Critically the List we proposed would operate as a 'no costs' jurisdiction; include a reduced or capped 'court book' evidentiary entitlement; provide a guaranteed turnaround time; include compulsory pre-hearing ADR. These measures would vastly improve access to justice for small and family businesses by supporting them to protect their own commercial interests in a way that is affordable, timely and able to deliver adequate sanctions, interventions and recompense from counterparties engaging in anti-competitive conduct that is a contravention of Codes and other regulatory mechanisms.

Larger fines, like those proposed under the Bill, would continue to be contested in the Federal Court with the accompanying processes, expenses, risks and evidentiary rules that are commensurate with penalties and awards of such significance. While the larger fines may produce a modest 'chilling effect' on unlawful, anti-competitive or Code-contravening conduct and will provide useful 'examples', the absence of enforcement of less substantial breaches risks rendering the provisions to which they apply *'a hunting dog that won't leave the porch'*.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr Cameron Dyson-Smith on 02 5114 6105 or at Cameron.Dyson-Smith@asbfeo.gov.au.

Yours sincerely



The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman