



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

19 December 2024

Director

Consumer Policy Unit

Market Conduct Division

The Treasury

via email: consumerlaw@treasury.gov.au

Dear Sir/Madam,

Unfair trading practices – Consultation on the design of proposed general and specific prohibitions

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) welcomes the opportunity to comment on Treasury's Unfair trading practices – Consultation on the design of proposed general and specific prohibitions (the consultation paper), which builds on the November 2023 Unfair trading practices – Consultation Regulation Impact Statement consultation.

The consultation regulation impact statement proposed four policy options to address possible gaps in the Australian Consumer Law, which leave consumers vulnerable to business practices of concern. Most stakeholders supported Treasury's fourth option: To introduce a combination of general and specific prohibitions on unfair trading practices. Treasury is now seeking stakeholder views on the design of a general and specific prohibitions on unfair trading practices.

The ASBFEO agrees that unfair trading practices should be prohibited and supported Option 4. It is our view that unfair trading practices protections must extend to small businesses (as a B2B protection), as well as consumers, because both groups experience harm from such practices, often in situations where there are power imbalances. An unfair trading practices regime is an opportunity to provide an economy-wide 'nest' of fair business practice expectations, reducing the need for sector specific industry codes.

General prohibition

Recommendation 1: The proposed general prohibition should expressly include small business (as a B2B protection) and be expressed in the terms suggested by the Queensland Law Society

The ASBFEO supports the proposal to introduce a general prohibition on unfair trading into Australian Consumer Law. As noted above, we urge the Australian Government to protect small businesses (as a B2B protection) in their dealing with larger businesses. Small and family business owners (particularly those from culturally and linguistically diverse backgrounds) can share similar vulnerabilities to individual consumers, and can fall victim to unfair practices owing to their small size and limited resources.

To protect small businesses as well as consumers, we recommend the Australian Government adopt the wording proposed by the Queensland Law Society in the Law Council of Australia submission to the consultation regulation impact statement:

Unfair conduct

1. A person must not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.
2. Conduct is unfair if:
 - a. it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the conduct, and
 - b. it causes a detriment (whether financial or otherwise).¹

This definition is simpler and more flexible than the one put forward in the consultation paper. We are concerned that a requirement that the conduct must unreasonably distort or manipulate the economic decision-making or behaviour of a consumer sets the bar too high and may not capture the full gamut of unfair trading practices.

The drafting could also explicitly state that failure to act in circumstances where that failure to act is unfair and causes a detriment is subject to the prohibition. An example of where we have encountered such behaviour is third-tier lenders (not members of the Australian Financial Complaints Authority) who have security over real property of small businesses and fail to respond to enquiries to pay out loans. Given the significant interest and charges payable on these loans and the presence of a security, it can be in the interests of third-tier lenders to allow these contracts to run up to the value of the security. We note that there is overlap between this example and the practice identified in the paper of impeding the ability of a consumer to exercise their contractual or other legal rights.

We also agree with the Queensland Law Society's suggestion that the prohibition should include the additional requirement that the conduct is not reasonably necessary to protect the legitimate business interests of the party who engages in the conduct. This would protect businesses who might otherwise be at risk of vexatious proceedings or potential infringement when acting reasonably.

Should the government adopt this recommendation, it is important to ensure that inappropriate manipulation of decision-making by consumers and small businesses, such as by making pre-contract touts that are not included in the executed contract, are still proscribed by the legislation. This could be included as part of the general prohibition or addressed as a specific prohibition. We discuss this further below.

Specific prohibitions

Recommendation 2: The specific prohibitions identified in the consultation paper should also apply to business to business transactions. Treasury should consider specifically prohibiting the practice of making pre-contractual touts that are then not included in executed contracts.

The ASBFEO agrees that the specific prohibitions listed in the consultation paper should be proscribed under Australian Consumer Law; namely subscription-related practices, drip pricing, dynamic pricing, online account requirements, and barriers to gaining access to customer support.

¹ Law Council of Australia, *Unfair trading practices— Consultation Regulation Impact Statement*, submission to Treasury, 12 December 2023, p. 8.



The prohibitions should also apply to protect small businesses in their dealings with other businesses. Small businesses are equally vulnerable to the practices identified in the consultation paper and may suffer greater detriment than consumers if the behaviour adversely affects their business as well as their personal finances.

The ASBFEO acknowledges that the specific prohibition against subscription-related unfair practices would apply to business-to-businesses transactions, which we support. However, we strongly recommend that the proposed prohibitions in relation to drip-pricing, dynamic pricing and online account requirements, and barriers to gaining access to customer support should similarly operate to protect small businesses in their dealings with other businesses.

In addition, we recommend including additional specific prohibitions to address problematic conduct experienced by small businesses. As noted above, behaviour that includes touts that are then not included in executed contracts could also be specifically prohibited.

Application to business-to-business dealings

The ASBFEO favours the proposed general and specific unfair trading practices approach, both to capture business-to-business transactions and to ensure the consumer protections also to apply to small businesses. As noted in the consultation paper, bargaining power imbalances, and a lack of resources or time to challenge actions in court, mean that small businesses face many of the same challenges as consumers when it comes to experiences of unfair trading practices.

Additionally, small businesses have a higher exposure to financial consequences if they are subject to unfair trading practices. A pertinent example is a small business acting on a larger customer's instruction to provide a certain volume of goods, only to have the large customer upon delivery inform the small business that there is an oversupply and then offer a reduced price, resulting in the small business either incurring a financial loss for the investment or barely breaking even.

We do not agree that a staged approach be adopted for the introduction of a general prohibition on unfair trading practices. While the consultation paper suggests that delaying the extension to small business would allow for the development of case law and achieve commercial certainty, the ASBFEO considers that taking a proportionate approach to compliance would achieve that purpose (see comments under recommendation 4 below). Further, the types of business-to-business dealings that would come within the prohibition would be different in character, such that the case law which may have developed would not be relevant or materially assist.

The consultation paper states that whether any specific protections applying to business-to-consumer transactions would be available to protect small business in their dealings would be considered on a case-by-case basis. We do not agree with this approach and recommend that the prohibition should apply immediately to small business whether in business-to-business dealings or in circumstances where the business comes within the definition of consumer.

Penalties

Recommendation 4: The ASBFEO recommends that civil penalties for breach of the general or specific prohibition should apply immediately, and that small businesses be provided with guidance on how to comply with the new provisions and given the opportunity to correct their behaviour before a penalty is imposed.

The ASBFEO agrees that should a general unfair practices prohibition be introduced it should carry a sufficiently high penalty to deter contraventions. However, we consider that penalties should only be applied after a person is notified of a breach and provided with guidance to allow them to



correct their behaviour. If a small business has been advised of non-compliance and does not correct the behaviour, then penalties should be applied. Such an approach would give businesses confidence in the operation of the law, while discouraging intentional and persistent unfair business practices.

Businesses need time to adjust to regulatory reform. Ensuring the legislation includes a grace period will provide businesses with time to improve their awareness and understanding and facilitate better compliance.

The ASBFEO advocates across government for right-sized regulation for small and family businesses, encouraging regulators to:

- understand the full suite of regulatory requirements affecting the sector
- ensure in all circumstances regulation is the minimum effective intervention necessary to achieve the desired standard or outcome.

Financial services

Recommendation 5: The Australian Government should extend any unfair trading practices prohibitions to all Australian Financial Services regulated under Australian Securities and Investment Commission Act 2001 to ensure alignment between the Australian Consumer Law and financial services law.

The ASBFEO is strongly in favour of extending any unfair trading practices prohibitions to financial services regulated by the Australian Securities and Investments Commission Act 2001 (ASIC Act) to ensure alignment between the Australian Consumer Law and financial services law. We agree with the points made by the Australian Consumer Law Committee in the Law Council of Australia submission to the consultation regulation impact statement. The Australian Consumer Law Committee notes that key consumer protections in the Australian Consumer Law are mirrored in the provisions of the ASIC Act; and therefore it would be preferable for any new provisions introduced into the Australian Consumer Law to similarly be replicated in financial services consumer protection law.

The ASBFEO agrees with the Australian Consumer Law Committee that a benefit of harmonious consumer protection laws for financial services and consumers of other goods and services would be that community education about legal rights and consumers' expectations and understanding about their legal rights could be aligned.²

In its submission to the consultation regulation impact statement, the Australian Securities and Investments Commission supported a whole-of-economy prohibition on unfair trading practices and uniform penalties for breaches of mirror provisions in the Australian Consumer Law and the ASIC Act. ASIC considers that:

[A] whole-of-economy reform will assist regulators to respond more effectively to perimeter and avoidance misconduct and complex business models that cross regulatory boundaries.³

The ACCC's submission to the consultation regulation impact statement also supported extending an unfair trading practices prohibition to the ASIC Act. It noted that a key principle of the

² Law Council of Australia, *Unfair trading practices— Consultation Regulation Impact Statement*, submission to Treasury, 12 December 2023, p. 16-17.

³ Australian Securities and Investments Commission, *Consultation regulation impact statement on unfair trading practices*, submission to Treasury, November 2023, p. 3.



regulatory framework is that general consumer protection provisions in the ASIC Act and the Australian Consumer Law mirror each other and only diverge where there is a sound policy basis to do so. This ensures that the same general consumer protections apply to all goods and services across the economy and reduces confusion about the application of the consumer law, including to products or services that may involve both financial and other elements.⁴

Similarly, AFCA supports:

[T]imely consideration of an economy-wide unfair trading prohibition, consistent with the objective of harmonising the consumer protection provisions in the ACL and the ASIC Act.⁵

AFCA has seen harmful business models that traverse financial and non-financial goods and services (including real property investment and motor vehicle finance; and observes that a broad prohibition against unfair trading can ensure that non-AFCA financial firms are held to similar standards as licensed firms, who must be AFCA members as a condition of their ASIC license.

We agree that it is not always clear whether a particular product is a financial product or service and can, in some cases, be a mixture of both. For this reason, a consistent approach from the outset is preferable to a staggered approach.

Our position is that if replicated in the ASIC Act, the unfair trading practices prohibition should extend to small businesses, who are just as likely to be subject to unfair conduct at the hands of financial services providers.

The ASBFEO Assistance team often receive requests for help from distressed small businesses to resolve a dispute with non-AFCA lenders. These cases are often in relation to unfair or egregious behaviour by financial service providers who have provided loans to vulnerable small businesses and have failed to act in good faith by not disclosing interest rates, fees and charges, securities taken and even the correct legal name of the finance company.

Commercial lending is not regulated by the *National Consumer Credit Protection Act 2009*, owing to the assumption that businesses irrespective of size either have the resources to acquire advice or already have the expertise available in their business. While consumers are provided with the highest levels of protection under the law, small businesses are left exposed to financial service providers that can exploit the limited protections for commercial finance.

If you require any further information, or have any questions regarding our submission, please contact the ASBFEO Policy and Advocacy team via email at advocacy@asbfeo.gov.au

ASBFEO position: The Australian Government should introduce a Federal Small Business and Codes List into the Federal Circuit and Family Court of Australia, to allow for timely, affordable and restorative outcomes.

The ASBFEO responds to requests for assistance from small businesses and family enterprises that are in dispute with other businesses or Australian Government agencies. We provide:

- information about dispute resolution options

⁴ Australian Competition and Consumer Commission, *Unfair trading practices, Consultation Regulation Impact Statement*, submission to Treasury, November 2023, p. 17.

⁵ Australian Financial Complaints Authority, *Response to Treasury's Consultation Regulatory Impact Statement, Protecting consumers from unfair trade practices*, November 2023, p. 2.



- access to mediation
- alternative dispute resolution processes under the Franchising, Horticulture, Dairy and Oil Codes of Conduct
- assistance with disputes with the Australian Taxation Office.

Alternative dispute resolution (ADR) can provide a cost efficient and timely way of resolving business disagreements. However, where disputes cannot be resolved through ADR, small businesses can face significant financial costs and delays if they seek relief through the Federal Court, as well as the risk of adverse costs orders.

The ASBFEO's Assistance function sees many small and family business complainants harmed by conduct that could well infringe existing protections under the Competition and Consumer Act, Australian Consumer Law and industry codes. Individual matters, no matter how egregious, are most unlikely to satisfy regulator investigation and enforcement guidelines or be deemed a priority for scarce publicly funded litigation budgets.

Accordingly, the ASBFEO proposes that the Australian Government introduce a Federal Small Business and Codes List into the Federal Circuit and Family Court of Australia, to provide small businesses with more feasible and timely means of enforcing legal rights, as well as facilitate enforcement action by regulators.

Such a List could potentially also offer a low-cost mechanism to finalise other claims such as unfair dismissal or adverse action claims that are unable to be resolved by the Fair Work Commission through no fault of the employer; for example, because the employee refuses consent to conciliation or arbitration, which would normally progress to the Federal Court.

Disputes appearing on the list could be capped at \$1 million (award or fine) and delivered via online hearings including pre-hearing mediation, significantly reducing the time and cost burden on a small business. The list could also operate on an 'own costs' basis and allow application for 'no adverse costs' orders, like that of Part IV of the Competition and Consumer Act.

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman