9 July 2026

Jason McDonald
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKS ACT 2600

via email: consumerlaw@treasury.gov.au

Dear Mr McDonald

Unfair trading practices protections for small businesses

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) welcomes the opportunity to provide a submission to Treasury's consultation on *Unfair trading practices protections for small businesses*.

Small businesses are often subject to unfair trading practices, practices that typically arise where there is a power imbalance, where the other party acts in a manner contrary to reasonably assumed terms and commercial practices, and which causes the small business financial or other detriment. In fact, many small businesses have characteristics and vulnerabilities akin to an individual consumer, particularly businesses from culturally and linguistically diverse backgrounds.

For this reason, the ASBFEO has long advocated for unfair trading practices protections for small business with protections applying to both consumer transactions and business-to-business dealings.

Extending the consumer general prohibition to small businesses

The ASBFEO strongly supports extending the proposed unfair trading practices general prohibition to small business consumers.

Small businesses —which includes sole traders— are regular consumers of goods and services and have many of the characteristics and vulnerabilities of individual consumers. Many small business owners are time and resource constrained and have a limited capacity to discern when unfair conduct is being used in the supply of goods or services, and to protect themselves against the resulting detriment.

We do not consider any adjustments are needed to the general prohibition. While a power imbalance can often exist between the supplier and small business consumer, it may not be present in all instances where there is unfair conduct and should therefore not be a requirement of the general prohibition. Also, the general prohibition should not exempt conduct deemed reasonably necessary to protect a supplier's legitimate interests. While unfair business practices typically occur where a business acts in a manner that is *not* reasonably necessary to protect its commercial interests, exempting all conduct that is deemed reasonably necessary risks giving a green light to conduct that is otherwise unfair and causes material detriment.

Extending the consumer general prohibition to small businesses would provide important protections against conduct that manipulates or unreasonably distorts the environment in which small businesses make purchasing decisions. This would complement the unfair trading protections small businesses will have in relation to subscription traps and drip pricing commencing 1 July 2027.

Unfair trading practices protections for small businesses in business-to-business dealings

The ASBFEO strongly supports introducing a new unfair trading practices protection for small businesses in business-to-business dealings. Businesses should be prohibited from engaging in unfair conduct towards a small business that causes them material detriment, for example, by introducing features into a business dealing that increases the power imbalance or reduces competition, or fails to follow through on reasonably assumed terms and commercial practices.

Our advocacy is informed by unique insights into business-to-business conduct gained through assisting small businesses to access dispute resolution services when in dispute with other businesses, and through our engagement with small business stakeholders across the ecosystem.

Over recent years, successive governments have taken action to improve conduct in business-to-business commercial relationships, particularly in circumstances where one party holds significantly greater bargaining power relative to the other party. This includes the extension of unfair contract terms protections to small business, and amendments to strengthen industry codes of conduct.

For example, unfair contract terms reforms have provided small businesses with important protections against harmful contracting practices, particularly where proactive regulatory action has led to the removal of potentially unfair terms in standard form contracts. However, this reform does not protect small businesses from conduct that is not covered by a contract, but is nevertheless unfair in the circumstances, or does not follow the original intent of the agreement struck. This unfair conduct can cause the small business material detriment (financial or otherwise) and, in circumstances where the small business has little possibility of recovering the loss, can have long-lasting impacts on the health of the business and its owner.

Past reviews into sectors where there are known power imbalances between contracting parties have shown that multi-year contracts and small business' dependency on a single, ongoing commercial relationship for its viability can enable the business with greater power to engage in conduct that benefits them exclusively and at the expense of the other business. In some sectors —such as franchising— this has seen the introduction of an industry code of conduct, but given the dynamic is not unique to those sectors there is a clear need for an economy-wide small business protection against unfair trading practices in business-to-business dealings.

Below are some case studies which highlight the following types of unfair conduct:

- omitting, restricting or withholding material information
- providing material information in an unclear, opaque, ambiguous or untimely manner, or in a way that overwhelms —or is likely to overwhelm— the small business
- unduly pressuring, obstructing or undermining the small business into making an economic decision
- making extravagant sales touts that are known to be untrue, with the contract containing a whole-of-agreement clause stating that any claims made outside the contract are not binding
- transferring risk to the small business where they have no ability to control or manage that risk
- impeding the ability of the small business to exercise their contractual or other legal rights

- delaying payment to the small business beyond the terms of the supply contract, or otherwise unreasonably delaying payment for goods or services provided by the small business.

Case study 1: A multinational business incurred damage to property from a third-party courier service carrying the supplies of a small business supplier. Shortly after the event, the courier service was liquidated. Rather than dealing with the matter through insurance and rights of subrogation, the multinational demanded payment from the small business supplier under threat of terminating the commercial relationship, in an arrangement where the supplier's business was dependent on the ongoing relationship.

Case study 2: A small business freight company that contracted with a large manufacturing company was regularly provided incorrect consignments that resulted in larger trucks being unnecessarily deployed to deliver loads, at considerable cost to the small business. The small business repeatedly requested the large company address the error for future consignments, however, the large company responded that a change in its computing system meant it was too difficult to access information relating to older consignments and declined to investigate, incurring significant ongoing costs for the small business. This matter was eventually resolved through a settlement with the assistance of the ASBFEO.

Case study 3: A large company supplied a small business with products without notification per the terms of the contract. The small business disputed the delivery on the basis that it was not notified and that the supply of products with a short expiry date would incur a loss for the small business. While the matter was in dispute, the large company applied penalty interest and charges on the small business' account.

Case study 4: A small business that had entered into a short-term commercial mortgage facility with a non-AFCA lender commenced a dispute while interest penalties were accruing. The lender ceased all communication with the small business with no incentive to engage due to the security held and rapidly increasing interest and penalties.

Case study 5: A small business contracted with a major multinational search engine optimisation (SEO) corporation for online marketing services. The small business maintains it was told it would receive a return on investment (ROI) of 500% during the initial sales pitch, which was unrealistic and not obtained. The small business sought to cancel the contract due to financial hardship, but the SEO corporation maintained it never promised a 500% ROI and demanded the full amount be paid.

Given the range of unfair conduct highlighted by these case studies, the ASBFEO considers there is a strong case to introduce an unfair trading practices protection for small business in business-to-business dealings. A well-designed general prohibition would provide the flexibility to capture the range of unfair conduct and could be complemented by a 'grey list' of practices to guide businesses, regulators and the courts regarding the type of conduct that is prohibited.

Small business threshold for unfair trading practices protections

To minimise regulatory complexity and compliance across related areas of commercial activity, the ASBFEO advocates for consistent eligibility requirements wherever possible. We therefore support the unfair trading practices protections having the same small business definition as applies to the unfair contract terms protections (fewer than 100 employees and an annual turnover less than $10 million), ensuring a consistent threshold across the ACL.

The ASBFEO also advocates for the application of the full range of ACL remedies, including pecuniary penalties, and an alignment with the maximum civil penalty.

Unfair trading practices in financial services

The ASBFEO strongly advocates for the extension of unfair trading practices protections to financial services regulated by the *Australian Securities and Investments Commission Act 2001*.

The ASBFEO regularly receive requests for assistance from small businesses unable to service their loan and in circumstances which appear to show unfair conduct by the lender. Examples of such conduct —usually by a non-AFCA lender— include extending finance where there was no realistic means of servicing the loan, inadequately disclosing the terms in the finance contract, opaque interest and penalty clauses that obscure the significant cost of the loan, pressuring the business into signing the contract and, after caveats are placed on property securing the loan, becoming unresponsive to the borrower seeking to adjust or cancel the loan.

When such a loan goes into default, the lender often redirects any payments the small business has made against the principal and interest to paying the default penalties first, so the loan remains in default until all penalties are paid. Penalties are commonly applied on a daily basis and can be as high as $1,000 per day once a loan has been in default, even for a short period. This can result in substantial detriment to the small business borrower as, once the loan is in default, it can quickly spiral to the point where they are unable to service the loan and the security is then accessed by the lender.

If you require any further information, please do not hesitate to contact the Policy and Advocacy team via email at advocacy@asbfeo.gov.au.

Yours sincerely

Lynda McAlary-Smith

Australian Small Business and Family Enterprise Ombudsman