



By email: consumerlaw@treasury.gov.au

To whom it may concern

Thank you for the opportunity to provide feedback on protecting consumers from unfair trading practices under the Australian Consumer Law (ACL).

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides advice, advocacy and affordable dispute resolution services to small businesses across NSW.

The Commission does not advocate for a particular option proposed, though encourages for the preferred option to be tested against the problem statement identified in the consultation regulation impact statement (CRIS).

Supporting small businesses to understand their rights and obligations

A common theme that arises in small business feedback and representations to the Commission is a lack of awareness in relation to their rights and obligations under the ACL, as a supplier or alternatively, as a small business consumer.

A challenge relating to the development of a prohibition on unfair trading practices is that it could provide a false sense of the rights and obligations of small businesses. The Commission has observed instances where rights relating to the unfair contract term (UCT) provisions can be misinterpreted on the basis that a contract term is perceived as 'unfair' without necessarily meeting the requirements of a UCT as defined in the ACL.

The prospect of a prohibition on unfair trading practices is likely to give rise to similar issues. Consumers may misperceive their rights as extending further than what the law itself provides for, on the basis that if they perceive conduct to be 'unfair', it is therefore prohibited.

To mitigate risk, a prohibition on unfair trading practice should be carefully designed to provide as much clarity over the rights and obligations of consumers and suppliers so that appropriate guidance and information can be provided.

The Commission acknowledges the intent of a potential prohibition on unfair trading practices is not to capture all forms of conduct that may be perceived as unfair, but rather to prevent the subset of unfair conduct that is recognised as particularly egregious (but difficult to address through existing provisions such as unconscionable conduct).

Subject to the scope and nature of any proposed prohibition, the Commission would encourage consideration of whether 'unfair trading practices' remains the most appropriate descriptor of the conduct prohibited, particularly if the provision is intended to only captures a subset of practices perceived as 'unfair' in the Australian context.

Digital platform issues

The Commission welcomes the focus on the experiences of consumers and businesses within the digital economy. The Commission has received representations from many small businesses in relation to digital platform issues that involve unfair trading practices. These issues tend to concern the following:

- Fake or false reviews
- Fraudulent refunds requested by consumers
- Unfair contract terms
- Poor or no communication with platforms leading to lack of access to dispute resolution
- Payment delays
- Business products being misrepresented
- 'De-platforming' – exclusion from platforms without good cause
- Difficulties cancelling membership or subscriptions.

When businesses are suspended or deactivated from a platform, the sudden lack of access to their brand and customers can be a stressful experience, which may also negatively impact cash flow. In these cases, platform providers often require business operators to report the issue via the platform, which they are unable to do as their access to the platform has been restricted or removed in the first instance.

The July 2023 Small Business Momentum Survey¹ conducted by the Commission found that 34 per cent of businesses surveyed had experienced misinformation or disinformation about their business while conducting operations on a digital platform. This may take the form of products being misrepresented by digital platform providers to consumers or the business being misrepresented by fake reviews. The Commission's mediation team found that in general, small business operators are suspicious of digital platform providers policies and lack confidence in platform escalation processes.

Additionally, the Commission has received representations from small business owners that have attempted to cancel their membership or subscription with a platform only to be faced with onerous processes, in addition to little or no support from the platform's customer service operators. The platforms are often requiring the small business owners to jump through impractical and unnecessary hoops to complete simple processes such as cancelling a membership, resulting in significant stress to small business owners with potential negative cashflow impacts.

A prohibition on unfair trading practices should be tested against its capability to address these concerns. The Commission would encourage contemplation of a more specific regulatory framework if a general prohibition against unfair trading practices is unlikely to be an appropriate mechanism to address common concerns.

¹ Small Business Momentum Survey Report July 2023. Available at: <https://www.smallbusiness.nsw.gov.au/resources/reports/small-business-momentum-survey-report-july-2023>

General prohibition

While the Commission notes the benefits of a principle based general prohibition of unfair trading practices such as allowing the law to keep up with the evolving market conduct, especially with technology and commercial changes, it can also, create ambiguity and cause uncertainty for many small businesses. As previously noted, the Commission consistently receives feedback from small businesses in relation to challenges with understanding rights and obligations under the ACL.

It is essential to design a general prohibition provision in a manner that does not create unnecessary uncertainty for business. It must be clear that the prohibition also encapsulates business to business dealings. Case law illustrates instances where conduct did not satisfy the threshold of unconscionable conduct, however, was still considered unfair. The Commission sees the benefit of the general prohibition for instances like these where the conduct falls short of the threshold but still causes detriment, as well as for certain issues raised with the Commission in relation to the practices of digital platforms.

However, a general prohibition can have shortcomings in that it can be difficult to determine the scope and nature of conduct to which the prohibition applies. The introduction of a non-exhaustive list of specific prohibited practices would complement the general prohibition by giving some certainty and guidance to consumers and small businesses. A clear issue with a standalone general prohibition is the time associated with generating precedent. Given the general nature, it would be some time before the courts had provided sufficient guidance to act as precedent for the vast range of unfair practices the provision is aiming to encapsulate. A non-exhaustive list of specific prohibited practices would alleviate some of the ambiguity.

Access to justice

The costs and resources associated with commencing legal proceedings can dissuade small businesses from seeking resolutions by taking legal action. The respondents of these types of claims are generally better resourced which can intimidate small businesses and lead them to conclude that the cost to dispute an issue will outweigh the benefit, rendering the claim unviable.

Alternative Dispute Resolution (ADR) is a practical option for most small businesses due to the lower costs and ability to deal with a matter quickly. However, ADR may not be useful in all circumstances given many forms of ADR are not compulsory and are non-binding. Voluntary ADR processes do not incentivise participation of the larger entities leaving small businesses in dispute with the choice of not pursuing a resolution or commencing lengthy and expensive legal proceedings.

The NSW Civil and Administrative Tribunal (NCAT) has jurisdiction to determine a consumer claim up to the value of \$100,000. While it is clear that NCAT can hear disputes between consumers and businesses (as suppliers), it is not as clear for small business consumers whether their business to business disputes or 'small business consumer' claims fall within the scope of the jurisdiction. Businesses that satisfy the consumer definition in the ACL may fall under the 'consumer' category used by NCAT, however, a 'consumer' is generally perceived as an individual. Information provided on the NCAT and NSW Fair Trading websites does not expressly state that small business consumers can access NCAT and file a consumer claim.

The Commission encourages the further assessment and evaluation of the current ADR mechanisms to ensure they are available and well-publicised for both consumers and small businesses.

Thank you for the opportunity to make a submission. The Commission supports improvements to the ACL framework to ensure small businesses are adequately protected. If you require further information, please contact Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission

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