

Our ref: QSBC-7823

Director, Consumer Policy and Products Safety Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600
(via email: consumerlaw@treasury.gov.au)

29 November 2023

To whom it may concern,

**Re: Protecting consumers from unfair trading practices – Consultation Regulation
Impact Statement**

The Queensland Small Business Commissioner (QSBC), including the Small Business Commissioner and supporting office, welcomes the opportunity to provide feedback to the Australian Government in relation to potential regulatory approaches to protect consumers, including small businesses, from unfair trading practices under the Australian Consumer Law (ACL).

The QSBC is established under the *Small Business Commissioner Act 2022*, with objectives to enhance the operating environment for small businesses in Queensland, and to reduce the times and costs of resolving disputes involving small businesses. This includes advocating on behalf of the 473,000 small businesses in Queensland, representing more than 97% of Queensland businesses¹.

Unfair trading practices disproportionately impact small businesses, compared to big businesses. Small businesses generally have less resources at their disposal to both identify and challenge potential unfair trading practices. The power imbalance between small and big businesses allows big businesses to exploit these vulnerabilities and leverage the legal system to their advantage. This places small businesses at a disadvantage – reducing their efficiency, competitiveness, and choices as a consumer in their own right.

In response to the questions outlined in the Consultation Regulatory Impact Statement (RIS), the QSBC provides the following feedback and recommendations for consideration.

¹ ABS 8165 Counts of Australian Business, including entries and exits as of 30 June 2022. Australian Bureau of Statistics, Canberra.

Key focus questions

8: What is your preferred reform option, or combination of options? What are your reasons?

The QSBC strongly supports Option 4 (Introduce a combination of general and specific prohibitions on unfair trading practices), as outlined in the Consultation RIS.

Inserting a list of specific unfair practices into the ACL will provide all parties with more clarity on what constitutes prohibited conduct. Combined with a general prohibition, which provides a broad and flexible principles-based prohibition, this will provide a comprehensive level of protection for consumers and small businesses. By clearly prohibiting specific practices, small businesses can better protect their interests (and will be less likely to unknowingly be engaging in unfair trading practices themselves). This option will reduce the reliance on the courts for determinations - saving small businesses time and money, and lessening the impact disputes pose on mental health and business relationships.

The QSBC also notes that this combined approach aligns with the regulatory approach of several other international jurisdictions, including Singapore, the European Union, and the United Kingdom - which would bring Australia in line with prominent trading partners and create a more competitive market for small businesses trading internationally.

The QSBC notes that the other options outlined in the RIS offer no, or much weaker, protections for small businesses:

- Option 1 (Status quo): The QSBC strongly opposes this option, which would see the continuation of harmful commercial practices (and emerging practices) that are not currently covered under the ACL, and which negatively impact small businesses. Under the current arrangements, small businesses have limited options for redress and regulators are limited in their ability to respond to unfair trading practices.
- Option 2 (Amend statutory unconscionable conduct): The QSBC strongly opposes this option. While broadening the ACL to include 'unfair conduct' as a factor that must be considered in determining 'unconscionable conduct' is a positive step, this option relies on a consumer, small business, or regulator seeking determinations by the courts. For small businesses, this option is financially unfeasible as they are unlikely to afford the \$130,000 average cost to pursue the dispute through the courts², and is therefore unlikely to be a deterrence against big business engaging in unfair conduct.
- Option 3 (Introduce a general prohibition on unfair trading practices): The QSBC supports this option in-principle; however, believes it falls short of the more comprehensive solution proposed in Option 4. While a general prohibition does allow for a broad and flexible principles-based approach and would greatly expand on the limited protections currently offered under the ACL, it is still reliant on judicial precedents. As outlined in Option 2 above, this would require small businesses and regulators to seek determinations through the courts, so may be a limited deterrent against big business engaging in unfair trading practices.

² Australian Small Business and Family Enterprise Ombudsman. *Access to Justice Report: November 2020*, 8.

Option 4 questions

4.2: Are there any consequences or risks that need to be considered when pursuing this policy option? Please provide details.

The QSBC notes that, in order for Option 4 to be effective, it is imperative that small businesses are able to seek determinations on unfair trading practices in an affordable and timely manner.

The QSBC therefore recommends that Option 4 be accompanied by the establishment of a Federal Small Business List in the Federal Circuit Court of Australia - to provide affordable, determinative, and timely access to justice for small businesses and regulators. This recommendation has previously been made by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) on several occasions, including in their submissions to the Treasury Laws Amendment (Competition and Consumer Reforms No.1) Bill 2022, and the Inquiry into promoting economic dynamism, competition, and business formation.

As per ASBFEO's previous recommendations, the establishment of a Federal Small Business List would empower small businesses to seek redress when subject to such unfair conduct – bypassing the current barriers of cost, risk, and delays associated with formal legal channels. ASBFEO have proposed that the Federal Small Business List be capped at disputes valued at \$1 million, utilise online hearings, operate as a 'no costs' jurisdiction, include reduced evidentiary requirements, guarantee a quick turnaround time, and include compulsory pre-hearing alternative dispute resolution. This reform would seek to enhance access to justice for small businesses and enable regulators, particularly the Australian Competition and Consumer Commission (ACCC), to efficiently address instances of anti-competitive behaviour, establish precedents, and enforce regulatory mechanisms.

4.3: Would this policy option place any additional financial or administrative cost or burden on small businesses and/or consumers?

The QSBC acknowledges that Option 4 is likely to have the highest regulatory impact of all options presented. Although small businesses will greatly benefit from the increased protections, some small businesses may themselves be currently engaging in unfair trading practices. These businesses may incur some compliance and training costs to understand the proposed changes, rectify changes, and ensure they are not engaging in them in future. It is imperative that small businesses are well supported to understand and comply with the new regulations when introduced. The QSBC recommends that regulators take an education-first approach when dealing with any small businesses engaging in unfair practices.

While there will be some negative impacts on small business, the QSBC believes that there will be an overall net-benefit to small business through the introduction of a clear list of specific prohibited practices and a broader general prohibition on unfair practices. If combined with the introduction of a Federal Small Business List in the Federal Circuit Court of Australia (as outlined in 4.2 above), this will provide small businesses with the ability to avoid unfair practices, defend their business interests, and provide them with access to justice if required.

4.4: Do you consider a specific prohibition on unfair trading practises in the form of a list or schedule of unfair conduct would be an adaptable policy option for technological change?

The QSBC considers a list / schedule with specific prohibitions to be an adaptable policy option to allow for changes and emerging practices, especially in the digital economy; however, to remain relevant and effective, a regular review timeframe of the list / schedule should be mandated under the ACL. A regular review, in consultation with key stakeholders, will ensure the list / schedule of specific prohibitions remains relevant and addresses emerging practices and changing business models.

4.5: Do you consider a specific prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?

The QSBC considers that a specific prohibition on unfair trading practices would sufficiently deter businesses from engaging in unfair conduct, provided it is supported by appropriate education material, civil penalties and the establishment of a Federal Small Business List in the Federal Circuit Court of Australia (as outlined in 4.2 above). It is also imperative that the regulators are empowered and sufficiently resourced to raise awareness of, educate about, and enforce, the regulations.

4.6: What types of unfair trading practices should be specifically prohibited? Should they be industry specific or economy-wide?

The QSBC supports an economy-wide prohibition on specific unfair trading practices, rather than industry specific prohibitions. Small businesses are time poor and have reported that finding information, monitoring changes, and understanding their obligations to be some of the most costly and burdensome parts of regulatory compliance³. Making the prohibitions economy-wide will simplify the reforms and reduce confusion for small businesses, and will ensure an even-playing field across all industries. An economy-wide prohibition also aligns with the ACCC's recommendation in an interim report of the Digital Platform Services Inquiry⁴.

Thank you for the opportunity to provide this feedback. If you have any further questions, please contact Rebekah Godbold, Principal Policy Officer, Strategy and Engagement on or email .

Yours sincerely

Dominique Lamb
Small Business Commissioner

³ Business Chamber Queensland. *Efficient Regulation Report 2023: Measuring the red tape burden on Queensland business*, 13.

⁴ Australian Competition and Consumer Commission. *Digital Platform Services Inquiry Interim Report No. 5 – Regulatory reform*, 64.