



**Small Business
Development Corporation**

Our Ref: D23/8967

Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: consumerlaw@treasury.gov.au

To the Director Consumer Policy and Product Safety Unit

PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES

The Small Business Development Corporation (SBDC) welcomes the opportunity to make this submission to the Commonwealth Treasury's Consultation Regulatory Impact Statement (CRIS) 'Protecting consumers from unfair trading practices'.

1. Background

The SBDC is an independent statutory authority of the Government of Western Australia, established to support and facilitate the growth and development of small businesses in the State¹.

Under the leadership of the Western Australian Small Business Commissioner, the SBDC provides a range of services to assist and empower small business operators in this State when they are faced with uncertainty or unfairness in their business, particularly when dealing with another party. These services are tiered based on the level of support needed, and include:

- information and guidance through online channels (including the SBDC's website), workshops, business advice and outreach services;
- dispute resolution service, which includes pre-mediation case management and mediation if required; and
- through the Business Investigation Unit, the SBDC is able to examine behaviour impacting negatively on the commercial interests of small businesses – particularly when there is a power imbalance between parties.

Through these various touchpoints with small businesses, the SBDC is able to monitor the Western Australian small business landscape and constructively contribute to government reviews and policy development. To that end, the SBDC's feedback on the CRIS follows, in line with select focus questions.

¹ The views presented here are those of the SBDC and not necessarily those of the Western Australian Government.

2. Focus Questions: Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide evidence to support your position.

Do you have any specific information, analysis or data that will help measure the impact of the problems identified?

As identified in the CRIS, there are a range of business practices occurring in Australia that fall outside the purview of existing regulatory frameworks and legislated protection thresholds. The SBDC agrees with this finding and asserts that these business practices can unfairly impact small businesses and their ability to trade, make fair decisions, or compete with other businesses in the market. This conduct has been able to continue due to a lack of adequate coverage by the Australian Consumer Law (ACL), unfair contract term provisions and State-based legislation.

There have been calls for the prohibition of unfair trading practices in Australia for decades, both by small business consumers, their representative groups (including the SBDC), the Australian Competition and Consumer Commission (ACCC)², the Productivity Commission³ and in the Consumer Affairs Australia and New Zealand Review of the Australian Consumer Law⁴. The ACCC has repeatedly raised concerns that existing legislative provisions under the ACL might not be sufficiently broad to protect small businesses and consumers from current and emerging trading practices that are unfair.

The SBDC has previously advocated for more to be done to protect small business operators from the unfair behaviour of landlords, franchisors or other commercial partners. In our submission to the 2023 Franchising Review⁵, for instance, the SBDC outlined a range of disputes managed by the SBDC that could be considered to have an unfair element given the imbalance of power between franchisors and franchisees. These include:

- contractual matters, including unfair contract terms, breaches of the franchise agreement or the Franchising Code, negotiation of a new franchise agreement and negotiation of exiting from a franchise agreement
- misleading and deceptive representations prior to the purchase of a franchise business (such as in relation to guaranteed income, work hours or location of work)
- franchisors withholding payments to franchisees for contracted work (ie. cleaning), or refusal to pay moneys owed (for example related to a negotiated cessation of a franchise agreement)
- supply issues, including third line enforcing
- use of marketing funds
- issues relating to the sale of the franchise business, including commercial leasing disputes.

² ACCC Digital Platforms Inquiry, Digital Advertising Services Inquiry and Perishable Agricultural Goods Inquiry.

³ Productivity Commission Review of Australia's Consumer Policy Framework, 2008.

⁴ Australian Consumer Law Review 2017. Available at: <https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review/final-report>

⁵ <https://treasury.gov.au/review/franchising-review>

In the SBDC's submission to the 2022 statutory review of the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (the CT Act), the SBDC supported broadening the matters that the Western Australian State Administrative Tribunal (SAT) could consider in determining unconscionable conduct as well as the inclusion in the CT Act of prohibitions of specific conduct that is considered clearly unfair and being such a significant problem in the retail tenancy market that it warrants legislative intervention⁶.

In that submission, the SBDC argued that the prohibition of unfair trading practices would lower the bar that is required to meet the unconscionable conduct threshold and arguably improve conduct standards. It would also increase the discretion of the SAT and the courts, making the law more flexible and responsive to evolving commercial practices and community expectations.

The Western Australian Government has yet to release its report into the review of the CT Act so it is not known what position will be taken in relation to unfair trading practices in the State's retail tenancy market. There are many businesses that are not covered by the CT Act however, so despite any potential State-based regulatory strengthening, the issue of unfair trading practices would still need to be addressed uniformly in order to protect the broader small business sector.

In relation to the possible scope of unfair trading practices, the SBDC can share examples of conduct experienced by our small business clients that appear to be unfair. The SBDC is unable to comment on the systemic nature of these types of conduct and does not necessarily claim that they should be specifically listed within unfair trading practice legislation.

The SBDC presents these examples to the Treasury to illustrate the many ways small business operators are disadvantaged when dealing with suppliers, landlords or competitors, and to help inform the determination of what an unfair trading practice is.

Theme One: Limited avenues for contact and support

The below examples illustrate the unfairness for small business customers when a supplier has limited avenues to be contacted and delays responding to the complaint. Small business customers are often left unable to resolve issues, leading to frustration, financial loss and abandonment of efforts.

- Google Ads and their decision to restrict small business advertising campaigns due to alleged breaches of their advertising policy, and then having a lack of communication avenues to discuss or appeal these decisions. The SBDC's business advisors report that the team at Google handling policy restrictions are unreachable by phone or email and they offer no detailed explanation for decisions beyond generic links to help pages. The SBDC has seen numerous businesses experiencing significant revenue impacts from these alleged policy breaches, despite the small businesses meeting the policy requirements. With no detailed feedback from Google, these businesses are left unable to advertise, while their competitors continue to run similar ads.
- Google My Business and difficulties in modifying listings. Many of the SBDC's clients have struggled with Google My Business, for example one client moved

⁶ SBDC submission available upon request.

premises and found their listing marked as “Permanently Closed” by Google, featuring an old, disconnected phone number. This led to a more than 50% drop in enquiries. When the business operator tried updating their details with Google, verification was required via the disconnected phone, with no alternative contact method to discuss the issue with Google.

- Meta (Facebook) suspending access to profiles, and then having no telephone support available. Facebook’s complaint resolution process is extremely challenging to navigate for business customers and can detrimentally impact their business through a decrease in online presence, the inability to remove scam reviews, update details or amend scheduled advertising campaigns. The SBDC has experienced these challenges when trying to seek removal of scam reviews. Requests have been logged numerous times, with these requests apparently being lost in the system, or simply ignored after a period of time. The SBDC is fortunate enough to have a marketing and communications team whereas the majority of small businesses do not, and trying to resolve a dispute can be near impossible. Another example with a ride share platform is outlined in Case Study One.
- Customer charges for delays caused by the seller. One example the SBDC has come across is a Sydney-based freight forwarding company that charges for storage on freight held beyond seven days. The issue lies in their lack of phone support and their official 24-hour email response policy, which often extends to 48 hours. Since multiple emails might be needed to resolve an issue, delays introduced by the company itself lead to customer storage fees.

Case Study One: Termination of contract by Rideshare Platform

The SBDC was approached for assistance by a contractor whose contract with an international rideshare company (Uber) was terminated. The termination was based on the allegation that he had shared access to their online proprietary system to another party. The company had allegedly detected multiple users logged into the system simultaneously on a particular date. The contractor disputed that he had given access to other users or used the system incorrectly.

As a result of this allegation, his contract had been terminated immediately, as was his access to the system, preventing him from acquiring work. This termination led to a loss of income estimated at a minimum of \$4,500 per month. The contractor had been working for the company for approximately five years in Brisbane before relocating to Perth in late November 2022.

The Dispute

Initially, the contractor attempted to resolve the matter but was only able to engage in an online chat with a representative from the company’s branch in the Philippines. During the conversation, he was informed that the company had investigated and made the decision to permanently terminate his contract.

The contractor was unable to provide the SBDC’s case manager with any contact details for the company, which is often the case with large conglomerates operating in Australia. The case manager contacted the company’s registered office, which happened to be their accountant. The accountant mentioned that she had been handling the company’s financial matters for years but did not have a specific contact person to refer the case manager to. She did however forward the email to the

company's legal representative. In response, the legal representative reiterated that they would uphold the decision to terminate the contract. Furthermore, they expressed their unwillingness to engage in further dispute resolution.

The Outcome

The case manager sent another email providing a more detailed explanation of the events that took place on the relevant day and requested that the contractor be able to resume his contract. In response, the company advised that they had decided to reinvestigate the matter. Following this investigation, the company stating that access to the account would be reinstated within 48 hours.

Theme Two: Commercial leasing and franchising

- Shopping centre landlords introducing an unsustainable level of competition against an existing business within a shopping centre. By way of example, one of the SBDC's clients had entered into a lease in a newly established metropolitan shopping centre under the impression that he would be the only butcher. A year later, there were an additional seven butchers operating from the shopping centre, with the landlord clearly having no intention of honouring his misleading promises to the tenant.
- Where a shopping centre has an embedded electricity network and rather than the landlord on-selling the electricity to tenants for the retail price (or they may have negotiated a cheaper tariff rate), they add a margin onto the bill. Due to the nature of the embedded network, tenants have no ability to purchase electricity direct from the retailer and have historically had no transparency regarding the on-sell margin.
- Shopping centre lease terms that require contributions to marketing funds (with contributions generally a percentage of a tenant's rent) that the small business tenant might derive no benefit from. The SBDC has observed that shopping centre marketing funds generally go largely towards marketing officer wages rather than advertising or marketing campaigns, and when these campaigns are run they often focus on the larger tenants.
- Landlords and franchisors using related companies to provide contracted services (such as cleaning and maintenance) to small business tenants or franchisees (which the tenant or franchisee is obligated to use) at a higher charge than could be obtained from the market. The SBDC has observed that this practice is generally undertaken by smaller landlords.
- Wide discretion in contracts to allow the landlord or managing agent to engage a supplier for works payable by the tenant, of which the costs are exorbitant. For example, a managing agent passing on to the tenant the costs of appointing a valuer that are unfairly excessive.
- Delays in the return of security deposits and the discharge of securities such as bank guarantees at the end of a lease or franchise agreement. An example is where a tenant pays operating expenses in instalments and the lease terminates at the beginning of a new financial year. The landlord keeps the bond until after they have reconciled the operating expenses (and had them audited) after the end of the financial year. This results in the tenant not receiving their bond back for over 12 months.
- Early termination of a lease or franchise agreement is also a topic that the SBDC's clients have raised, where a power imbalance is at play and the small

business operator can be treated unfairly. Without disregarding the legitimate rights of a landlord and sanctity of contract, it could be considered unfair for the refusal of early termination of a lease various circumstances including:

- Death of the tenant, particularly where the individual is crucial to the business (for example car mechanic) and there are no suitable employees or family members to take over management of the business.
- Domestic violence, particularly between partners of a business. In this instance, where the safety and wellbeing of the individual/s involved is paramount, a swift and sensitive lease termination process is required.
- Sale of the premises to a new owner. In this instance, if a lease is not registered or is a short-term lease, the new owner may have the option to terminate the lease. This same right is not afforded to a tenant however, which could be argued is unfair.

Theme Three: Payment times

- Excessively long payment times by a large customer to a small business supplier. This unfair practice was identified in the final report of the statutory review of the *Payment Times Reporting Act 2020*⁷, with the report outlining that unfair conduct by large businesses relating to the payment of their small business suppliers could result in financial and non-financial costs to small businesses. Other unfair practices related to payment times includes a business-to-business contract which allows one party to extend its payment term at any time, a term in a contract which forces or coerces one party to use supply chain finance to mitigate unfairly long payment terms or use a supplier portal which imposes additional costs on the supplier. One of the findings in this report was that small businesses are not being protected from unfair payment-related practices.

Theme Four: Auto renewal of contracts

- The SBDC's business advisers have observed that small business operators are experiencing automatic renewal of contracts, which often have a direct debit payment plan in place and long contract terms. While this right to renew the contract may have been included in the initial contract and the supplier notifies the customer via email that this contract will be automatically renewed, quite often these emails are being missed due to the email going to a 'junk' folder, the email has been sent to a person who no longer works for the business, or the email has been overlooked by an extremely busy business operator.
- In a recent example, one of the SBDC's clients received notification of an auto renewal of a contract via a text message and email. The business operator replied to the email and text message stating that they did not want to renew the contract, however this was not accepted by the supplier as the email and text message were auto generated with a "do not reply" directive. The customer was subsequently required to go through a convoluted, multi-step process to cancel the contract.
- The SBDC argues that the practice of auto renewing contracts unfairly impacts the small business customer, even if auto-renewal notifications are in place. One option that could result in a more balanced commercial relationship is where the customer is required to undertake an action such as confirming the

⁷ <https://treasury.gov.au/publication/p2023-428993>

continuation/renewal of their contract. Consideration would also need to be given to ensuring there is a sufficient notification period and that the process of confirmation is not unduly burdensome for the customer.

Theme Five: Contractual matters

- Inducing small business consumers to pay for an extended warranty and misleading the consumer to believe these rights were above and beyond what they were otherwise entitled to under the ACL.
- Refusal to provide a copy of a contract. Refer to Case Study Two.

Case Study Two: Verbal contracts

A small business operator sought assistance from the SBDC to resolve a dispute related to a verbal contract. While verbal contracts are widely used, this case demonstrates the potential risks and associated unfair conduct related to the use of verbal contracts.

The Dispute

The small business operator contacted the supplier who offered business coaching services on a subscription basis (with an annual value of \$18,000). During the initial phone call, the supplier read the contract terms and conditions to the small business operator, obtained bank details and advised that upon receipt of the first payment, this would be deemed as contract acceptance. No written copy of the contract was provided to the small business operator, however the phone conversation was recorded.

A few months after entering this contract, the small business operator was dissatisfied with the services provided, requested a transcribed copy of the contract and a cessation of the direct debit fees. The supplier refused to provide the transcription of the contract citing commercial in confidence and refused to cancel the direct debit.

The Outcome

The SBDC's dispute resolution case manager was successful in obtaining a copy of the contract on behalf of the small business. Unfortunately, upon review of the contract, it was determined that the contract terms were being adhered to, although clearly aggressive sales tactics had been used when the contract was entered into. The small business operator sought to exit the contract which the supplier refused initially, however was willing to negotiate a reduction in moneys owed. The small business did not accept this offer and the supplier is now seeking reimbursement of the unpaid subscription fees.

Although the verbal contract of services was legally binding, the fact that the supplier refused to provide a copy of the transcribed contract could be considered unfair. As it was not an unsolicited agreement, cooling off periods were not applicable. The lack of written contract made it challenging for the small business customer to review the agreed services against what was being delivered.

Theme Six: Access to justice

- Small business operators that have a valid claim against a larger business for a remedy or financial payment (for example unpaid invoices) but rather than the

business paying what is due or acting in good faith, they seek to take advantage of their stronger financial position and drag the matter out through the courts. This is often a strategic tactic and intentional behaviour that seeks to financially cripple the smaller party. Refer to Case Study Three.

Case Study Three: Circumventing judicial processes

The following example illustrates how established dispute resolution avenues such as the *Construction Contracts Act 2004 (WA)* adjudication process and the SAT are ineffective when businesses with enough capital and legal representation proceed with frivolous counter complaints through the judicial system. The ultimate goal appears to be to exhaust the complainant's finances and subsequent ability to continue to fight to get back moneys owed. The SBDC has seen that the result of this behaviour is that many small business operators withdraw their adjudication claim to counter legal action or are forced into insolvency to avoid the high cost of defending counterclaims.

This case was referred to the SBDC's Business Investigation Unit by Adjudicate Today, which acted as the independent adjudicator appointed under the *Construction Contracts Act 2004* because they were concerned about the targeted and malicious conduct by the larger party.

The Dispute

A large accommodation provider engaged a small electrical business to perform electrical maintenance works at its accommodation facility. The accommodation provider was seeking to increase the bed capacity of its facility and had purchased second-hand generators from China to support this expansion. During the course of the work, the electrician advised that the generators were not fit for purpose and tagged them accordingly. The accommodation provider subsequently cut off these tags and used the generators, which resulted in an explosion and significant damage to the facility.

Following completion of the works, invoices to the value of \$70,000 were left unpaid and overdue by as much as 118 days.

The accommodation provider refused to pay the invoices, instead seeking \$42,936.45 (which shortly thereafter increased to \$61,574.50) in damages from the electrician for faulty generators.

The electrician submitted an application for adjudication under the *Construction Contracts Act 2004*. The adjudication determination was that the accommodation provider must pay the electrician the sum of \$69,033.01 plus interest of 6% per annum until payment plus costs of \$11,362.50.

The accommodation provider then proceeded to use the judicial system to avoid paying the electrician:

- The accommodation provider made an application to the SAT that: "...the decision made by Adjudicate Today be set aside, and that a decision is made by the SAT that the Applicant did not make any payment to the Respondent".
- The accommodation provider filed a Writ of Summons in the District Court of WA, claiming damages to the amount of \$242,747.00 from the electrician.

- The SAT then granted the accommodation provider leave to withdraw the proceeding, dismissed the application, and awarded \$2,350.00 to the electrician.
- Following correspondence from the electrician, the accommodation provider filed a Statement of Claim in the District Court of WA, increasing the damages claimed to \$360,842.83.
- The accommodation provider then filed an Application for a Judicial Review in the Supreme Court of WA, applying for a review of the Adjudication Determination and setting aside the Adjudication Decision.

The finding from the Judicial Review was that the accommodation provider's contestation of the jurisdiction of the original adjudication was unjustifiable and the application for a judicial review was rejected. The electrician was awarded \$96,000 and an additional \$90,000 in costs, totalling \$186,000.

The Outcome

The case took over two years to resolve, during which time the electrician had to return to fly-in, fly-out work to cover the mounting legal bills. The outstanding amount of unpaid moneys remains unresolved despite the legal matter being finalised. The emotional toll of this experience on the small business operator has been significant and is ongoing.

Theme Seven: Enforcement

- The SBDC's business advisory and dispute resolution teams are regularly contacted by small business operators seeking assistance with enforcement or remedy. A common example of this is in relation to the motor vehicle industry, with issues related to faulty vehicles or repairs.
- While these cases should be remedied by the dealer or repairer under their ACL, some are refusing to do so which is resulting in unfair outcomes for small business operators.
- Resourcing issues within the relevant State enforcement agency means that many of these cases are referred to the SBDC. While the SBDC's dispute resolution team does have a high success rate for resolution, unfortunately the service is voluntary and requires a willingness by both parties to be successful.
- Ultimately, with any unfair trading practice legislation that may be introduced, it will only be effective with adequate enforcement.

In conclusion, the SBDC broadly agrees with the representation and scope of unfair trading practices outlined in the CRIS, particularly in relation to the following six categories:

- targeting of vulnerable groups, recognising that small businesses are one of these vulnerable groups with, at times, very little bargaining power
- predatory or aggressive business conduct, including where this conduct is designed to circumvent legal avenues for recourse, avoid paying invoices or costs owed, or adhering to judicial decisions
- difficulty opting out or cancelling of services
- dark patterns and digital engagement practices
- misleading omissions and hidden information
- limited mechanisms for redress.

3. Focus Question: How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?

When determining the definition of unfair in relation to business practices, the SBDC considers it appropriate for the definition used within the unfair contract terms provisions of the ACL to be a natural starting point as illustrated below:

- [the conduct] causes a significant imbalance in the rights and obligations of one party, and
- [the conduct] is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the action, and
- [the conduct] would cause detriment (whether financial or otherwise) to a party.

Upon reviewing the examples listed in this submission, the definition could also be broadened to include the following components:

- the conduct significantly impairs the small business consumer's ability to make a decision, or
- the conduct challenges the consumer's ability to communicate in a fair manner with the supplier, or
- the conduct imposes unreasonable financial costs due to supplier delays or unreasonable timeframes for reconciliation of accounts.

The SBDC supports the application of international definitions where relevant to the Australian context. There may well be learnings from the application of these definitions overseas, with Australia able to improve on these definitions to address any limitations.

It must be noted that the SBDC's comments are made within the reality that in business-to-business dealings, one party having a better bargaining position over the other party is not inherently unfair, nor should it necessarily be legislated against, particularly when negotiation is available to both parties.

4. Focus Question: What is your preferred reform option, or combination of options? What are your reasons?

The SBDC has considered the policy options presented in the CRIS and most supports Option 4 – 'Introduce a combination of general and specific prohibitions on unfair trading practices'. The inclusion of a non-exhaustive list will help to provide some level of certainty to businesses regarding what constitutes an unfair trading practice, and the general prohibition will provide some level of safety to customers who have been the victim of unfair conduct not necessarily specified on the list.

The inclusion of this list in regulations would enable it to be updated over time to reflect any new unfair trading practices that evolve as a result of technological advancements or other changes to the operating environment.

The CRIS poses the question of whether unfair trading practices should be industry specific or economy-wide, to which the SBDC suggests the inclusion of both would be beneficial. Listing a range of trading practices that could be experienced by any

number of small businesses, whilst also listing industry-specific, or topic-specific conduct (such as those related to payment of invoices) may help to provide clarity for as many small businesses as possible.

The SBDC welcomes further consultation and discussion regarding the provisions that would be contained in any list of unfair trading practices.

5. Focus Question: Are there any alternative or additional reform options to those presented you think should be considered?

The SBDC has observed that in many instances, small business operators are experiencing conduct that appears to be unfair and could be dealt with through existing contractual or regulatory arrangements (such as the ACL or the CT Act). As previously mentioned, where an enforcement agency is not adequately resourced, small business customers are often unable to seek adequate remedy and are faced with pursuing private legal action.

While the SBDC does its best to support small businesses in Western Australia through the provision of a low-cost dispute resolution service, this remains voluntary and can be circumvented by a party unwilling to participate⁸. In the SBDC's opinion, there appears to be a need for stronger enforcement of the ACL by both Commonwealth and State-based regulators, particularly in relation to upholding the rights of small business consumers.

Nonetheless, small business access to information is critical to them better understanding their rights, what is fair and reasonable when dealing with another partner, and what is a legitimate unfair trading practice. Continued and enhanced education by regulators is supported by the SBDC and will be extremely important when implementing any unfair trading practice legislation.

6. Concluding remarks

The SBDC strongly welcomes the examination of unfair trading practices and consideration of the regulatory options that could effectively manage and deter this conduct, something the agency has been championing for years.

It is clear that despite the various laws and prohibitions in place, small business consumers are continuing to fall foul of conduct that seeks to mislead, restrict information, take advantage of power imbalances, reduce choice or competition, avoid provision of remediation or payments due, or circumvent existing avenues for recourse. While the ACL limits the more egregious aspects of this behaviour, there continues to be conduct that is unfairly impacting small business consumers and the detriment, in the SBDC's opinion, is significant enough to warrant government intervention.

⁸ Except in the case of the majority of disputes arising under the CT Act whereby parties in dispute must come through the SBDC before matters can go before the SAT. (Refer to s.25D(2) of the CT Act and s.10 of the Commercial Tenancy (Retail Shops) Agreements Regulations 1985.)

Given this, the SBDC strongly supports regulatory intervention to address unfair trading practices and looks forward to further discussion with the Commonwealth Treasury to progress this.

If you would like to discuss this submission in more detail, please contact Lauren Westcott, Senior Policy and Advocacy Officer on [redacted] or email at [redacted].

Yours sincerely

David Eaton PSM
SMALL BUSINESS COMMISSIONER

29 November 2023