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

By email: consumerlaw@treasury.gov.au

Dear Director

Unfair Trading Practices – Consultation Regulation Impact Statement

I write in response to Treasury's invitation to comment on the Consultation Regulation Impact Statement (CRIS) *Protecting Consumers from Unfair Trading Practices*.

The introduction of protections against unfair trading practices to better protect small businesses is welcomed.

Inherently, small businesses are more susceptible to unfair trading practices in their dealings with larger businesses due to an imbalance in power and the ensuing effect on their bargaining capacity. Reform to the Australian Consumer Law (ACL) is long overdue to ensure that small businesses can compete on an even playing field and are afforded appropriate protections from the unscrupulous behaviour of bigger businesses.

In reviewing the options presented in the CRIS, option four is supported for providing the greatest benefit to small businesses. As noted in the CRIS, adopting a combined approach that encompasses a broader general prohibition and a set of specific prohibited practices mirrors the structure of existing misleading conduct provisions within the ACL.

Simply extending the application of statutory unconscionable conduct presents complex difficulties, particularly due to its reliance on judicial interpretation. This is despite the 2021 landmark decision of the Full Federal Court which found that a small business is not required to have a vulnerability or disadvantage exploited by a company in order for conduct to be deemed unconscionable. Even in the event that the threshold for unconscionable conduct is lowered, the risk of uncertainty for small businesses in knowing where this bar is set will be immense.

Similarly, the introduction of a general prohibition on unfair trading practices would diminish the confidence of small businesses and arguably achieve an outcome similar to maintaining the status quo, with the added burden of substantial implementation costs.

Despite the CRIS noting that option four will impose the greatest regulatory burden on government and businesses, the inclusion of a frequently updated schedule of unfair trading practices could potentially relieve part of the burden through increased clarity for small business owners.

The inference drawn in the CRIS that option four may present the largest transition cost to businesses due to it representing the most significant legislative change is challenged, in the sense that the ability for implementation to take place more readily as a result of clearer expectations should not be understated.

Whilst some industries may advocate for sector-specific protections, the use of detailed prohibitions that apply to all sectors would be consistent with other key jurisdictions such as the European Union (EU), the United Kingdom and Singapore, with all of these jurisdictions having issued sets of approximately 30 'blacklisted' actions categorised into broader groups.

While it is acknowledged that compliance costs would ensue from the implementation of option four, the publication of a comprehensive guidance document similar to the EU's *Commission Notice on the Interpretation and Application of the Unfair Commercial Practices Directive* would greatly assist businesses in ensuring compliance and minimising implementation costs associated with the new proposal. This document was designed with small and medium sized enterprises in mind and importantly, it offers detailed legal interpretation of matters such as how the requirements intersect with other relevant legislation, managing consumer reviews and influencer marketing, the application of enforcement procedures and penalties and methods of adapting the requirements to online platforms. Interestingly, this guidance document discusses specific industry obligations, something which could be explored outside of incorporating sector-specific obligations into the legislation itself. Use of such a document could also aid in explaining any changes to the schedule as a result of technological advancements.

Regarding penalties, it is imperative that any prohibition on unfair trading practices has penalties attached that are not insignificant. Similar to existing ACL provisions, penalties based upon the turnover of a business may ensure that smaller businesses are not negatively impacted by disproportionate penalties that are also applicable to large corporations with the ability to easily finance pecuniary amounts. Consideration should also be given to the introduction of criminal penalties for serious offences, which would add an additional layer of deterrence for businesses engaging in bad practices.

Finally, the importance of small businesses being able to easily enforce unfair trading provisions is critical. With the Australian Competition and Consumer Commission not being appropriately equipped to progress individual matters through the courts, small businesses will not be in a position to absorb the cost, expense and reputational risk of pursuing court action. On this basis, I lend support to advocacy by the Australian Small Business and Family Enterprise Ombudsman for a Federal Small Business and Codes List (List) to be established in the Federal Circuit Court of Australia. Introduction of such a List would provide a pragmatic avenue for small businesses to access justice and apply precedents in a time sensitive and expedient manner without excessively detracting from the day to day demands of running their business.

Thank you for the opportunity to provide comment on these important protections for small businesses.

Nerissa Kilvert
SMALL BUSINESS COMMISSIONER

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