



Competition and Consumer Branch
Market Conduct Division
Department of Treasury
Langton Crescent
Parkes ACT 2600
By email: MoreCompetition@treasury.gov.au

Dear Sir/Madam,

RE: Submission regarding ‘Competition and Consumer Reforms No. 1 Bill 2022: More competition, better prices – Exposure Draft.’

Thank you for the opportunity to provide feedback with respect to the ‘*Competition and Consumer Reforms No. 1 Bill 2022: More competition, better prices – Exposure Draft.*’ The Council of Small Business Organisations Australia (COSBOA) welcomes your consultation process and appreciates your efforts to strengthen Australia’s competition laws.

The original notification COSBOA received via email from Treasury on 19 August 2022 at 6:15pm requested a response by 26 August 2022. From COSBOA’s perspective, the process of consultation for this submission has been disappointing. Whilst understanding that this is important to the Government, the timeline for the consultation process was unrealistic and the time and subsequent extension offered to respond to what is a very important issue for COSBOA, was inadequate.

COSBOA believes the Government should protect small businesses and consumers from anti-competitive behaviour through legislative reforms, the Australian Competition and Consumer Commission (ACCC), and state-based mechanisms.

We acknowledge the inherent power imbalance that exists between big businesses and small businesses. Many small businesses are in a vulnerable position due to the hardships they have experienced during the COVID-19 pandemic.

We acknowledge your intention to strengthen penalties to deter breaches of consumer law, promote competition and better corporate behaviour, and ensure consumers are afforded protection. We support this intention, while also seeking a commitment of further resources towards the ACCC and other mechanisms promoting timely and affordable dispute resolution.

The Council of Small Business Organisations Australia (COSBOA)

COSBOA is the national peak body representing the interests of small business. Collectively, COSBOA’s members represent an estimated 1.3 million of the 2.5 million small and family businesses that operate in Australia.

As a collaboration of peak organisations across a wide range of industries, COSBOA acknowledges small and medium sized enterprises (SMEs) are major contributors to the Australian economy. SMEs employ 68% of Australia’s workforce. In GDP terms, SMEs together contribute 56% of value added. Small and medium businesses are therefore key partners in rebuilding Australia’s economy as Australia emerges from the COVID-19 pandemic.

Our View of Competition Policy

A healthy competitive environment is essential for small businesses to survive, grow, provide job opportunities, and contribute to the diversity and culture of local communities. Small businesses are vulnerable to being exploited and taken over by big businesses, monopolies, and duopolies. This vulnerability threatens the capacity of small businesses to continue trading, retain local jobs, and enhance local communities by providing support to local sporting clubs and community organisations.

COSBOA supports competition policies that maintain a healthy, competitive environment for businesses; limit market power and inhibit the creation of monopolies; and support the diversity of small businesses in local communities.

We recommend:

- Greater power and resources be given to the Australian Competition and Consumer Commission (ACCC) to protect small business;
- The establishment of a formal (non-voluntary) merger control regime in line with international best practice;
- The merger test be reviewed so that a merger can be blocked if one of the merger parties already has substantial market power that would be entrenched, materially increased, or materially extended as a result of the acquisition;
- All urban planning policy encourages the preservation of small business high streets, with an emphasis on disallowing increased competition from big businesses.

Case Studies

Smaller fuel retailers are widely recognised for their role in creating the pricing tension that keeps average fuel prices low. Coles and Woolworths damaged market competition when they entered the industry in 2003 and 2004. In the ten year period following market entry of the two supermarkets, an estimated 1100 independent service station sites closed given their inability to compete with the creative pricing strategy involving shopper docket discounts.

The creative strategy whereby income from the supermarket chain was allegedly used to subsidise the fuel operation (i.e. charging higher food prices to subsidise cheaper fuel prices) was effectively prohibited in 2013 as a result of Coles and Woolworths entering into a voluntary undertaking not to apply large quantum shopper docket discounts in the future. Since that time, the market has seen the growth of new independent operators, but the number of independent retailers remains lower than it was before the market entry of the duopoly in 2003/2004.

The National Farmers' Federation (NFF), have described farmers and consumers needing "a fair go" due to the corrosive nature of markets defined by concentration. The NFF believes farmers are on the frontline of unfair competition laws. Across every market in the food and fibre supply chain, a handful of companies control the entire market. This has resulted in farmers' revenues being squeezed unfairly, and consumers are still paying extremely high prices for their groceries. The NFF welcomes review and reform of Australia's competition policy framework, and also recommends introducing codes of conduct for food supply chains defined by concentration and unfair practices such as the poultry meat sector; introducing legislation that bans unfair business practices; introducing a legislated right to repair for farm machinery, as recommended by the Productivity Commission; and establishing the office of the Perishable Agricultural Goods Commissioner to provide advocacy on required competition reforms within food and fibre supply chains and progress compliance and enforcement action.

Our members, Independent Food Distributors Australia (IFDA), met with the ACCC to discuss addressing unfair contract terms and trading practices across the entire supply chain. As part of the newly formed Food Industry Alliance which also includes MGA, AACS and NFF, IFDA advocates for protecting family-owned businesses against the misuse of market power and avoiding a corporatised supply chain in Australia. IFDA seeks to work with the ACCC to ensure the various aspects of competition policy are strengthened.

Similarly, our members MGA Independent Retailers (Master Grocers Australia) have advanced significant advocacy efforts with respect to ACCC matters. In relation to supermarkets, MGA has highlighted that

Woolworths and Coles control 75 per cent of the market share, and with Aldi controlling 10 per cent, independent businesses are left sharing 15 per cent of the market. This is a huge imbalance of market power. MGA have also opposed Woolworths acquisition of PFD. Despite the strong representations from MGA and other organisations, the ACCC could not find strong enough facts and evidence to suggest the PFD acquisition by Woolworths would substantially lessen competition. MGA has also been involved with advocacy regarding shopper dockets, unsustainable merchant payment fees, and the investigation of Employsure for misleading marketing, promotional and contract behaviours. The ACCC instituted proceedings against Employsure in December 2018, alleging Employsure misled consumers that it was, or was affiliated with, a government agency through its Google Ads. In October 2020, the Federal Court dismissed the ACCC's case. The Full Federal Court upheld the ACCC's appeal unanimously in August 2021.

Competition and Consumer Reforms No. 1 Bill 2022: More competition, better prices

COSBOA acknowledges increased penalties will assist in deterring some big businesses from participating in anti-competitive behaviours, however the financial benefits associated with anti-competitive conduct will require strong and consistent enforcement of the legislation to achieve desired outcomes.

We note the ACCC currently has limited capacity to deal with small business disputes when larger disputes with broader systemic issues are prioritised. The central issue of whether conduct 'substantially' lessens competition in a market requires careful consideration. 'Substantial' is an important concept in competition and consumer law, but it is not straightforward as the meaning of substantial depends on the context and in a relative sense. Significant and long-lasting harm can be experienced by small businesses and consumers during the time it takes for ACCC investigations to be completed.

We urge the Government to provide increased resources for the ACCC to deal with small business disputes. While we understand the ACCC does not generally get involved in individual disputes, we note the ACCC's key roles include providing guidance to small businesses and directing small businesses to other dispute resolution processes. The ACCC plays a vital role in helping small businesses understand their rights and obligations, particularly when dealing with suppliers and other businesses. The ACCC also helps small businesses understand their rights and obligations under the unfair contract terms law.

The Small Business and Franchising Consultative Committee was established by the ACCC to provide a forum where competition and consumer law concerns related to the small business and franchising sectors could be discussed by industry members and government representatives. COSBOA is very pleased to be a member of this Committee, and we enjoy a collaborative working relationship with the ACCC. We appreciate the opportunities for consultation provided and we support further investment in these types of initiatives.

We also support the recent recommendations made to the Competition and Consumer Branch by The Hon. Bruce Billson, Australian Small Business and Family Enterprise Ombudsman, with respect to the creation of a Small Business and Codes List in the Federal Circuit Court of Australia. The aim of this proposal is to provide timely access to justice for small businesses and regulators. We agree that through the creation of such a list, small and family businesses who experience anti-competitive conduct would be empowered to engage in a low-cost alternative to seek legal redress. We note this list would operate as a 'no costs' jurisdiction and include compulsory pre-hearing Alternative Dispute Resolution (ADR). COSBOA strongly supports improving access to justice for small and family businesses who seek timely and affordable redress from anti-competitive conduct.

The Law Council of Australia recognises that all Australians have, under the law, the right to seek justice, however exercising this right can be difficult with more than 13 per cent of Australian's living under the poverty line and legal aid available to only 8 per cent. Many people who are financially struggling are considered too wealthy to receive basic legal assistance, while experiencing multiple layers of disadvantage.

Small business owners often experience disadvantage and barriers such as financial constraints, low education and literacy levels, language barriers, lack of accessibility, and lack of knowledge of the law and their legal rights. These barriers are often amplified for small business people living in rural, regional and remote areas; people with disability; LGBTQ people; Aboriginal and Torres Strait Islander people; people from Culturally and Linguistically Diverse (CALD) communities; and people who have recently arrived in Australia. Past lived experiences of discrimination and marginalisation can result in mistrust towards the justice system and a

reluctance to engage. Many small business owners do not have the financial means to access professional legal representation in order to resolve their disputes. We therefore support the introduction of improved opportunities for low-cost alternative dispute resolution and legal redress for small business competition and consumer matters.

Post COVID-19 Climate

In the current post COVID-19 pandemic climate, it is particularly important to recognise the humanity of small business owners; support small businesses to grow and employ; and maintain a fair playing field between small business and big business. Small businesses are still navigating severe financial hardship due to the challenges of the pandemic. Many small business owners currently have less cash flow, reduced ability to borrow and re-finance, and an ever-increasing debt burden due to deferred loans and payments. They need time to recover.

The COVID-19 pandemic brought a permanent and dynamic shift in consumer behaviour, particularly in CBD areas. Some small business owners now need assistance with restructuring and exit strategies, ensuring they can exit gracefully from their current business without impediments for the future. Other small businesses owners who have a viable business need assistance to deal with debt as they continue to rebuild with limited cash flow. It is important for small businesses to receive ongoing support through known and trusted pathways with their industry associations, peak bodies, trusted advisors, and regulators. COSBOA advocates for the investment of further resources to support small businesses, including greater support for the ACCC in regulating anti-competitive behaviours and progressing small business disputes.

Summary

COSBOA supports the intention of the *'Competition and Consumer Reforms No. 1 Bill 2022: More competition, better prices – Exposure Draft'* to strengthen penalties, thereby aiming to deter breaches of consumer law, promote competition and better corporate behaviour, and ensure consumers are afforded protection. We urge the Government to commit further resources towards the ACCC and to consider creating other opportunities for alternative dispute resolution and legal redress for small business competition and consumer matters.

COSBOA advocates for continued small business stakeholder consultation in relation to competition and consumer reforms. We welcome further opportunities to provide feedback in the future.

On behalf of our members, I sincerely thank you for the opportunity to participate in this consultation process.

Yours sincerely,



Alexi Boyd
Chief Executive Officer
Council of Small Business Organisations Australia (COSBOA)

14 September 2022

About COSBOA

Small business in Australia is the backbone of the economy. We harness its diversity and provide its people with a voice, distinct from big business.

Established in 1979, the Council of Small Business Organisations of Australia (COSBOA) is a member-based not for profit organisation exclusively representing the interests of small businesses.

The capability, representation and reach of COSBOA is defined by a mix of over 40 national and state-based association members. COSBOA's strength is its capacity to harness its members views and to advance consensus, across policy areas that are common to many. Our member organisations work behind the COSBOA

secretariat, to assist us with policy development and to guide our advocacy - not just for small business but also for the benefit of the Australians they employ.

In this capacity, COSBOA makes submissions and representations to Government including its agencies, on issues that affect small business and in pursuit of good.