

Our ref: QSBC-10962

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

13 December 2024

To Whom It May Concern,

Re: Unfair trading practices: Consultation on the design of proposed general and specific prohibitions

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 the design elements of general and specific prohibitions on unfair trading practices as well as benefits and compliance costs for business.

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 482,000 small businesses in Queensland, representing more than 97% of Queensland businesses¹.

Unfair trading practices can 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 in their business dealings.

In response to the questions outlined in the consultation paper on the design of proposed general and specific prohibitions, 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 2023. Australian Bureau of Statistics, Canberra.

General prohibition

1. Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?

The QSBC does not have any fundamental issues with the proposed general prohibition as outlined in the consultation paper; however, we remain concerned about the continued reliance on court determinations and the development of case law to define what constitutes an unfair trading practice under this general prohibition.

As noted in our previous submission on the Consultation Regulation Impact Statement on 29 November 2023, we continue to advocate for the establishment of a Federal Small Business List within the Federal Circuit Court of Australia so that small businesses are able to seek determinations on unfair trading practices in an affordable and timely manner.

6. Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed?

The QSBC does not have any fundamental concerns with the proposed grey list of examples of conduct which may be considered an unfair trading practice under the general prohibition. In order for this grey list to remain relevant and capture emerging unfair trading practices, the QSBC recommends that this list be regularly reviewed and updated—informed by ongoing stakeholder feedback and recent court determinations. A comprehensive and up-to-date grey list will hopefully dissuade unfair trading practices and reduce the incidence of small businesses having to take matters to court for determinations.

8. Would there be compliance costs for businesses if the proposed general prohibition is introduced into the ACL? Would small businesses be disproportionately impacted noting that ACL reforms apply economy wide? Where possible, please provide quantitative information.

The QSBC does recognise that there will be compliance costs on some small businesses where they are currently engaging in practices which would be considered an unfair trading practice under the proposed reforms. These impacts and costs may include the time and cost 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 these reforms when introduced (see Q9). The QSBC recommends that regulators take an education-first approach when dealing with any small businesses engaging in unfair practices (see Q11).

While there will be compliance costs on some small businesses, the QSBC considers 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. These benefits include increased protections for small businesses in their business-to-business dealings, and a more even and competitive 'playing field' for small businesses who do not engage in unfair practices themselves.

9. What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices?

To ensure that small businesses are not engaging in harmful practices (whether intentionally or unintentionally), they will require comprehensive support. This includes the provision of

clear, plain language guidance materials that break down complex concepts into easily digestible information. These materials should use contextual examples relevant to small businesses. It's crucial that the guidance material is delivered in multiple formats to accommodate different learning preferences and time-poor small business owners—including printed resources, webinars, and face-to-face workshops. Additionally, to reach as many small businesses as possible, these resources should be actively promoted through key networks such as industry associations and chambers of commerce, fostering widespread awareness and engagement across the small business community.

Alongside resources for small businesses to implement changes to their practices, the QSBC recognises the need for resources to improve small business' ability to confront unfair trading practices being employed against them. The QSBC recommends that the ACCC develop a suite of template letters that can be used by small business as a first-step to challenging unfair trading practices. These templates should include references to the grey list of prohibited practices and specific prohibited practices, by citing relevant sections of the ACL. These templated letters would empower small businesses to address potential breaches in a timely and cost-effective way—without the need to seek costly legal advice. It is hoped that this approach would see disputes resolved quickly without the need to escalate.

11. Should civil penalties commence when a general prohibition commences, or following a transition period? If you support a phased approach, is a two-year transition period adequate to give businesses confidence around the operation of the law before penalties apply?

The QSBC supports an education-led approach for small businesses ensuring that they have all the knowledge, resources and understanding of the prohibitions to implement changes to their practices in a timely and cost-effective manner. Unlike larger businesses, small businesses may not have the resources to stay across regulatory changes and quickly implement changes. As such, the QSBC recommends that penalties not be immediately applied against small businesses. If penalties were to be introduced from the beginning, the QSBC recommends that these penalties should apply only to large businesses so that small business are not unduly or unfairly impacted.

Specific prohibitions

18. Do you consider that the proposed specific prohibition should apply to all businesses that offer products or services using a recurring payment model or should certain businesses/sectors be exempt? For example, sectors already subject to relevant industry specific regulation (for example, telecommunications).

The QSBC supports an economy-wide model on specific prohibitions, 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 compliance. 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.

24. Do you agree civil penalties should commence at the same time as the proposed new prohibitions take effect, or should civil penalties commence following a period of compliance (and what would be an appropriate transition period)? What is the maximum civil penalty a court should be able to impose for a breach of a specific prohibition?

As per the QSBC's response to question 11, the QSBC supports an education-first approach for small businesses before applying penalties. The QSBC suggests that there could be a sliding scale of penalty amounts depending on the size of the business / severity of the breach e.g. larger penalties for larger businesses and smaller penalties for smaller businesses. This would ensure small businesses are not disproportionately impacted by penalty amounts.

30. Should any prohibitions relating to dynamic pricing and online account requirements also apply to protect small businesses in their dealing with other businesses?

The QSBC believes that prohibitions relating to dynamic pricing and online account requirements should also apply to protect small businesses in their dealings with other businesses. Small businesses are often more vulnerable to unfair practices due to limited bargaining power, and dynamic pricing or mandatory online account creation requirements can exacerbate these vulnerabilities.

Dynamic pricing can create unfair competition for small businesses, especially if larger competitors have the capacity to adjust prices based on real-time market data or consumer behaviour. Small businesses may struggle to match these price fluctuations, which could lead to reduced sales or profit margins, and potentially force them out of the market. Therefore, protecting small businesses from exploitative dynamic pricing practices is essential to ensure a level playing field and foster healthy competition.

To protect small businesses, regulations should be put in place to ensure that dynamic pricing is transparent, fair, and does not disproportionately disadvantage smaller businesses if it cannot be removed. Likewise, online account requirements should be flexible, allowing small businesses to offer simpler transaction processes without unnecessary burdens. This would help small businesses compete more effectively, prevent market distortions, and support their long-term sustainability in the digital economy.

32. Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address consumer harm arising from a business's failure to provide a direct point of contact or access to customer support? If not, should there be a specific prohibition and how could this be designed?

The QSBC suggests that while a general prohibition could help address some consumer harm arising from a business' failure to provide a direct point of contact or access to customer support, it may not be sufficient on its own—instead requiring more targeted regulation to effectively address it. To address the harm that arises from a lack of direct access to customer support, a specific prohibition could be introduced that mandates businesses to provide a clear and accessible point of contact for customer inquiries or complaints. This would ensure that consumers can reach out to a business when they face issues with a product or service and can receive timely, effective responses. This would be highly valuable to small businesses who need contact with suppliers quickly and efficiently to ensure their business can operate effectively.

33. Should any such prohibition also apply to protect small businesses in their dealings with other businesses?

The QSBC would strongly support protection for small businesses especially in relation to 'small business to large business' interactions. A power imbalance in business relationships

can lead to unfair advantages, where larger companies have disproportionate control over smaller businesses. For example, a small business may struggle to resolve an issue with a digital platform like Meta, where they have limited direct access to customer support or decision-makers. When a problem arises, such as an account suspension or billing dispute, the small business may find themselves waiting for extended periods, while larger organisations with more influence receive quicker resolutions.

Other considerations

35. Do you have views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings?

The QSBC strongly advocates for the immediate implementation of a general prohibition on unfair trading practices, encompassing both business-to-consumer (B2C) and business-to-business (B2B) dealings.

Small businesses often lack the capacity to defend their interests against larger enterprises and are comparatively as vulnerable as individual consumers. In the QSBC's experience, small businesses are no less susceptible to the negative impacts of unfair practices whether the transaction is considered a B2C or B2B transaction under the ACL. Therefore, the QSBC suggests that the prohibition should be universally applied in B2B transactions—at a minimum this prohibition should be immediately applied to B2B dealings where one of the parties is a small business.

Unfair trading practices in B2B dealings involving a small business can also indirectly impact consumers. When small businesses are harmed by unfair practices, their ability to deliver their products or services may be impacted, ultimately leading to a reduction in market competitiveness and consumer choice.

From a regulatory standpoint, introducing a general prohibition across both sectors at the same time could lead to clearer guidelines and simpler compliance requirements for businesses—minimising confusion and ensuring that businesses are fully aware of their responsibilities from the outset. This could ultimately reduce the regulatory burden and support small businesses in complying with fair trading standards across both types of transactions.

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

Yours sincerely

Dominique Lamb
Small Business Commissioner