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To whom it may concern

Thank you for the opportunity to provide feedback on the proposed amendments for general and specific prohibitions from unfair trading practices under the Australian Consumer Law (ACL).

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides advice, advocacy and affordable dispute resolution services to small businesses across NSW.

The consultation paper is welcomed as an opportunity to conduct further analysis and solicit stakeholder feedback to support the development of policy recommendations. Gaps within the existing regulatory architecture should be clearly defined in both conceptual and practical terms before proceeding with a general prohibition against unfair trading practices. Changing and complex regulatory requirements present challenges for small businesses, and it is essential for changes to the ACL to be justified by robust and compelling evidence, including cost-benefit assessment.

Appropriate caution is needed to understand the impact of any proposed changes, noting many of the cited instances of 'unfair' conduct are broad in nature, or otherwise not well defined, and arguably have the potential to encompass legitimate and reasonable activities. The existing protections of the ACL typically target more egregious forms of conduct as they are most likely to give rise to consumer detriment. Care needs to be taken to avoid potential unintended consequences resulting from regulatory overreach.

The Commission also urges for small businesses to be extended the same protections as would be afforded to other consumers given they face substantially the same challenges when engaging in the marketplace. This is consistent with other elements of the ACL which do not tend to exclude small businesses.

General prohibition of unfair trading practices

While the Commission supports initiatives to promote fairness, the proposed framing of a general prohibition on unfair trading practices introduces several uncertain and ambiguous elements that would require legal clarification. For example, the scope of terms such as "unreasonably distorts or manipulates" needs to be clearly and easily understood by impacted stakeholders.

These concepts should be contained to avoid regulatory overreach. For example, the primary objective of most marketing initiatives is to influence consumer behaviour and perceptions of economic harm could extend beyond the scope of what is intended (for example, a customer may perceive they have been harmed if they feel they should have been told that a product was due to go on sale in a week).

A broader view of consumer welfare should also be considered, recognising that marketing activities and sales interfaces can sometimes enhance the value of a product, such as by improving customer experience. This is particularly relevant in contexts where commodification of a good or service may inherently diminish a product's value, and where some consumers derive legitimate enjoyment from experiential elements even though other consumers may regard it to be exploitative.

Similarly, the conduct examples within the 'grey list' warrant careful consideration. For many suppliers it would be unclear how these examples differ from existing obligations under the ACL and the extent of their application. The Commission anticipates that many suppliers would adopt a cautious approach, potentially incurring significant legal costs to review their contracts and information to determine whether they are compliant. Additionally, there could be confusion in requiring suppliers to provide all material information while simultaneously ensuring it is presented in a manner that does not overwhelm consumers (noting it is often the volume of information which overwhelms consumers).

Should it proceed, additional limitations to clarify the extent of the prohibition may be warranted. This includes incorporating a legitimate interest element and establishing safe harbours and guidance so the effect of the prohibition is easily understood. For example, standard marketing activities, including innovative approaches that connect consumers with products or services of interest, should be clearly excluded. Such activities generally do not result in material detriment and should not be unnecessarily restricted.

As noted in the Commission's submission to the Consultation RIS, the concept of "unfair trading practices" may itself be misleading and likely to be misunderstood. The proposed framing risks including conduct that may not universally be regarded as unfair, while simultaneously failing to capture many practices that are commonly perceived as being unfair (which is ultimately a concept in the eye of the beholder). An alternative name and framing of these provisions could help to avoid unrealistic expectations about the level of protection provided.

Extending protections to small businesses

Should it proceed, the consultation paper proposes a staged approach for the introduction of a general prohibition on unfair trading practices, initially only applying to business-to-consumer dealings. The intent behind this approach is to allow sufficient time for a body of case law to be developed from the proposed law changes and to provide more commercial certainty about the operation of the provision and what it should achieve.

Small businesses face similar disadvantages to individual consumers stemming from information asymmetry or imbalances in bargaining power. Without their inclusion in these protections, small businesses will have to manage the burden of complying with new standards without receiving equivalent protections.

It is also important to consider how other jurisdictions, such as the United States, have extended general protections to transactions involving small businesses. For example, section 5 of the *Federal Trade Commission Act* broadly prohibits unfair or deceptive acts or practices. By adopting suitable harm or loss thresholds, unnecessary or disruptive overreach can be avoided while also effectively combating egregious conduct not already covered by existing laws.

This is consistent with other protections contained within the ACL which can apply to small businesses where they face substantially the same challenges as other consumers.

Specific prohibitions

The Commission encourages further policy development to more clearly establish the policy rationale, including a clearer problem statement and articulation of objectives, when contemplating additional specific prohibitions. While the Commission supports regulatory intervention in circumstances where

there is clear evidence of consumer detriment, the proposed areas of focus require more detailed policy development and may warrant their own separate review processes to ensure impacted stakeholders are properly engaged.

Subscription-related prohibitions

The Commission has received numerous reports from small businesses facing significant challenges in cancelling subscriptions, or being adversely affected by the automatic renewal of contracts, and is supportive of considering opportunities to improve outcomes in this focus area.

Matters brought to the attention of the Commission often involve perceived misrepresentations, omission of key information, or obstacles to cancellation. Other instances include businesses attempting to cancel within a cooling-off period but being denied due to terms which were not clear to the customer. Other cases involve attempts to cancel a subscription due to it failing to deliver on its promises, but with difficulties in securing a remedy under the existing protections of the ACL (such as a service cancellation or refund due to a failure to meet a consumer guarantee).

It is unlikely that all challenges relating to subscriptions can be resolved through pre-sale disclosure obligations alone. Challenges brought to the attention to the Commission are often due to terms and conditions being misunderstood or unclear, or challenges that arise post-sale.

Barriers to accessing customer support: digital platforms

The Commission frequently hears from small businesses about challenges involving digital platforms and online marketplaces, particularly regarding practices perceived to be unfair. A common issue is the unexpected suspension or exclusion from accounts without good cause. These problems are compounded by inadequate customer support from digital platforms, including absence of clear contact points, insufficient responses to assistance requests, and a lack of transparency in account deactivation decisions. Such delays can have serious consequences for small businesses, including reduced market access, cash flow disruptions, and ultimately, significant revenue losses.

The consultation paper proposes the general prohibitions would capture practices where a business fails to provide adequate access or does not remove barriers to customer support. Excluding small business contracts from these prohibitions would leave small businesses vulnerable to the ongoing disadvantages of substandard processes. Designing a specific prohibition for this type of behaviour that also covers small business contracts would compel digital platforms to provide appropriate levels of customer support.

Building on the recommendations from the final report of the *Digital Platform Services Inquiry*¹, it would be beneficial to develop minimum internal dispute resolution standards for digital platforms. A significant proportion of small businesses seeking the Commission's assistance with platform-related issues require support to escalate matters with service providers or to facilitate communication between parties. While the Commission strives to resolve every case brought to its attention, it lacks the authority to compel private enterprises to take specific actions, leaving some disputes unresolved.

The European Union's *Digital Services Act* (DSA) provides a model for best practice. The DSA establishes key guidelines for digital platforms concerning the suspension or termination of user accounts and activities. Under the DSA, platforms must provide a clear 'statement of reasons' for any suspension decisions and offer an internal complaints system, enabling users to challenge these decisions or seek redress through an out-of-court dispute resolution body. These provisions apply universally to all platform users, safeguarding their online presence.

¹ Australian Competition and Consumer Commission (2019), [Digital Platform Inquiry \(Final report\)](#), ACCC, p. 506.

The European Union's rules under the DSA require platform operators to engage mediators when internal complaint handling processes fail. In this context, the ACCC could consider leveraging the mediation services provided by State and Territory Small Business Commissions or Ombudsmen. These services have a strong track record in successfully resolving business disputes involving small businesses, making them a proven and valuable resource for addressing such obligations.

The Commission recently released model practices and procedures to encourage improved user experiences for small businesses as part of our [Digital Platforms Hub](#).

Compliance and enforcement

The Commission does not support penalties due to potential ambiguities associated with a broad prohibition on unfair trading practices. However, it would be appropriate for conduct with more serious consequences to be subject to penalties, including through existing protections against unconscionable conduct or false and misleading representations, or new specific conduct prohibitions.

While the Commission acknowledges this approach would be less effective at deterring a broad range of conduct that may be perceived to be unfair, it is a balanced approach in recognition that such a prohibition would potentially capture less egregious forms of conduct. Consumers would retain the ability to seek remedies or redress directly from suppliers, as they currently do under the consumer guarantees framework. The need for a penalty regime could be considered after implementation or as part of a transition plan.

Where new penalties are introduced for specific prohibitions, clear, comprehensive, and easily accessible guidance materials should accompany any regulatory changes impacting small businesses. Such materials should be specifically designed with small businesses in mind, providing practical insights into enforcement procedures, penalties, and sector-specific adaptations. This would greatly assist small businesses in understanding and implementing compliance measures, minimising their administrative and financial burdens.

Thank you for the opportunity to make a submission. The Commission supports improvements to the ACL framework to ensure small businesses are adequately protected. If you require further information, please contact Megan Bennett, at either commission@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

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