

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600

Submission to the consultation on unfair trading practices

To the Director, Consumer Policy and Product Safety Unit,

As the only independent organisation advocating for entrepreneurial and small business women across Australia, Entrepreneurial & Small Business Women Australia (ESBWA) welcomes the opportunity to make a submission to the consultation on unfair trading practices.

This submission highlights that female small and medium business owners need to be considered when reviewing unfair trading practices and possible reforms to the Australian Consumer Law.

Introduction

Entrepreneurial & Small Business Women Australia is an advocacy and education platform for women-led small and micro businesses, entrepreneurs and founders in Australia. With a membership base of over thirteen thousand female business owners in Australia, ESBWA is the primary advocate for Australia's female business community.

ESBWA welcomes changes to trading practices that protect small business owners, however, we caution against increasing the burden of regulation on small businesses. As part of our submission process, we sought feedback from small business owners who had been negatively impacted by large businesses or franchisors trading practices, informing our views on this topic.

Key issues and recommendations

Small businesses can often face the same challenges as consumers when it comes to experiences of unfair trading

ESBWA agrees that small businesses face similar challenges to consumers when it comes to experiences of unfair trading. Small business owners are particularly vulnerable to being misled by a misrepresentation of services and goods advertised versus the actual service or product provided. For example, in the business coaching and consultancy industry, there is minimal oversight and regulation to protect small business owners. Feedback from our members included examples of engaging with consultancy agencies and being misled into making decisions that cost thousands in lost revenue and business growth opportunities with no recourse for the agencies who engaged in unfair business practices.

Franchisee owners are also vulnerable to unfair and misleading trading practices. Feedback from members highlights misleading terms, a lack of transparency in head office spending and a culture of bullying and intimidation from head office. A particular concern with franchise models is the potential for terms that allow franchisors to price gouge franchisees. One member stated that they had to purchase all their stock from head office which would purchase stock at cost and sell to franchisees at a large profit.

ESBWA welcomes expanding the scope of statutory unconscionable conduct to capture a broader range of 'harmful conduct' or 'unfair conduct' which would provide small businesses with greater protection against unfair trading practices as outlined above. Along with these changes, we suggest that further education and resources should be provided to small business owners to help them navigate business decisions that may disadvantage them or leave them open to vulnerabilities.

Cautioning against changes that would burden small businesses with excessive regulations

While ESBWA welcomes changes to the scope of unfair conduct, we caution against changes that place undue burdens on small businesses.

We are concerned that the potential costs outlined in Option 3 – Introduce a general prohibition on unfair trading practices and Option 4 – Introduce a combination of general and specific prohibitions on unfair trading practices, will be exacerbated for small businesses.

Costs from Option 3 that may disproportionately impact small businesses are:

- Businesses would incur compliance and training costs to ensure they are not engaging in unfair trading practices.
- Judicial precedent on a general prohibition may take time to develop and be consistently applied. This could create uncertainty for businesses which could have a chilling effect on competition and innovation.
- Depending on how it is framed, a general prohibition could create uncertainty for businesses and consumers and be difficult to enforce.

Costs from Option 4 that may disproportionately impact small businesses are:

- Businesses would incur compliance and training costs to ensure they are not engaging in unfair trading practices.
- Businesses may be uncertain about what is unfair which may create an overly cautious commercial environment with potential impacts on business confidence and innovation.

If specific prohibitions, as listed in Option 4, are implemented we agree that a specific list of unfair practices would help ensure small businesses are aware of their obligations, however, we also suggest that there would need to be specific resources made available to small businesses including standard contract forms and access to advice.

Conclusion

Small businesses must be protected from unfair trading practices and ESBWA welcomes the opportunity to raise concerns highlighted by our members. Small businesses must be protected from unfair trading practices and given tools and resources to ensure that they can protect themselves from unfair trading practices.

In changing regulations, the impact on small businesses must be considered and acknowledged. We caution against regulations that disproportionately affect small businesses and suggest that further resources and education must be provided to ensure small businesses can comply with and understand these regulations.

ESBWA acknowledges the prospects and challenges presented to the Australian Government regarding unfair trading practices and looks forward to furthering the dialogue on behalf of women-led small and micro businesses, entrepreneurs and founders in Australia.

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