

8 December 2016

Australian Consumer Law Review Secretariat  
Consumer Affairs Australia and New Zealand  
c/o Department of Treasury

Delivered via email: [ACLreview@treasury.gov.au](mailto:ACLreview@treasury.gov.au)

Dear Secretariat,

**RE: SUBMISSIONS TO THE INTERIM REPORT**

Thank you for the opportunity to submit a response to the Interim Report of the Australian Consumer Law Review (ACLR).

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) assists with alternative dispute resolution and acts as an advocate for small businesses and family enterprises in relation to key policies and laws which impact on small business, including the Australian Consumer Law (ACL). We made a submission to the ACLR and also provided preliminary comments on a draft of the Interim Report. This response builds upon our prior submissions and comments.

We welcome the Interim Report's recognition of issues relating to scope and coverage of the ACL as well as options and approaches to increase the effectiveness of consumer guarantees and product safety legislation, challenges with unsolicited consumer agreements legislation, unconscionable conduct and unfair contract terms. In particular, we appreciate the focus in Chapter 1.3 of the Interim Report, which highlights the relevance to small business of topics addressed in detail in other sections.

In response to questions raised in the Interim Report (Appendix B), we outline our suggestions and comments below:

***Protections for Small Businesses***

Small businesses should have access to the same protections under the ACL as individual consumers. While we do not argue that small businesses should be treated in all contexts as if they were individual consumers, the operational objectives of the ACL include fostering effective competition and enabling confident participation by meeting the needs of those in the market who are most vulnerable or at greatest disadvantage.

We reject suggestions that concerns around vulnerability and disadvantage are ‘less relevant in a business context’. According to Australian Bureau of Statistics data, 61% of all small businesses in Australia have no employees. A further 28% have between 1 – 4 employees (the size of many individual consumers’ households).<sup>1</sup> A substantial proportion of small businesses have a *turnover* – not a take-home profit – that is tens of thousands of dollars lower than the average wage of a full-time Australian employee. When a small business suffers a detriment from which consumers generally are protected under the ACL, the capacity of the business to continue generating income is compromised, resulting in even greater impact than that experienced by individuals whose overall incomes are not directly affected by their actions as consumers. Further, the repeat nature of many business-to-business transactions can adversely affect the bargaining power of small businesses in ways that do not arise for individual consumers, putting them at a distinct disadvantage in relation to larger businesses. Thus, issues of vulnerability and disadvantage are highly relevant in the case of small business, and allowing small business access to the protections afforded to consumers under the ACL is critical to realising the law’s objectives.

### ***Extending ACL protections***

It follows, for example, that the \$40,000 threshold for the definition of ‘consumer’ should be removed and replaced with criteria that reference the characteristics of the actor being protected, not the value of the transaction. Any type of threshold will be arbitrary, generating unfairness at the boundary and risking unintended consequences due to its remoteness from the ACL’s underpinning rationale. Criteria that reference an actor’s likely degree of vulnerability or disadvantage, on the other hand, go straight to that rationale. In the case of small business, one option would be to harmonise with the definition in our legislation which defines a small business as one having under 100 employees or \$5 million in annual turnover. If a value-based threshold is required, we would suggest that the dollar amount should be harmonised with other legislation, such as the recently introduced unfair contract terms provisions which set a threshold at \$300,000 or \$1 million for contracts longer than a year.

### ***Regulation and Enforcement***

Regulation and enforcement of the ACL with respect to small business should be risk-based, nuanced and with education as the key regulatory strategy.

Regulators responsible for educating the public about any future changes to ACL should be sensitive to small business needs (e.g. for out-of-hours access to tailored information sessions) and trusted channels (e.g. existing associations and networks, including online small business communities, that are able to frame regulatory information in attractive and accessible ways for their members).

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<sup>1</sup> ABS Counts of Australian Business 8165.0, Feb 2016.



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Communications should also recognise the fact that small businesses are both regulated businesses and protected actors under the ACL. Small businesses are beneficiaries in both of these ways because, apart from the protections they receive in their consumer-like capacity, protections afforded to the customers of small businesses provide clarity and certainty that enables them to operate freely and to innovate with an understanding of appropriate boundaries.

### ***Access to Justice***

An effective consumer law requires cost-effective access to justice through alternative dispute resolution (ADR). For most small businesses, ADR is the only practical option when disputes arise under the ACL. However, ADR in itself is not a perfect solution, especially where there is a large imbalance of power between the parties to a dispute. For example, when a small business suffers detriment at the hands of a larger business it can be difficult to persuade the other party to engage in ADR in the absence of a credible threat of litigation.

We welcome the Interim Report noting the importance of services available to assist small businesses to resolve disputes, including our 'Dispute Support' service and our role in directly assisting small businesses.

We will continue to follow the review with interest. We hope these comments assist you and would be happy to discuss these matters further with you. Please feel free to contact either myself or Dr Janet Hope, by telephone 02 6263 1565 or email [janet.hope@asbfeo.gov.au](mailto:janet.hope@asbfeo.gov.au).

Yours sincerely,

**Kate Carnell AO**

Australian Small Business and Family Enterprise Ombudsman

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