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To the Treasury
By submission: Treasury Consultation Hub

RE: Unfair Trading Practices Protections for Small Businesses – Consultation Paper

The Internet Association of Australia Ltd (**IAA**) thanks the Treasury for the opportunity to respond to the Unfair Trading Practices Protections for Small Businesses – Consultation Paper.

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized Internet service providers (**ISPs**) in the telecommunications industry, many of whom fall under the small business threshold proposed in the Consultation Paper. We submit our response in representation of these members, as well as for the greater public good of the Internet industry which underpins much of today's digital economy. IAA has also been actively involved in the development of unfair trading practices (**UTP**) laws, and we welcome the development of tailored UTP laws in respect of small businesses, that reflect the unique position of small businesses in Australia as industry players as well as consumers within the market.

From the outset, we express our support in principle, for ensuring small businesses are protected from UTP. As many of our members are small businesses themselves, we understand and recognise the great harm that UTP can have on small businesses, which materially affects the ability of these businesses to thrive in the market, which can result in reduced competition, and therefore adversely affects the Australian economy overall. Furthermore, we also take this opportunity to highlight that telecommunications consumer safeguard regulations already provide protections for small businesses in relation to unfair trading practices.

We consider it is essential that any new framework addressing protections for small businesses from UTP is carefully calibrated so that it does not unduly constrain reasonable and legitimate commercial relationships. Noting that many participants in the small business ecosystem – including our members – are themselves small business customers and suppliers, there is a risk that disproportionate new obligations could impose compliance burdens on the very small businesses that the reforms are intended to protect. Our submission is therefore guided by the principles of supporting proportionate protections that are balanced against the need to preserve reasonable commercial operations to avoid disproportionate and unintended adverse impacts.

SMALL BUSINESSES AS CONSUMERS

1. Should the proposed general prohibition (section 28B) be extended to also protect small businesses where they acquire goods or services as a consumer?

2. Should any adjustments be made to the proposed general prohibition when extending it to apply in respect of supply to small businesses?

IAA supports, in principle, extending the general prohibition on UTP to protect small businesses where they acquire goods or services in a genuine consumer capacity. We understand and recognise that small businesses purchasing goods and services for their own use, and not for resale, production or transformation in trade, often face similar vulnerabilities to individual consumers.

We strongly posit that any extension should be carefully scoped to only apply where the small business is acting as a consumer, and not in business-to-business (**B2B**) dealings. This distinction is important to preserve the boundary between consumer safeguards and ordinary commercial dealings. We understand B2B dealings are also being considered as part of the consultation, which we respond to below. To further clarify this distinction, we recommend that the general prohibition as extended to small businesses should only apply where:

- There is an imbalance in bargaining power between the supplier and the small business;
- The conduct causes or is likely to cause financial detriment to the small business; and
- The conduct is not reasonably necessary to protect the supplier's legitimate interests.

We consider these qualifications will help ensure the general prohibition targets genuinely harmful conduct arising from power imbalances rather than capturing reasonable and ordinary commercial practices.

We also consider the threshold at which the 'small business' definition is set is fundamental to ensuing the distinction between small businesses acting as a genuine consumer, as opposed to capturing B2B relationships.

We understand that the proposed small business threshold (<100 employees or <$10 million annual turnover) aligns with existing ACL, such as the threshold set in relation to unfair contract terms, and there is merit in promoting consistency within the ACL.

However, we highlight that this threshold is inconsistent with the small business threshold used in telecommunications consumer protections regulation, where the threshold is typically set as:[1]

> *a business which acquires or may acquire one or more telecommunications products which are not for resale and which, at the time it enters into the consumer contract:*
>
> > *(i) does not have a genuine and reasonable opportunity to negotiate the terms of the consumer contract; and*
> >
> > *(ii) has or will have an annual spend with the provider which is or is estimated on reasonable grounds by the provider to be, no greater than $40,000.*

[1] This definition has been taken from the *Telecommunications (Financial Hardship) Industry Standard 2024*, but is similar to the threshold used in various other telecommunication regulation, including, but not limited to the *Telecommunications (Domestic, Family and Sexual Violence Consumer Protections) Industry Standard 2025* and *Telecommunications Service Provider (Customer Identity Authentication) Determination 2022*.

We further note that the threshold is also inconsistent with the *Privacy Act 1988* (Cth) which sets the threshold at businesses with an annual turnover of ≤$3 million.

In general, we consider the proposed threshold of <100 employees or <$10 million annual turnover is too large and captures businesses we do not consider to constitute 'small businesses'. Particularly in the telecommunications context, where a business of up to 100 employees or with a turnover with $10 million acquires telecommunications services for its business, it is better characterised as an enterprise customer and obligations relating to the commercial relationship should fall under B2B dealings.

As an increasingly vital service to conduct business in the modern age, telecommunications services are supplied to almost all businesses across Australia, including to enterprise customers. Indeed, there are ISPs whose business model is solely to provide services to SMEs. However, ironically, the proposed threshold would mean there are cases where the small business consumer is actually larger in size and of greater revenue than many of the small to medium sized ISPs in the telecommunications sector. We are concerned this may cause unintended consequences, including, but not limited to:

- introducing new regulatory burdens for smaller ISPs having to segment their customers in order to comply with the new laws;
- causing or entrenching power asymmetry between the smaller ISPs and enterprise customers; and
- further entrenching the dominant telecommunications providers in the market who are better equipped to absorb costs associated with the proposed laws.

We discuss the inconsistency between the thresholds further below.

5. Are there interactions with other regulatory frameworks (including industry codes or other sector-specific laws) that should be considered in relation to this option? If so, how should these be managed?

8. Would there be any additional compliance costs for businesses if the proposed general prohibition was extended to protect small businesses, noting the Bill if passed would already require businesses to comply in respect of supply to consumers?

Furthermore, as noted above, there is already extensive regulation in relation to consumer safeguards for the telecommunications sector, which we reiterate, also applies to small business customers. These regulations impose obligations that intend to curtail unfair practices, such as those contemplated by Government as part of the UTP laws.

Importantly, the Telecommunications Consumer Protections Code (**TCP Code**) which set out requirements in relation to responsible selling practices, provision of material information, advertising, billing and credit management, customer service and account support, was recently rejected by the Australian Communications and Media Authority (**ACMA**). The ACMA is expected to shortly commence consultation on a replacement industry standard which will introduce further enhanced safeguards in respect of these matters.

In addition to the TCP Code, there are other telecommunications regulations that address consumer safeguards including, but not limited to, financial hardship for vulnerable customers, complaints handling and domestic and family violence support, all of which also apply to small business consumers.

The inconsistency between the proposed small business threshold and that used in telco-specific regulation will create significant complexity for providers, including but not limited to:

- the practical difficulty of applying different eligibility criteria to determine which protections apply to which customers;
- a risk that certain consumer safeguards will only apply to a subset of small business customers depending on which threshold is used, undermining consistency and clarity for both providers and consumers; and
- duplication of compliance obligations where telco-specific rules and the general prohibition both seek to address similar conduct – for example, disclosure of material terms – but via different mechanisms and thresholds.

We consider that there are likely to be additional costs arising specifically from the duplication and inconsistency between the general prohibition and existing consumer safeguard regulations. This will arise from the increased scope and complexity of managing overlapping regimes, including, but not limited to:

- building and maintaining systems capable of distinguishing which small business customers fall within scope of which regime;
- training, compliance monitoring and other legal review costs associated with applying two different thresholds and duplicative obligations; and
- increased risk of inadvertent non-compliance arising from the complexity of the overlapping regimes.

We reiterate our concerns with the inadvertent consequences this is likely to have on the telecommunications sector due to the long tail of small telecommunications providers who are already finding the regulatory landscape prohibitively complex. As smaller telecommunications providers already struggle to operate and compete due to the high costs of operating, compounded with an increasingly complex regulatory landscape, telecommunications providers will be effectively squeezed out of the market. This would be a grave outcome for small business consumers who will be left with less choice in telecommunications services provision overall. Noting the telecommunications market is already heavily dominated by a small number of players, reducing competition is not in the interest of consumers.

We therefore recommend that, as it pertains to the telecommunications industry, the Treasury consider exempting the telecommunications industry from the general prohibition in recognition of the existing consumer safeguard regulation that already covers small business customers. Again, we reiterate that the ACMA is developing an industry standard that will introduce further enhanced protections in its replacement standard of the TCP Code.

Notwithstanding this position, in the event the telecommunications sector is not exempted from the general prohibition, we recommend that the small business threshold used for the general prohibition is harmonised so that it aligns with the threshold used in telecommunications consumer protections instruments.

We also recommend that the Australian Competition and Consumer Commission (**ACCC**) collaborate with the ACMA to engage meaningfully with the telecommunications sector, including providing clear guidance on how the UTP general prohibition framework interacts with telco-specific regulation.

BUSINESSES-TO-BUSINESS DEALINGS

As mentioned above, many of our members are themselves small businesses operating with comparatively limited market power relative to larger wholesale or upstream providers and suppliers. We note that there have been instances where the ACCC has had to intervene in relation to potential unfair trading practices in the sector, such as in the relationship between access providers (wholesale providers) and access seekers (retail providers) of network infrastructure. Furthermore, there are, extensive telco-specific rules administered by the ACCC to curtail anti-competitive and unfair conduct. For example, the *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* governs how telecommunications carriers share network infrastructure by outlining mandatory terms and processes including but not limited to information provision, application timeframes and dispute resolution processes.

Given the sector-specific nature of these dynamics, we recommend that the Treasury undertake further, targeted sector-specific consultation with each sector to determine whether a general economy-wide framework addressing power imbalances in B2B relationships is the most appropriate mechanism.

More broadly, we recognise the genuine harms that UTP can cause to small businesses in B2B dealings where there is a serious imbalance in bargaining power. However, we consider that the existing ACL is likely to capture many of the examples cited in the Consultation Paper.

In our view, the more significant gap is not legislative in nature, but rather that affected small businesses are unable or unwilling to access the protections already available. We recognise this may be due to a range of factors – whether due to a lack of awareness of their rights, limited resources to purse a remedy, or fear of commercial retaliation. We consider that against this context, introducing further legislative protections is unlikely to meaningfully address these underlying issues. **Therefore, we recommend that the Treasury and ACCC prioritise educative campaigns directed at small businesses on existing rights under the ACL, and how to access protections and remedies.** Crucially, guidance provided to industry should be sector-specific, addressing and highlighting relevant sector dynamics to provide greater utility.

REMEDIES FOR BREACH

19. Should there be a transition period before any new laws commence, or before civil penalties apply to any new laws?

IAA strongly supports a transition period, both before the new laws commence, and separately, before civil penalties apply. It is critical that businesses are given a genuine opportunity to review, understand and implement the necessary changes before being exposed to penalty risk. In particular, as these proposed laws are likely to affect small businesses not only as small business customers, but also as suppliers, it is important that transition periods reflect the substantive work and time it takes to review and change systems, processes and contractual documentation. Small businesses are often particularly disproportionately affected by regulatory reform due to their limited resources and need greater time and assistance with unpacking complex regulatory frameworks to understand the obligations themselves, and then to implement changes in their business operations and procedures. Small businesses often also rely on external legal assistance to update internal and public facing policies and other documentation due to their lack of in-house regulatory expertise which compounds the cost and time associated with regulatory compliance.

We consider this to be particularly the case for the telecommunications sector which is facing an onslaught of regulatory reform. Importantly, as noted above, the sector is anticipating a new industry standard to replace the TCP Code, which is a substantive piece of regulation that covers various aspects of telecommunications operations in respect of customer service.

We therefore recommend a 12-month transition period before the commencement of any new laws. Additionally, we recommend that the Government and ACCC commit to taking a 12-month educative approach to compliance following the commencement of the new laws, taking enforcement action only in exceptional cases of egregious breach or serious negligence. Furthermore, during the initial 12-month period following the commencement of the new laws, the ACCC should collaborate with meaningful sector-specific engagement to inform industry of the new laws and how they apply in practice. For the telecommunications sector specifically, we recommend joint ACCC and ACMA consultation and guidance given the overlapping nature of the UTP framework with existing telco-specific regulation.

We consider this approach would support effective compliance outcomes while allowing the ACCC to take enforcement actions in egregious instances where businesses contumeliously engage in UTP. We note that this compliance and enforcement approach was taken by the Department of Home Affairs in respect of the regulatory reform of the *Security of Critical Infrastructure Act 2018* (Cth) and its subordinate legislation. We consider this approach reflects regulatory reform best practice, and thus supports effective compliance outcomes by ensuring industry engage meaningfully with the requirements rather than treating it as a mere check-box exercise.

Once again, IAA appreciates the opportunity to contribute to the Unfair Trading Practices Protections for Small Businesses – Consultation Paper. We reiterate our commitment to and support for ensuring small businesses are also protected from unfair trading practices. Again, we express our support the work of the Government and Treasury in addressing gaps in the economy, acknowledging the real harms affecting small businesses due to their lack of bargaining power. However, we are equally interested in ensuring any new laws are proportionate and fit-for-purpose. Importantly, these laws should not serve as a barrier to conducting business between enterprises where the risk of unfairness for ‘consumers’ is not apparent due to the nature of the commercial relationship. To that end, we look forward to continue working with Treasury, regulators, industry and other stakeholders in the development of a fit-for-purpose unfair trading practices regime in relation to small businesses.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia Ltd (**IAA**) is a not-for-profit member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (**WAIA**), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IAA regularly engages with government and regulatory bodies on policy matters affecting the Internet industry. In particular, our advocacy efforts represent the small to medium sized internet service providers in Australia who are often disproportionately disadvantaged by law reform affecting the telecommunications sector. Our public policy work is guided by the following principles:

- *We stand for an internet for the common good*
- *We stand for an open internet platform*
- *We stand for measured, effective and practical regulation*

IAA is also a licenced telecommunications carrier and provides the IX-Australia service to Corporate and Affiliate members on a not-for-profit basis. It is the longest running carrier neutral Internet Exchange in Australia. Spanning seven states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.