BCA

Business Council of Australia

# Submission regarding Treasury's Unfair Trading Practices Consultation Regulation Impact Statement

November 2023

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# 1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide feedback to Treasury on the Unfair Trading Practices Consultation Regulation Impact Statement (CRIS).

The BCA recognises that a well-functioning market-based economy is supported by effective consumer protections, to support both consumer participation and competition. Australia has a well-established consumer protection framework comprising various regimes including the Australian Consumer Law (ACL) and other protections under the *Competition and Consumer Act 2010* (Cth) (CCA), the *Privacy Act 1988* (Cth), the *Spam Act 2003* (Cth), and the *Competition and Consumer* (*Consumer Data Right) Rules 2020* (Cth). There are also sector-specific protections, including for financial services,[1] energy,[2] telecommunications,[3] private health insurance and others. Protections may take a number of forms from legislated protections to voluntary industry codes.

The combination of economy-wide and sector-specific protections provides for a comprehensive framework of protections for consumers and small businesses. This existing risk-based approach to consumer protection ensures consumers and small businesses are protected, while minimising the regulatory risks and uncertainty, in contrast to vague prohibitions that are dependent on court determination.

ACL already captures unfair trading practices included in other jurisdictions' provisions including:

- General protections – including misleading and deceptive conduct, unconscionable conduct, and unfair contract terms.
- Unfair practices – including false or misleading representations, unsolicited selling, pyramid schemes, and other unfair practices including harassment and coercion.

The 2017 Australian Consumer Law Review noted that "the value of an additional general unfair trading prohibition is uncertain at this point in time" given the many existing protections in the ACL.[4]

The BCA does not support the introduction of a general prohibition against unfair trading practices as the arguments in support of change put forward in the CRIS:

- **Lack clarity around the nature of the consumer harm** that needs to be protected by a new prohibition.
- **Fail to demonstrate that the existing consumer protection framework** (which includes the ACL and other consumer protections) is unable to provide sufficient protection to consumers.
- **Rely on subjective and undefined concepts of what is "unfair**" which will in turn create substantial uncertainty and regulatory risk, and delays in resolution, which are not in the interest of consumers or businesses.
- **Conflate the level of consumer protection offered in different jurisdictions** with whether or not there is a general prohibition against unfair trading practices. This assumes there is a 'gap' in protections afforded in Australia compared with other jurisdictions without any detailed comparison between equivalent regimes to determine whether this is in fact the case.
- **Fail to identify that the jurisdictions referred to in the CRIS (US, UK, EU and Singapore) do not have an equivalent punitive penalty regime** to Australia's ACL.
- **Do not account for differences in the nature** of the regulatory regimes in some jurisdictions which are more administrative in nature (a model that is not replicated in Australia).

[1] *Australian Securities and Investments Commission Act 2001* (Cth).
[2] National Energy Customer Framework (NECF).
[3] The Telecommunications Consumer Protections Code (TCP Code) contains rules for telecommunications providers. The code protects customers who use mobile phone, landline and internet services, including NBN.
[4] Consumer Affairs Australia and New Zealand, 2017 *Australian Consumer Law Review Final Report*, page 51.

- **Do not account for overlapping reforms** including the Australian Government's commitment to reforming the *Privacy Act*, the introduction of the Scams Code and Consumer Data Rights.

Poorly targeted or ill-evidenced reform risks undermining consumer interests in the long term by:

- **Limiting the ability for consumers to quickly benefit** from an unfairness standard because the protection is too vague. This will also hinder businesses' ability to have clarity around what conduct will contravene the ACL or enable consumers to understand when they can enforce their rights. Ultimately, it would require a court to interpret, which will result in more uncertainty for many years as cases make their way through the courts.
- **Increasing the cost and complexity** to businesses of delivering goods and services in Australia.
- **Chilling business investment and innovation** which could lead to fewer products and services being made available in Australia. It is important that businesses can operate in Australia with confidence that the legal regime applies certain and predictable rules. BCA members have already indicated that piloting of products, delivery models and investment in new product options would be impacted by the regulatory uncertainty and risk of substantial penalties, under ACL, if a vague prohibition is introduced.
- **Reducing dynamism and competition** as businesses become more risk-averse in response to increased regulatory and compliance risk.

Adding an uncertain prohibition (that will require clarity from the courts) to an already complex and comprehensive consumer law framework will only make Australia less competitive and less attractive as a destination for international capital. This is not only through the direct costs of bad regulation, but also by disincentivising existing businesses from investing and modernising their business models – either through new explicit regulatory barriers, or from the signal overregulation sends about government's attitude towards innovation. This would be a very poor outcome. Australia's future prosperity relies on businesses modernising and taking up new technologies and ways of doing business. Without this, we will be left behind.

# 2. Key recommendations

The BCA recommends that:

1. No change is made to existing ACL at this point in time.
2. Further work be undertaken to clarify the nature of the conduct that is thought to give rise to particular consumer harm. Potential harms should be mapped against the ACL and other consumer protections to determine whether gaps exist and their materiality.
3. Government should defer further consideration of an unfair trading practices prohibition until the impact of the expanded scope of Unfair Contract Terms laws, including the introduction of penalties, and the Privacy Act reforms have been allowed to take effect and change conduct.
4. Government should not adopt a general prohibition against unfair trading in the form of Options 3 and 4.

# 3. Key issues

## 3.1 Significant compliance risk

The BCA is concerned that the nature of the problem underpinning the CRIS has been poorly articulated and is not supported by clear analysis or evidence that there is a gap in the ACL. Without clear identification of an actual gap in the existing consumer law framework, the discussion of potential legislative solutions is premature.

Notwithstanding the lack of clarity around the actual gap in the existing consumer law framework, recommending a vague standard such as "unfairness" presents significant regulatory risk to businesses by virtue of the substantial uncertainty about the nature of what business activities constitute as "unfair trading" and the prospect that such clarification will be left to the courts.

Further, the penalties under the CCA for breaches of ACL are substantial. Recent changes to the Act increased penalties to the greatest of:

- $50 million;
- Three times the benefit obtained from the conduct; or
- 30 per cent of the adjusted turnover during the breach period if the benefit cannot be determined.

These penalties are materially greater than those available in jurisdictions referred to in the CRIS with an unfair practices prohibition.

For example, in the United States detailed guidance is provided by the regulator as to what constitutes conduct in breach of consumer protections, and administrative hearings are utilised in the first instance along with cease-and-desist orders. Only if those orders are breached, are penalties available via civil fines of up to around US$50,000 per breach. This is substantially lower than under the CCA. Other examples include the United Kingdom which does not have a civil penalty scheme in place, the European Union that can seek a maximum fine of four per cent of trader turnover or EU$2 million if turnover cannot be determined, whilst in Singapore, the maximum consumer claim is SG$30,000. Furthermore, unfair practices regimes in other jurisdictions are more oriented towards promoting compliance and are far less punitive.

## 3.2 A vague, general prohibition is not in the interests of consumers

A vague, general unfair trading practices prohibition will not readily improve outcomes for consumers and will have long-term consequences for the delivery and availability of goods and services in the economy.

Poorly targeted or ill-evidenced reform risks undermining consumer interests in the long term by:

- **Limiting the ability for consumers to quickly benefit** from an unfairness standard because the protection is too vague. This will also hinder businesses' ability to have clarity around what conduct will contravene the ACL or enable consumers to understand when they can enforce their rights. Ultimately, it would require a court to interpret, which may only result in more uncertainty for many years as cases make their way through the courts.
- **Increasing the cost and complexity** to businesses of delivering goods and services in Australia.
- **Chilling business investment and innovation** which could lead to fewer products and services being made available in Australia. It is important that businesses can operate in Australia with confidence that the legal regime applies certain and predictable rules. BCA members have already indicated that piloting of products, delivery models and investment in new product options would be impacted by the regulatory uncertainty and risk of substantial penalties under ACL if a vague prohibition is introduced.

- **Reducing dynamism and competition** as businesses become more risk-averse in response to increased regulatory and compliance risk.

## 3.3 Absence of clear evidence of a gap in Australia's consumer law framework

The Regulatory Impact Statement process is designed to support best practice regulation that is well-evidenced and well-targeted to avoid unnecessary and disproportionate impacts on business and the community. The BCA is concerned that the underlying premise of the consultation is flawed as the CRIS has not definitively established that the "unfair practices" referred to on page 9 of the CRIS are outside Australia's existing consumer law framework. That is, the 'gap' and therefore need for legislative reform is not well-evidenced.

A consultation process that asks stakeholders to comment on proposed solutions, when the scope of the problem is unclear, is unlikely to meet best practice standards for regulatory reform. This substantially increases the likelihood of a poor regulatory outcome leading to potentially unintended consequences.

To illustrate, Appendix A takes a few examples of issues identified in the CRIS and identifies key components of the existing consumer protection framework that addresses the identified issues.

The exact scope of the problem that requires a wholly new legislation prohibition is unclear. Without knowing the proper scope of the problem, designing a targeted solution with appropriate safeguards (if indeed any solution is needed) is not possible.

The CRIS also highlights that other jurisdictions have a form of unfair trading practices prohibition whereas Australia does not.

A comparison of an unfair trading practices prohibition by name alone, does not provide for a ready or accurate comparison of consumer protections between Australia and elsewhere. Such an assessment fails to account for the specific nuances in each regime, including that Australia, unlike most other jurisdictions (e.g. the US, EU and Singapore), extend the protections offered to consumers, to small businesses, and have far more significant penalties (and therefore stronger deterrence) compared with other "unfairness" regimes. The lack of specificity around the conduct, to be captured by a vague prohibition also fails to recognise the extensive industry-specific consumer and small business protections in place, in many industries.

The analysis of the actual legal gap or scope of the problem simply has not been completed to the necessary standard required of a Regulatory Impact Statement process. In light of the substantial regulatory uncertainty, the introduction of a new prohibition would cause a potential chilling effect on new initiatives. Consideration of any changes to the ACL should be paused until a proper and detailed assessment of the application of the existing consumer law regime to unfair practices has been completed.

### 3.3.1 Australian Consumer Law already includes unfair trading practices

The ACL already contains an unfair trading practices regime:

- General protections – including misleading and deceptive conduct, unconscionable conduct, unfair contract terms.
- Unfair practices – including false or misleading representations, unsolicited selling, pyramid schemes, and other unfair practices including harassment and coercion.

The 2017 Australian Consumer Law Review noted that "the value of an additional general unfair trading prohibition is uncertain at this point in time" given the many existing protections in the ACL[5]. Given the further reforms to the ACL since then (e.g. amending the definition of consumer, introducing significantly higher

[5] Consumer Affairs Australia and New Zealand, 2017, *Australian Consumer Law Review Final Report*, page 51.

penalties for ACL contraventions or introducing penalties for unfair contract terms), the conclusions of the Review remain applicable today.

Concerning unconscionable conduct, leaving aside the myriad of regimes that make up Australia's current consumer protection framework (e.g. the ACL, the Privacy Act, the CDR rules etc.), the very purpose of the unconscionable conduct provision in s 21 of the ACL is to protect against "unfair" conduct. Specifically, s 21 is "directed at conduct, which while it may not be misleading or deceptive, is nevertheless clearly *unfair* or unreasonable".[6] And while s 21 uses the terminology "unconscionable" vs. "unfair", its purpose is to address "tactics…which are commonly used in business but which may be considered unfair."[7]

### 3.3.2 The CRIS also needs to account for industry-specific protections

In addition to existing protections within the ACL, many industries have industry codes (mandatory or voluntary), adding to consumer protections, and/or are subject to legislated consumer protections.

Examples of industry specific protections include:

- Telecommunications – Telecommunications Consumer Protection Code
- Energy – Electricity Retail Code
- Financial services – *Corporations Act* and *National Consumer Credit Protection Act* requirement to provide financial services or credit activities 'efficiently, honestly and fairly.'[8]
- Private Health Insurance – Obligations under the *Private Health Insurance Act* 2007, ministerial approval for changes to fund rules and premium changes and the voluntary Private Health Insurance Code of Conduct.

Businesses are also protected through a variety of codes including:

- Dairy Code of Conduct
- Franchising Code of Conduct
- Food and Grocery Code of Conduct

The combination of economy-wide consumer protections through legislation (such as the ACL, *Privacy Act* and Consumer Data Rights regulations), industry and issue-specific protections shows how comprehensive the consumer protections are in Australia. Further, the CRIS provides no commentary or guidance on whether the overseas jurisdictions referred to in the CRIS, have their own industry or sector-specific protections including codes to enable an accurate comparison with the Australian regime. Feedback from BCA members indicate that the codes have had a net benefit on their engagement with consumers and other businesses.

### 3.3.3 Privacy and data-related consumer issues are already being addressed

As set out in the CRIS, the overwhelming majority of ACCC commentary and recommendations concerning the benefit of an unfair trading practices prohibition concern data and privacy matters.

However, many aspects of the government's thinking, as set out in the CRIS, are already being considered through other reform processes that are underway. This includes through major reform processes and key government priorities, including the Privacy Act Review and the new Scam Code. Treasurer Dr Jim Chalmers has also indicated that a soon to be released statement of expectations for the Australian Securities and Investment Commission will "focus on protecting consumers and investors in the digital sphere…"[9].

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[6] Second Reading Speech, *Trade Practices Revision Bill 1986* (House of Representatives Hansard, 19 March 1986, page 1627).
[7] Explanatory Memorandum for ss 52A(2)(d), which has been in replicated under ss 22(1)(d) of the ACL; Explanatory Memorandum, Trade Practices Revision Bill 1986 at 22; remainder of this quote is "(eg the salesman 'putting his foot in the door'), although if the conduct in question is relatively harmless and does not affect the fairness of the final transaction, the unfairness of those tactics may carry little weight."
[8] Section 912A(1)(a) of the *Corporations act 2001* and section 47(1)(a) of the *National Consumer Credit Protection Act 2010*
[9] Durkin, P. (2023) 'Chalmers sets new expectations for ASIC', Australian Financial Review, 21 November 2023 available at https://www.afr.com/policy/economy/chalmers-sets-new-expectations-for-asic-20231121-p5eljr.

The government has already committed to examining a new test for 'fair and reasonable information handling', as part of the government response to the Privacy Act Review. This is intended to examine how to protect individuals from (poorly defined) 'dark patterns' and covers aspects of the conduct raised in the CRIS as being concerning. It is unclear how having overlapping (and likely duelling) intervention from government on this issue would be helpful.

Further, as we have previously pointed out, the definition of 'dark patterns' itself is critical. The ACCC has previously suggested regulating 'dark patterns', suggesting they are deliberate design decisions made to 'nudge' consumers to take a specific course of action. However, nudge techniques such as framing are common in all forms of marketing and communications. The techniques can be used to promote virtuous choices just as much as for any other purpose. Government itself has invested in exactly this kind of activity through the Behavioural Economics Team (BETA) in the Department of the Prime Minister and Cabinet.

### 3.3.4 Unconscionable conduct

The CRIS also appears to be predicated on the challenges the ACCC have had in succeeding in bringing unconscionable conduct claims. BCA member analysis found that since 2013, the ACCC have succeeded in 85 per cent of claims of unconscionable conduct it has brought. Of the small percentage it did not succeed on, the ACCC still did so on other ACL grounds in the majority of instances. As noted in the CRIS, government may wish to consider whether any changes to unconscionable conduct provisions are necessary. The ACL Review Final Report's recommendation concerning the exploration of an unfair trading practices prohibition, was in the context of the operation of unconscionable conduct.

Three categories of unfair trading practices were highlighted by the Review's Final Report:

- *Take[ing] advantage of consumers being unable or failing to appreciate unexpected consequences of a contract.*
- *Exploiting vulnerable consumers by charging fees or costs that far exceed the cost of providing the service.*
- *Take[ing] advantage of vulnerable consumers who cannot access alternative products or are unaware of alternatives available to them.* [10]

Putting to one side that the ACL Review could not conclude that there was indeed a gap in existing ACL, these categories of conduct are very different to the wide range of examples raised in the CRIS consultation paper. The latter two relate to vulnerable consumers, which aligns more closely with the penumbra of unconscionable conduct, while the former relates to knowledge around the terms and conditions of a contract which could be addressed through the existing Unfair Contract Terms regime.

### 3.3.5 Any intervention must be targeted and reflect a genuine gap in the existing comprehensive consumer protection framework

Notwithstanding earlier comments about the necessity for government to determine if there is indeed any gap in the consumer protection framework, a targeted solution is vastly superior to a vague, general prohibition. As the ACCC observed: "*the scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance*".[11]

The BCA has observed an increasing tendency of governments to legislate broad-based powers without having evidenced a gap in existing legislation. The ACL already has an established form, and the introduction of an unfair trading practices prohibition is likely to duplicate existing prohibitions. Incorporating a fix for a specific gap within the canon of the existing framework, if established, is less likely to cause the wide range of unintended consequences that a general unfair trading practices prohibition presents.

[10] Consumer Affairs Australia and New Zealand, 2017, *Australian Consumer Law Review Final Report*, pages 50-51.
[11] Australian Competition and Consumer Commission, 2022, *Digital Platform Services Inquiry – Interim report No. 4 – General online retail marketplaces*, page 5.

## 3.4 Other matters

### 3.4.1 Safe harbour

Notwithstanding the BCA's recommendation that no changes be made to the ACL at this stage, any amendments to the ACL should include appropriate safeguards including safe harbour provisions to reduce regulatory and compliance risks for businesses seeking to meet their ACL obligations. Our members advise that is certainly the position in the United States, where the legitimate business reasons of a business are taken into account.

### 3.4.2 Guidance material

Member feedback indicated that comprehensive guidance material from the regulator would be valuable and necessary to support the intended operation of any amendment to the ACL. Comprehensive guidance material would be one method of mitigating some of the regulatory uncertainty arising from the operation of a general prohibition.

Utilisation of guidance material can also assist the regulator to evolve advice in light of emerging technologies or business models.

### 3.4.3 Right to action

The right to take action for a breach of the ACL extends beyond the regulator to consumers and, in contrast to other jurisdictions like the United States which only apply to individuals. There may be advantages to narrowing the right to action to the regulator, as per the US approach, to further assist in managing regulatory uncertainty.

### 3.4.4 Identifying small business

The CRIS notes that small businesses should be included in any new protection against unfair trading practices. As noted in previous BCA submissions on Unfair Contract Terms, a definition of employees fewer than 100, and turnover less than $10 million is difficult for businesses to assess in practice. A more efficient approach could be achieved through greater consistency in small business definitions, as well as by allowing for the turnover test to also be verified through the Small Business Identification Tool introduced as part of the Payment Times Reporting Scheme. While there are still some issues with the Small Business Identification Tool in practice, it continues to be improved and should have much wider applicability and support other policies targeted at small business.

### 3.4.5 Phased Approach

Finally, the introduction of any legislative amendments should take the same approach as occurred with respect to the original misleading and deceptive conduct prohibition and the recent unfair contract standard, where penalties do not, or did not immediately, apply. Taking an incremental approach allows businesses facing an uncertain, new and untested standard to develop their systems and processes, without facing crushing penalties and when guidance will likely be very limited.

# Appendix A

Unfair trading practices examples

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# Appendix A

**Unfair trading practice coverage examples**

| CRIS Unfair Trading Practice | Existing consumer law framework | Comments |
|---|---|---|
| Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into) | ACL – sections 18, 21 & 29<br>Grocery Code – section 20<br>Franchising Code – sections 8-11, 17<br>Dairy Code – section 29<br>NSW FTA – sections 47A & 47D | s 18 of the ACL: Misleading or deceptive conduct.<br>s 29 of the ACL: False or misleading representations<br>Non-disclosure of contract terms including financial obligations could be false or misleading in breach of section 29 of the ACL where, for example:<br>■ the business makes a positive representation that the customer will receive certain benefits; and<br>■ fails to disclose that the customer must perform certain obligations in order to obtain those benefits.<br>s 21 of the ACL: Unconscionable conduct.<br>Non-disclosure of contract terms including financial obligations could amount to unconscionable conduct in breach of section 21 of the ACL, where it would be against good conscience in all the circumstances to not disclose those terms. This could also amount to a system of unconscionable conduct if, for example, the practice of not disclosing certain contract terms was ingrained in the business practices of the business. |
| Inducing consumer consent or agreement to data collection through concealed data practices | ACL – sections 18, 21, 23, 29, 33, 34<br>CDR Rules - rule 4.10(b)(ii)<br>APP – APP 1, 3, 4, 5, 6, 7, 11 | ACL<br>Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations<br>Inducing consumer consent or agreement to data collection through concealed data practices could be misleading or deceptive conduct in breach of section 18 or 29 of the ACL where, for example:<br>■ the business represents they will not collect certain data, or use data for certain purposes; and<br>■ this representation is incorrect; or<br>■ the business is silent as to its collection or use of data; and |

| CRIS Unfair Trading Practice | Existing consumer law framework | Comments |
|---|---|---|
| | | ■ there is an expectation that this would be disclosed.<br><br>Section 33 and 34: misleading conduct as to the nature of goods and services<br><br>Section 23 – Unfair contract terms<br><br>Inducing consumer consent or agreement to data collection through concealed data practices could be in breach of section 23 of the ACL where, for example:<br><br>■ customers are made to accept privacy policies that lack transparency (e.g. are lengthy or confusing);<br><br>■ the collection of data under the privacy policy could cause the customer detriment; and<br><br>■ the collection of data is not reasonably necessary to protect the business's legitimate interests.<br><br>APP 5<br><br>An APP entity that collects personal information about an individual must take reasonable steps either to notify the individual of certain matters or to ensure the individual is aware of those matters. This includes a requirement to take reasonable steps to make such disclosure either before or at the time it collects personal information. |

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