Australian Banking Association

Protecting consumers from unfair trading practices

ABA submission to Treasury

1 December 2023

Australian Banking Association

Contents

Australian Banking Association

Key Recommendations

1. The ABA recommends Option 1 of the Consultation Regulation Impact Statement (**Consultation**) for the following reasons:

    (a) in the context of financial services provided by ABA member banks, the status quo already provides an extensive regulatory framework that governs much of the harmful conduct identified in the Consultation;

    (b) some of the potential harms identified in the Consultation are being addressed in the ongoing Privacy Act Review, and to avoid any regulatory overlap, this process should be completed first;

    (c) to the extent that there are residual gaps in the context of practices associated with digital platforms, any reforms should be targeted towards addressing those gaps;

    (d) the Consultation does not convincingly make the case that the introduction of any general prohibition on unfair trading is necessary or desirable; and

    (e) further work is required to better define the "problem" relating to unfair trading practices.

2. If any legislative reforms were to be pursued these should be highly targeted and incremental to the existing legal and regulatory framework as opposed to an economy-wide reform.

Policy Lead:

About the Australian Banking Association (ABA)

The Australian Banking Association advocates for a strong, competitive, and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Australian Banking Association

ABA submission to Treasury regarding unfair trading practices

The ABA welcomes the opportunity to provide a response to Treasury's consultation on protecting consumers from unfair trading practices. We note at the outset that the consultation confines its attention to a possible unfair trading prohibition under the Australian Consumer Law and does not consider the extension of reform to Australian Securities and Investments Commission (ASIC) regulated financial services in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), but notes that Treasury intends to consult on similar reforms to the ASIC Act through a separate process in 2024.

As a statement of principle, the ABA agrees that consumer protections are critical and therefore supports appropriate regulation that protects consumers from unfair trading practices. Since 1993 the ABA and its members have proactively demonstrated their commitment to consumer protections, including small businesses, through its Banking Code of Practice which provides safeguards and protections not set out in law.

In addition to the Banking Code, the ABA acknowledges the extensive regulatory regime already applying and proposed to apply to banks which covers many of the harmful practices identified in the Consultation. We provide further detail on this in section 1 below.

New proposals which add further duplication of existing laws and introduce further uncertainty and complexity, such as those contemplated by Options 3 and 4 in the Consultation do not, in our view, meaningfully add to existing consumer protections. If additional protections are likely to overlap with existing laws, we question what will be removed from the existing regulatory regime to eliminate incremental duplication.

Further, we note that since the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, our industry has implemented an additional 1,175 pages of legislation and regulation. The impact of increased compliance burden is especially pronounced on smaller banks. The ABA continues to support a level playing field among industry participants which allows proportionate investment in regulations that improve customer outcomes.

Finally, a broad economic-wide approach that adds further complexity and cost rather than targeted reform to address specific harms has the potential to reduce productivity, innovation, and in turn, competition in the banking industry. These outcomes do not benefit the Australian economy and its consumers.

While the planned 2024 consultation will be of greater relevance to banks, the ABA nevertheless recognises the economy-wide importance of the issues raised in the Consultation and accordingly has an interest in submitting the industry's more detailed views as follows.

1(a) Existing regulatory framework

The "continuing cost" listed in the preliminary impact analysis for Option 1 states that "Unfair trading practices not covered by existing laws would likely continue, with consumers and small business bearing financial and non-financial costs as a result of these practices, with no effective options for redress."[1]

For the reasons outlined below, we are not convinced that this statement is accurate in respect of the banking industry.

[1] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023, page 22.

In anticipation of the planned consultation on similar changes to the ASIC Act, we note that the regulatory regime for banks (and to a lesser extent, financial services providers generally) is considerably more stringent than for most other businesses. For example, many existing laws indeed cover unfair trading practices, including specific digital practices, and include effective options for redress by consumers. In this respect we highlight:

a) Obligations under legislation including the *Corporations Act 2001* (Cth), *Australian Securities and Investments Commission Act 2001* (Cth), *National Consumer Credit Protection Act 2009* (Cth) and the *Privacy Act 1988 (Cth)*.

   These acts impose broad obligations and protections to customers which include:

   a. a requirement to act efficiently, honestly, and fairly (s912 of Corporations Act and s47 of the National Consumer Credit Protection Act);
   b. a requirement for banks and their agents to exercise a best interest duty when providing personal advice (s961B of Corporations Act);
   c. design and distribution obligations;
   d. pre contractual disclosure obligations which contain detailed requirements relating to disclosure of information to consumers before they enter a contract with a bank to ensure they can make an informed decision about the product or service they choose; and
   e. responsible lending obligations.

b) A well-developed and broadly accessible dispute resolution system exists for bank consumers, with ABA members following internal dispute resolution processes that comply with ASIC's Regulatory Guide 271. Further, access by consumers to a free of charge external dispute resolution process via the Australian Financial Complaints Authority (AFCA) is available.

c) That ABA members with a retail presence have also subscribed to the ABA's Banking Code of Practice which contains additional consumer protections not set out in the law, including specific protections for small business customers.

Please refer to Annexure 1 for a summary of the non-exhaustive list of the existing regulatory regime.

1(b) Proposed legislative reform

The ABA also notes that consideration of other proposed regulatory changes, such as the Privacy Act Review Report, may provide additional consumer protections without the need for economy-wide changes. The proposed reforms address some of the harms described in the Consultation, for example:

a) concealed data practices are addressed under the "right to access and explanation" proposals (see section 18.3 of the Privacy Act Review);

b) exploiting behavioural vulnerabilities is addressed under the "direct marketing, targeting and trading" proposals (see section 20 of the Privacy Act Review);

c) all or nothing clickwrap consents are addressed as "bundled consents" proposals (see section 11.3 of the Privacy Act Review); and

d) complex disclosures are addressed under section 10 of the Privacy Act Review.

Accordingly, the ABA recommends allowing the Privacy Review to be completed before proceeding further with any of Options 2,3 or 4 in the Consultation to avoid duplication and inconsistency and, allow for a more coherent and effective overall approach to consumer protections.

1(c) Case law cited

The ABA notes the cases cited by Treasury in the Consultation as examples where "there may be conduct that causes significant consumer harm" but is not for example, misleading or deceptive conduct but which nevertheless distorts consumer choice or does not reach the threshold of unconscionable conduct. These examples include:

- Inducing consumer consent or agreement to data collection through concealed data practices;
- Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice;
- Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered;
- Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy;
- Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise);
- Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights;
- Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into);
- All or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection, and use of data, and do not provide consumers with meaningful control of the collection and use of their data; and
- Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.[2]

We question whether some of the listed issues are in fact outside existing protections. For example, 'non-disclosure of contract terms' is something that might well be caught by the Unfair Contract Terms regime.[3]

In addition, despite the Consultation asserting that the issue is not confined to digital platforms, many of the above issues seem more relevant in that context. If that is in fact where the perceived issues are most acute, then options that would introduce more targeted changes seem more appropriate.

Where the Consultation does seek to identify shortcomings in existing laws that are more relevant to the economy as a whole, is in the list of cases that are said to demonstrate 'limitations' in the existing misleading and deceptive conduct, and unconscionable conduct, regimes.

These cases are presented as if they make the 'limitations' in the regimes obvious. However, the fact that the ACCC was unsuccessful in any given case should not lead to a conclusion that there is necessarily a limitation in the law.

---

[2] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023. Page 9

[3] The extent to which a term is transparent is a factor that can be considered in deciding whether a term is 'unfair (s.12GB(2)(b))

On closer scrutiny, we consider the cases cited by Treasury do not support the underlying assumption that a general unfair practices prohibition would change the determinations of the court for the following reasons:

a) ***Australian Competition and Consumer Commission v AGL South Australia Pty Ltd [2014] FCA 1369 & [2015] FCA 339***

The ACCC was largely successful in this case and failed only in relation to the last series of alleged misrepresentations on the basis that:

- the representations as pleaded *were not made* (this could have been different if the ACCC had pleaded the case differently – see para 286 of the 2014 judgement), and
- in respect of the allegation that omission to provide certain information was misleading, that the relevant customers did not have a reasonable expectation that the information should be disclosed.

The Consultation says "[t]his case illustrates the legal limits to the existing prohibition on misleading and deceptive conduct." [4] It is not clear how that is so and how a general prohibition on unfair trading would have changed the result in this case.

b) ***Australian Competition and Consumer Commission v Medibank Private Limited*** **[2018] FCAFC 235**

The Consultation fails to mention that the trial judge and all judges of the Full Court found that the alleged representations (relating to out of pocket expenses and the giving of notice of changes to benefits) had not been made. The consensus view can be summarised in a statement by the trial judge that the Full Court agreed with:

> *"If the applicant's contentions were correct, it would follow, as Medibank contended, that on the applicant's view of things, the documents relied upon by the applicant must also convey a representation to the consumer that Medibank indemnifies members for all costs of all included procedures – which number well over 5000 – not just radiology and pathology. And no one could possibly believe or infer that, because, apart from anything else, it flies in the face of repeated warnings about out-of-pocket expenses in the Cover Summaries, the Member Guide and other product documents."*[5]

On the unconscionable conduct point, which was based on Medibank's decision not to expressly inform its members that it had terminated some of its contracts with providers, the ACCC's case had been pleaded on the basis that the above representations had been made.

Hence its case was made more difficult considering the Court's finding in that regard that the alleged representations referred to above had not been made. While it is true, as the Consultation notes, that Justice Beach, with whom the other members of the Full Court agreed, commented that Medibank had acted harshly and even unfairly, that was only after his Honour extensively and carefully outlined the reasons why Medibank had not acted unconscionably.[6]

The Consultation's quoting of Justice Beach on unfairness seems designed to emphasise that unconscionability is not equal to unfairness, but it does not necessarily follow that the ACCC

[4] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023. p13

[5] Australian Competition and Consumer Commission v Medibank Private Limited [2018] FCAFC 235, [171].

[6] Australian Competition and Consumer Commission v Medibank Private Limited [2018] FCAFC 235, [353].

would have succeeded in an action brought under a general 'unfair trading' prohibition, and the Consultation does not set out a case for why it should have.

c) ***Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493***

The Consultation omits important facts from the case. First, the ACCC was successful in its case on misleading and deceptive conduct, both initially and on appeal.

Second, though the ACCC failed to establish unconscionable conduct, this could have been different if it had pursued and proved its more serious allegations. For example, the Full Court noted:

> *"If the ACCC had followed its initial course of seeking to prove the vehicles had suffered major failures, and had proved that, the unconscionability case might have looked quite different."*[7]

The Full Court, in coming to the same conclusion as the primary judge that there was no unconscionable conduct, noted the following key facts:[8]

> *First, the ACCC expressly disavowed any allegation of dishonesty or fraud on the part of Mazda."*
>
> *"Second, unlike in [Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90], the conduct relied upon by the ACCC did not involve deception in the form of a ruse or a stratagem by sales representatives to gain access to a consumer for the purpose of achieving sales pursuant to explicit directions from their employer."*
>
> *"Third, the ACCC does not advance any systemic conduct case on the part of Mazda, rather it advanced seven (7) individual cases based on essentially the same type of conduct. The absence of a 'system' case meant that the fact there were seven individual cases, in which similar behaviour was proved, was not as significant as it otherwise might have been."*
>
> *"Finally, the ACCC initially raised but ultimately abandoned any case that the Consumers had established an entitlement to a full refund or replacement vehicle at no cost by reason of the faults that they had experienced with their vehicles."*

Again, the Consultation does not convincingly make the case for why this outcome represents a gap in the existing regulatory framework, or that any general prohibition on unfairness would have changed the outcome.

d) ***Pitt v Commissioner for Consumer Affairs [2021] SASC 24***

The Consultation implies that the Court of Appeal of SA judgment overturned the lower Court decision in favour of the Commissioner on the basis that there was no 'special disadvantage.' However, this is only partly correct.

The Court of Appeal cited and agreed with the judgment in *Australian Competition and*

[7] Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493, [558].

[8] Australian Competition and Consumer Commission v Mazda Australia Pty Limited [2023] FCAFC 45. [559-562].

Consumer Commission v Quantum Housing [2021] FCAFC 40 which made clear that it is not necessary, for statutory unconscionability, to establish any special disadvantage. Because the lower Court judgment was based on there being such disadvantage, the Court considered and overruled on that point.[9]

However, the Court also went on to consider the question of broader unconscionability, that is, without the need to show special disadvantage.[10] After very carefully weighing the facts, the Court found:

> *"we consider that Mr Hartwig was in a vulnerable or disadvantageous position in the sense that he was in a weak bargaining position relative to Mr Pitt. He was in a difficult position, with limited alternatives to the arrangements proposed by Mr Pitt. At the same time, we do not think that Mr Hartwig's ability to understand either of the arrangements proposed by Mr Pitt, or his ability to assess and protect his own interests, was seriously affected, or compromised.*
>
> *He was able to, and did, make a free choice to enter into the Option Agreement and Addendum. Further, while the agreements he entered into were advantageous to Mr Pitt, they also provided some potential benefit to Mr Hartwig in terms of assisting him to raise the funds he needed to move into a retirement village."*[11]

Even if there had been a general prohibition on unfair trading, it would still be necessary to weigh all the facts and it is by no means clear that the outcome in this case would have been different. The ABA also considers it would an undesirable outcome if an unfairness regime had the effect of making actionable any situation where there was an imbalance in bargaining power.

1(d) Defining the problem

The Consultation provides some examples of trading practices which are both potentially unfair and, presented as practices which are not covered by existing provisions in Australia's consumer laws. [12]

Overall, for the reasons outlined above, the ABA considers that the examples and practices cited in the Consultation do not adequately define what the problem is. In our view, precision in defining the problem is critical in selecting the most appropriate option to address it. As stated above, if the problem is most manifest in relation to digital platforms, then a targeted solution that addresses any gaps there would be a better option than to introduce a new and potentially disruptive economy wide prohibition on unfair trading.

2 If any reform is pursued, it should be targeted in nature

For the reasons discussed, the ABA's preferred position is Option 1.

Options 3 and 4 do not propose a specific definition of "unfair" in the context of the "general prohibition of unfair", making it challenging to evaluate them as a feasible choice. [13] We consider any new

[9] Pitt v Commissioner for Consumer Affairs [2021] SASC 24, [156].
[10] Pitt v Commissioner for Consumer Affairs [2021] SASC 24, [80].
[11] Pitt v Commissioner for Consumer Affairs [2021] SASC 24, [252].
[12] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023. Pages 4 and 6
[13] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023, pages 25 to 28.

definition of “unfair” should be settled before further work on these options and not the other way around as proposed in the Consultation.

Finally, we make some observations on the Consultation references to overseas jurisdictions as follows:

a) **Requirement for a legislative gap analysis:** inevitably, between jurisdictions there will be differences in the underlying regulatory regimes and as such it would be premature to adopt any foreign jurisdiction approach without a proper legislative gap analysis.

b) **Different market dynamics:** different jurisdictions have different market structures and consumer behaviours. Adopting alternative approaches may not address the unique market conditions applying to Australian consumers.

c) **Implementation complexity and cost:** any introduction of new concepts such as “substantial injury” used in the United States will introduce complexity as interpretation and understanding via court judgements takes time to evolve.

d) **Business uncertainty:** as the Consultation acknowledges, until a definition of unfairness is developed and affirmed through case law, it may lead to a more cautious commercial environment and so reduce innovation for consumers.[14]

Accordingly, the ABA considers it premature to evaluate Options 3 and 4 until these factors have been assessed. Should there be any shift from the current status quo, the ABA’s preference is reform that is directed at the specific industries or enterprises who are carrying on activities that are not otherwise caught by existing law.

[14] Protecting consumers from unfair trading practices. Consultation Regulation Impact Statement. The Treasury. August 2023, page 28.

Australian Banking Association

Annexure 1 – Non-exhaustive list of existing regulatory regime

1. National Consumer Credit Protection Act 2009 (Cth)

The *National Consumer Credit Protection Act 2009* (**National Credit Act**), including the National Credit Code, applies to the conduct of Australia credit licence holders, such as banks. It applies to a breadth of banking products such as personal loans, home loans and credit cards and includes the following obligations on banks:

- to act efficiently, honestly, and fairly in relation to the carrying out of their statutory obligations;
- prohibiting the giving of information or documents that are false in a material particular or materially misleading way while engaging in a credit activity;
- to comply with responsible lending obligations including the requirement to conduct an assessment as to whether a credit product or increase is 'not unsuitable' for a consumer (by making reasonable inquiries and verifications);
- to comply with pre-contractual disclosure requiring a precontractual statement for consumers setting out a broad range of matters e.g., the amount of credit, interest rates under the contract and a statement of credit fees and charges that are or may become payable:
- to provide prescribed information statements that set out the customer's statutory rights and obligations before entering the contract, such as how to terminate the contract; and
- to provide key fact sheets for home loans to inform consumers of key terms, charges, fees, repayments, and definitions.

2. Corporations Act 2001 (Cth)

The *Corporations Act 2001* applies broadly to financial products and services, which includes shares, futures, securities, managed investment products, direct debit, smart cards, cheques, guarantees and any deposit-taking facility made available by a bank. Chapter 7 contains provisions regulating the conduct of banks, including:

- that banks must do all things necessary to ensure that the financial services offered by the bank are provided efficiently, honestly, and fairly;
- that a person must not engage in dishonest conduct, or conduct that is misleading, deceptive, or likely to mislead or deceive in the provision of a financial product or service;[15]
- mandatory disclosure obligations such as Product Disclosure Statements and Financial Services Guides, to ensure that consumers can make informed and well understood decisions;[16] and
- product design and distribution obligations, intended to help consumers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to the design and distribution of products.[17]

[15] Sections 912A; 1041G and 1041H Corporations Act 2001 (Cth).
[16] Section 1012C, 942B Corporations Act 2001 (Cth), respectively.
[17] Part 7.8A Corporations Act 2001 (Cth).

Australian Banking Association

3. Privacy Act 1988 (Cth)

The *Privacy Act 1988* requires banks (as APP entities)[18] to comply with the Australian Privacy Principles.[19] Among other things, an APP entity that collects personal information about an individual must take reasonable steps to notify the individual of certain matters or ensure the individual is aware of those matters.

These matters include the APP entity's identity and contact details, the fact, and circumstances of collection, whether the collection is required or authorised by law, the purposes of collection, and whether the entity is likely to disclose personal information to overseas recipients including, if practicable, the countries where they are located.

4. Unfair Contract Terms regime in the ASIC Act

Banks are also required to comply with the unfair contract terms regime in the ASIC Act, the purpose of which is to protect consumers (including small businesses) who commonly enter into contracts for financial products and services from unfair contract terms.[20]

Under the legislation, any term of an eligible contract that is found to be unfair is void and courts can also make orders to vary the contract, refuse to enforce terms of the contract or direct the business to refund money or provide services to the consumer affected.

Examples that could be considered unfair include:

- unilaterally varying the upfront price payable under the contract without the right of another party to terminate the contract,
- assigning the contract to the detriment of another party without consent, and
- limiting the ability of one party to sue another party.

The UCT scheme also subjects banks to significant financial penalties for breaches of the scheme.

5. The ABA Banking Code of Practice

The Banking Code of Practice (the **Code**) is a self-regulatory framework for ABA member banks with a retail presence that sets out standards of practice and service for individual and small business customers, and their guarantors. The Code provides customers with safeguards and protections not set out in law including disclosure requirements prior to or at the time of a banking service so that consumers can make an informed decision.

The Code commitments are contractually enforceable by customers who are also able to enforce their rights via internal dispute resolution processes in accordance with ASIC's Regulatory Guide 271: Internal dispute resolution; or via external dispute resolution through AFCA.

[18] The term 'APP entity" means an agency or organisation (see section 6(1) Privacy Act 1988 (Cth)).
[19] Section 15 Privacy Act 1988 (Cth).
[20] Section 12BF to 12BM ASIC Act 2001 (Cth).