

## Response to Treasury's Consultation Regulatory Impact Statement, *Protecting consumers from unfair trade practices*.

The Australian Financial Complaints Authority (**AFCA**) welcomes consultation on the proposed introduction of a prohibition against unfair trading as set out in the Consultation Regulation Impact Statement (**CRIS**). We believe that this represents an important opportunity to set standards and expectations of business behaviour that are in line with community expectations.

As stated in the CRIS, the current consultation confines its attention to a possible unfair trading prohibition under the Australian Consumer Law (**ACL**) and does not directly consider the extension of reforms to regulated financial services in the Australian Securities and Investments Commission Act (**ASIC Act**). The CRIS states that this will be considered through a separate regulation impact assessment process which will be advanced in 2024.

AFCA is the external dispute resolution scheme authorised under the *Corporations Act* 2001 to deal with complaints about licensed firms in the financial sector. The AFCA scheme is overseen by the Australian Securities and Investments Commission (**ASIC**) and must comply with general considerations which are: accessibility; independence; fairness; accountability; efficiency and effectiveness.

AFCA resolves complaints that individual or small business consumers make about their financial firms. Our complaint resolution service, provided free to consumers, is an alternative forum to tribunals and courts, and our decisions are binding on financial firm members. AFCA operates under a set of Rules which set out what complaints we can consider, the procedures we can use to resolve complaints, remedies we can provide and related matters including our reporting obligations.

Fairness is at the heart of AFCA's dispute resolution service. There are two fairness tests found in AFCA's Rules that AFCA staff and decision makers must apply when assessing complaints. Our general test (applying to all non-superannuation complaints) requires an AFCA decision maker to do what they consider is *fair in all circumstances* having regard to:

- a) legal principles
- b) applicable industry codes or guidance
- c) good industry practice

d) previous relevant Determinations of AFCA or Predecessor Schemes (but these are not binding).

Our fairness jurisdiction operates alongside the existing duties and laws that apply to financial product and services and credit providers. It does not set new standards of conduct for financial firms. We believe that fairness in design, delivery and in outcomes is essential to building and maintaining consumer trust in markets and that the proposals discussed in the CRIS are important and timely given:

- prior experience in relation to predatory or unfair business models that have resulted in uncompensated consumer losses; and
- enhanced awareness of how dark patterns and online manipulation can distort consumer outcomes and competition in an increasingly digital world.

While AFCA can deliver fair outcomes (to financial firms and consumers) who are party to a complaint, a new standard prohibiting unfairness can shift the focus onto fairness by design and seek to effectively respond to systemic unfairness (rather than relying on individual consumers to make a complaint to obtain an appropriate remedy). It can also ensure, in the financial services context, that unlicensed financial firms are held to similar standards as licensed firms who must be members of AFCA as a condition of their ASIC licence.

AFCA has seen business models that have caused significant consumer harm, some of which traverse financial and non-financial products and services (including models involving real property investment and motor vehicle finance) and/or operate across different regulatory jurisdictions. These include business models that have exploited First Nations Australians.

AFCA therefore supports timely consideration of an economy-wide unfair trading prohibition, consistent with the objective of harmonising the consumer protection provisions in the ACL and the ASIC Act. This has the potential to influence business behaviour, maximise good consumer outcomes across the economy, and reduce the risk of regulatory arbitrage by bad actors.

We look forward to the opportunity to make further submissions on this issue.