



ACT
Government

Protecting Consumers from unfair trading practices

ACT Government Submission to the Consultation Regulation Impact Statement

November 2023

I am writing on behalf of the ACT Government in relation to the Treasury's Consultation Regulation Impact Statement on Protecting consumers from unfair trading practices ('the CRIS').

Markets are increasingly complex. Even without manipulative or distortionary conduct, consumers must consider an ever-increasing range of factors in order to make a 'good' decision – an exercise which the Australian Securities and Investments Commission has demonstrated is enormously challenging for consumers to do.¹ These considerations increase substantially in digital marketplaces with the use of consumer data, making decision-making even harder.

As such, the ACT Government echoes the concerns of the Australian Competition and Consumer Commission (**ACCC**) and other stakeholders about the types of business conduct outlined in the CRIS, and resultant consumer detriment. The ACT Government is supportive of reform to address these harms, and regulatory impact analysis of the feasible options.

This submission does not respond to particular questions or support a particular option. Rather, the ACT Government offers up several suggestions to guide Treasury's consultation.

I. *Unfair trading practices*

Where business practices have the potential to cause significant consumer harm, it is important to ensure there are adequate protections in place. As identified in the CRIS, and supported by recent cases and emerging research, there is conduct occurring, occasioning consumer detriment, but it:

- is not misleading or deceptive, or likely to mislead or deceive;
- does not reach the threshold of unconscionable conduct;
- does not form part of a standard form contract, or relate to actions surrounding the entering into an agreement, rather than the content of the agreement;
- is not referable to contractual rights; and/or
- is not a specific practice currently prohibited by the ACL.

Much of this conduct was not foreseen when the ACL was drafted. Business practices have changed over recent years, with digitalisation and shifts to electronic commerce accelerated by the COVID-19 pandemic. Consumer reliance and dependence on digital markets has also increased.

The CRIS provides examples that suggest that the ACL in its current form does not provide consumers with adequate protection against emerging business practices that are increasingly creating information asymmetries that result in consumers making, or falling into, decisions that are not in their best interests, or that they would ordinarily make had they known the consequences beforehand. It is timely to consider how the ACL may need to change to meet new challenges.

¹ Australian Securities and Investments Commission, [Disclosure: Why it shouldn't be the default](#), October 2019.

There are many benefits from digital and data-driven innovations, both for businesses, consumers, and markets.² However, these innovations are coupled with developments in how businesses use consumer data which can be cause for concern.

For example:

- the ACCC's *Digital Platforms Inquiry* found firms use consumer data to take advantage of information asymmetries, bargaining power imbalances and behavioural biases to undermine consumer autonomy and influence consumer decisions;³
- the University of Melbourne showed consumers were guided toward different choices, based on their 'consumer persona' when shopping online, without realising that it was happening;⁴ and
- Paterson and Bant found data collection and predictive analytics enable businesses to individualise their approach to consumers through targeted advertising and differential pricing, varying these strategies in response to granular consumer information.⁵

At the same time, it can be challenging for consumers to understand what data is being collected and how it is used. Key information can be hard to find, often contained in complex and lengthy privacy policies, or terms and conditions, and is therefore omitted from the consumer's decision-making process.⁶ This may undermine consumers' capacity to make meaningful and informed choices.⁷

It is also important to acknowledge that potentially unfair trading practices do not only occur in digital marketplaces. Traditional 'bricks and mortar' or 'analogue' businesses can monetise their increasingly sophisticated understanding of consumer behaviour and biases through profiling and targeted strategies. This is highlighted by the case study examples in the CRIS.⁸

In addition to the examples provided in the CRIS, there is also the opportunity for Treasury to explore further examples such as those put forward by the ACCC in its submission to the Productivity Commission Inquiry into the Right to Repair. The ACCC suggested that an unfair trading prohibition could also address the following conduct:

- Undisclosed, planned obsolescence that relies on high switching costs to force consumers to regularly purchase additional or replacement products;

² Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report*, June 2019, p. 442.

³ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report*, June 2019, p. 442.

⁴ DQUBE Solutions, Dr Suelette Dreyfus, Associate Professor Shanton Chang, Dr Andrew Clausen and Professor Jeannie Paterson, [Drawing back the curtain: Consumer choice online in a data tracking world](#), December 2020.

⁵ Paterson, J and Bant, E, *Should Australia introduce a prohibition in unfair trading? Responding to exploitative business systems in person and online*, Journal of Consumer Policy, March 2020.

⁶ For similar issues arising in the financial services market, see Australian Securities and Investments Commission, [Disclosure: Why it shouldn't be the default](#), October 2019.

⁷ Consumer Policy Research Centre, [Unfair Trading Practices in Digital Markets – Evidence and Regulatory Gaps](#), December 2020.

⁸ *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493; *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24.

- Businesses not disclosing that, as a result of internal decisions on future support, a product will be obsolete in an unreasonably short period of time; and
- A business not providing security updates for smart products for a reasonable amount of time, thereby putting sensitive consumer information at risk.

The ACT Government does not have a final position on defining the concept of ‘unfair,’ but acknowledges the Productivity Commission’s Inquiry Report - *Access to Justice Arrangements* highlighted that people lack knowledge about whether to take action and what action to take; a problem exacerbated by poorly defined or undefined legal concepts. The ACT Government encourages the Treasury to consider the extent to which the options proposed will make it easy for consumers and businesses to understand the reforms, and subsequently enforce their rights.

Providing guidance will also seek to limit confusion or debate about what may be fair or unfair in the mind of a consumer or a business.

II. *Impact of unfair trading practices*

Unfair trading practices can have serious consequences for individuals, businesses and the broader economy. As the CRIS acknowledges, these impacts will be felt in different ways. Consequences may include:

- distorted economic behaviour;
- a lack of consumer choice, sovereignty, and autonomy;
- increased risk of scams, in particular, targeted scams; and
- increased risk of data breaches exposing personal and financial information.

These consequences are brought into stark relief where, because of experiences of vulnerability, an individual may be unable to adequately protect their own interests. Granular information on situational vulnerabilities can be used to target consumers with inappropriate products, deploy discrimination (including price discrimination), or exclude groups of consumers from markets. For example, Paterson and Bant showed instances of businesses segmenting consumers who had recently experienced a personal or emotional crisis and targeting them with information for products they cannot afford as a means of dealing with the crisis.⁹

It is important to recognise the consumer impacts of unfair trading practices will extend beyond the financial impacts, although these are likely to be the most common and immediately apparent. Consumers may be exposed to reputational damage, disappointment, and distress, in addition to longer term distrust of markets.

In addition, as identified the Australian ‘marketplace’ has changed dramatically since small business and consumer protection laws were first enacted. There has been a steady rise in online shopping both in the past two decades and a shift to how businesses sell products and services to

⁹ Paterson, J and Bant, E, *Should Australia introduce a prohibition in unfair trading? Responding to exploitative business systems in person and online*, Journal of Consumer Policy, March 2020, p. 13.

consumers, which further accelerated during COVID-19. As a result of this shift, businesses are now more able and willing to collect consumer data and use it to help them better understand their customers' needs and behaviour.

These innovations can benefit consumers through greater choice, new and better products and services, or an improved online experience and increased productivity. However, they can also lead to situations where businesses use information about their consumers and behavioural biases to distort choice, and to achieve windfall gains at the expense of consumers, small businesses, and the commercial success of businesses that compete fairly. It is this 'hidden' conduct that needs to be addressed.

Removing this distortion opens up the possibility of improved competition, consumer welfare, and allocative efficiency, incentivising the development of products tailored to consumer preferences.¹⁰

III. Solution

As noted above, the ACT Government considers that where business conduct risks market failure and consumer detriment, it is important to ensure there are adequate safeguards and protections in place. As the CRIS, and other stakeholders have noted, some emerging practices are not captured by existing consumer protections. Reform could help to fix this gap. Reducing harmful or predatory business practices will also place all businesses on a level playing field, thereby improving fair and efficient competition, and with it, consumer, and business welfare.

The ACT Government encourages the Treasury to take an outcomes-focussed approach, guided by the consultation objectives, and the overarching objective of the *Competition and Consumer Act 2010*, 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' We look forward to the outcomes of the regulatory impact assessment in providing guidance to jurisdictions on the relative impact (in terms of both benefits and costs) of the feasible options.

Relevantly, I have heard from many Canberrans that it is difficult for consumers to enforce their rights. I understand the Consumer Policy Research Centre made similar findings in their report on the second-hand vehicle market in Victoria.¹¹ Businesses can be reluctant to respond to consumer issues, and the time, cost and complexity of Court and Tribunal proceedings can be prohibitive. As such, in weighting the costs and benefits of each option, I urge the Treasury to consider the benefits of options which do not solely rely on consumers to self-advocate to enforce their rights. This may include examining how we can proactively deter unfair practices, in addition to ensuring

¹⁰ Australian Competition and Consumer Commission, [Digital Platforms Inquiry – Final Report](#), June 2019, p. 443.

¹¹ Consumer Policy Research Centre, [Detours and Roadblocks: The consumer experience of faulty cars in Victoria](#), October 2023.

regulators can act against harmful practices when they arise.¹² Reducing the quantity of disputes will also minimise costs to businesses and the community.

The ACT Government also suggests the Treasury consider how reform could reduce costs of disputation and how the options in the CRIS could either reduce the number of cases going to Court or result in more efficient litigation.

Finally, it is important that any regulatory reform is complemented by accessible and easy to understand information and education.¹³ The ACT looks forward to working collaboratively with other jurisdictions as the reforms progress to develop these tools, to ensure the full benefit of any reform is realised, and costs are minimised.

¹² Paterson, J and Bant, E, *Should Australia introduce a prohibition in unfair trading? Responding to exploitative business systems in person and online*, Journal of Consumer Policy, March 2020.

¹³ Consumers International, *Consumer Protection: [Why it matters to you – A practical guide to the United Nations guidelines for consumer protection](#)*, 2016.