

ARA SUBMISSION REGARDING UNFAIR TRADING PRACTICES – CONSULTATION REGULATION IMPACT STATEMENT (CONSULTATION RIS)

NOVEMBER 2023

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments to Treasury, in relation to the Unfair trading practices – Consultation Regulation Impact Statement (CRIS).

The ARA is Australia's oldest, largest and most diverse retail body, representing a \$400 billion sector that employs 1.3 million Australians. As Australia's peak retail body, representing more than 120,000 retail shop fronts, the ARA informs, advocates, educates, protects and unifies independent, national and international retail members.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate across all categories - from food to fashion, hairdressing to hardware, and everything in between.

EXECUTIVE SUMMARY

The ARA currently supports *Option 1 – no change to the current statutory regime*. We hold this position for four main reasons:

- 1) Australia has a strong consumer law framework (incorporating the Australian Consumer Law, Privacy,¹ Consumer Data Rights,² multiple industry codes)³;
- 2) the Australian retail sector is still recovering from the last three years, and a law based on novel concepts that have not previously been incorporated in Australia's consumer law framework to cover harms that are already covered by the existing consumer law framework, will create significant uncertainty leading to retailers being unsure of how to conduct their business;
- 3) there are multiple important government initiatives currently on foot, for example, Privacy Act reforms, that will further supplement the consumer law framework but which will impose further new obligations on our membership; and
- 4) reforms that have recently been implemented, including the unfair contract penalties that could have a significant impact on the retail sector.⁴

Introducing another new and uncertain reform will add another layer of compliance burden on top of those proposed by the Privacy Act Review Report,⁵ on essential mid-sized retail businesses. This in circumstances

¹ *Privacy Act 1998* (Cth).

² *Competition and Consumer (Consumer Data Right) Rules 2020*.

³ For example, the Food and Grocery Code and the Franchising Code and the Dairy Code.

⁴ From 9 November, Courts can impose substantial penalties on businesses and individuals who propose, use or rely on unfair contract terms in standard form contracts, following amendments to the *Competition and Consumer Act 2010* (Cth), including Australian Consumer Law, introduced by the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth).

⁵ For example, it is proposed by the Attorney-General's Department and agreed in-principle by the Government that the small business exemption should be removed exposing small businesses to the regulatory burden of the Privacy Act:

where Australia already has a world-leading consumer protection regime, represents yet another worry for retailers who are already in a state of disruption, in an industry who's sustained recovery is vital for the Australian economy.

ARA RECOMMENDATIONS

Recommendation 1: No Change to Statutory Regime	The ARA recommends remaining with the current regime, at least while the retail sector is in recovery from recent years of disruption, and also whilst adjusting to other new and proposed reforms
Recommendation 2: Focus on education and awareness raising for existing regime	Invest in engaging and educating retailers regarding the existing regime. Make clear existing expectations so that retailers have guidance on what behaviours are acceptable or unacceptable, and what may be considered 'unfair'.
Recommendation 3: Apply enforcement action under the existing regime where necessary	Apply enforcement action under the existing regime where necessary and broadcast outcomes to the retail sector as part of ongoing awareness and education.
Recommendation 4: Maintain status quo by dealing with conduct of concern through other mechanisms	Broad changes that impact across all Australian commerce are not necessary for dealing with the conduct of concern.

AUSTRALIA'S CONSUMER LAW FRAMEWORK – BACKGROUND OF 'UNFAIR'

Australia has a long-standing "Unfair Practices Regime" under the ACL,⁶ which includes a broad range of additional legislative protections. Australia's overarching "Consumer Law Regime" is far broader than the ACL and the CRIS tends to ignore the multiple overlapping obligations that already apply to retailers and which are designed to protect consumers.⁷

Given the robust and expansive broader Consumer Law Regime that operates across all retailers, it is not apparent that there any gaps. Even assuming for a moment that there is a gap, it is not apparent that it cannot otherwise be addressed by or is not capable of being addressed through existing enforcement mechanisms under one of the many existing consumer focussed laws.

Australian Government, *Government Response to the Privacy Act Review Report* <<https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>>.

⁶ First introduced as Division 1 (Unfair Practices) of Part V of the *Trade Practices Act 1974* (Cth), and now contained in Parts 2 and 3 of the Australian Consumer Law.

⁷ In addition to the Australian Consumer Law, some of the key legislative instruments that apply to the retail sector include: the *Competition and Consumer Act 2010* (Cth) (see for example section 46 (misuse of market power)); the *Privacy Act 1988* (Cth), including the Australian Privacy Principles; the *National Measurement Act 1960* (Cth) and *National Trade Measurement Regulations 2009* (Cth); *Greenhouse and Energy Minimum Standards Act 2012* (Cth); State liquor legislation (for example, the *Liquor Act 2007* (NSW)) and the *Spam Act 2003* (Cth).

Regulating commercial relationships through the imposition of uncertain, general prohibitions raises further concerns. For example, the Franchising Code of Conduct (the Franchising Code) includes several provisions designed to prevent potential unfairness between franchisors and franchisees.⁸ At its broadest, the Code includes a general requirement that the parties to a franchise agreement act in good faith (clause 6), which has been interpreted in several decided cases - generally where a franchisor is alleged to have acted contrary to good faith.⁹ Although broad, the particular structure of the franchise arrangement and the supporting provisions allow some clarity as to the requirements.

There are a number of other mandatory and voluntary regimes that apply either exclusively or principally to retail businesses, such as the *Spam Act 2003*;¹⁰ the Food and Grocery Code of Conduct;¹¹ the Franchising Code of Conduct;¹² the Dairy Code of Conduct;¹³ the Unit Pricing Code¹⁴ and the Consumer Data Right.¹⁵ These regimes also successfully regulate specific issues of Government concern, rather than an economy-wide prohibition that would cause uncertainty across multiple industries. It should also be noted that the number of these regimes in operation also demonstrate how many regulations are already specifically applied solely to the retail industry.

NEED FOR RETAIL RECOVERY

The health of the Australian retail sector impacts all Australians. The sector directly employs one in ten Australians and is dominated by small to medium size businesses, many of them family owned and operated. The retail sector has demonstrated remarkable resilience over the last three years, adapting and responding

⁸ For example:

- Section 6 – Obligation to act in good faith
- Sections 8-10 – Obligation to provide disclosure documents
- Section 11 – Obligation to provide information statement
- Section 17 – Obligation to disclose materially relevant facts
- Sections 27-29 – Obligation to give reasonable notice of termination
- Section 31 – Unilateral variation of agreement

⁹ See for example *Australian Competition and Consumer Commission v UltraTune Australia Pty Ltd* [2019] FCA 12 at [358]-[362]; *Australian Competition and Consumer Commission (ACCC) v Geowash Pty Ltd (Subject to a Deed of Co Arrangement) (No 3)* [2019] FCA 72 [746]-[765].

¹⁰ The *Spam Act 2003* (Cth), for example:

- Sections 16 – Prohibition on sending unsolicited electronic messages
- Section 17 – Information requirements for sending commercial electronic messages
- Section 18 – Requirement for unsubscribe function
- Sections 20-22 – Prohibition on supplying, acquiring or using address-harvesting software or address harvested lists

¹¹ For example:

- Section 6B – Dealing with suppliers lawfully and in good faith
- Section 9 – Unilateral variation of agreement
- Section 16 – Payments for better positioning of groceries
- Section 20 – Notice requirements for funded promotions
- Section 22 – Changes to supply chain procedure
- Section 23 – Threats of business disruption

¹² See above n 8.

¹³ For example:

- Section 11 – Obligation to act in good faith
- Section 28 – Unilateral or retrospective step downs
- Section 33 – Limitations on variations
- Section 29 – Disclosure of fees for service

¹⁴ Schedule 1 – Display of unit prices.

¹⁵ Rule 4.10(b)(ii) – Prohibition on bundling consents for designated sectors

to multiple challenges and disruptions that have impacted consumer spending, labour markets and supply chains.

However, most small to medium-size retailers (55%) remain uncertain or concerned about their financial future as a consumer spending slowdown continues to impact the industry. While 57% of small and mid-sized businesses are defying economic headwinds to meet or exceed their financial benchmarks, as many as 43% are falling short. The cost of doing business continues to place significant strain on retailers. Almost all (93%) said they have seen cost increases in their businesses over the past 12 months, with more than one-third (36%) saying their costs have increased by more than 10% – well above the level of inflation.¹⁶

While decelerated consumer spending is the most pressing concern (57%), wage costs (41%), cost of goods and services (39%), staffing shortages (29%) and cash flow management (29%) also ranked in the top 3 pressing concerns.¹⁷ In the face of these potential challenges, a strong and sustained retail recovery is critical to Australia's continued economic resilience, with flow-on benefits across the whole community.

Imposing yet another consumer law, that appears to materially overlap with existing laws while at the same time incorporating new concepts and ideas that are not part of our current law is likely to further add to the uncertainties retailers are facing.¹⁸ A law prohibiting unfair practices based around new and untested concepts, the meaning of which will only become clear following litigation and judicial interpretation, will be highly uncertain making it very challenging for retailers to determine exactly how to comply.¹⁹ Retailers will face a Clayton's Choice – to either "take the risk" their proposal or conduct is not subjectively unfair or add to their costs by getting advice on whether to carryout potentially every day retail activities. In a hyper competitive retail sector, adopting a cautious approach, which in some situations may be too cautious, is not going to help retailers and neither will adding costs to what are already thin margins.

The risks of litigation arising from a new and highly uncertain business norm ("unfairness") will spawn litigation (or threads of) from opportunistic consumers and/or disgruntled businesses. In that sense, an uncertain law favours those with deep pockets while others will face pressure to settle speculative threats or cases because of the costs and uncertainty of taking on a highly uncertain business norm test. This situation is very different to the current ACL which benefits from years and years of judicial precedence giving those facing speculative litigation the certainty needed to make appropriate decisions.

Adding yet another law to the already extensive Consumer Law Regime will negatively impact Australia's retailer's recovery given the significant costs of compliance required for an uncertain and overwide-reaching legislative prohibition.

OTHER GOVERNMENT INITIATIVES

In addition, the government's focus on initiatives such as Respect@Work, Family and Domestic Violence Leave and the provision of more affordable childcare have received strong support from our sector.

¹⁶ Australian Retailers Association, 'Tis the season to rally behind SMB retailers amid mounting pressures' (Media Release, 30 October 2023) <<https://www.retail.org.au/media/tis-the-season-to-rally-behind-smb-retailers-amid-mounting-pressures>>.

¹⁷ Ibid.

¹⁸ See above nn 9 - 14.

¹⁹ In March 2004, the Australian Government Senate Economics Reference Committee Report into the effectiveness of the *Trade Practices Act 1974* in protecting small business, unambiguously stated that "unfair" conduct is an ambiguous concept that would carry "a serious risk" of making the existing unconscionable conduct prohibition unworkable (at [3.23] and [3.28]).

However, these positive changes coincide with the rollout of the most significant industrial relations reforms in many decades, creating an extremely complex and resource intensive workplace landscape for business in 2023.²⁰

SUMMARY

The ARA submits that existing consumer protection and competition laws are fit for purpose and should be relied upon in the first instance, supported as necessary and appropriate by education and awareness building so that retailers have guidance on what behaviours are acceptable or unacceptable, and what may be considered 'unfair'. And, enforcement action by the ACCC where necessary. The ARA considers maintaining the status quo appropriate because the conduct of concern in the CRIS can be dealt with without reforms that impact the business norms of all Australian commerce.

Thank you again for the opportunity to provide a submission. Any queries in relation to this submission can be directed to our policy team at .

²⁰ Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth).