



Insurance Council
of Australia

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
Treasury

Via email: consumerlaw@treasury.gov.au

Dear Sir/Madam

Protecting consumers from unfair trading practices

The Insurance Council of Australia (Insurance Council) and its members welcome the opportunity to comment on Treasury's *Protecting Consumers from unfair trading practices Consultation Regulation Impact Statement* (CRIS).

The Insurance Council is the representative body for the general insurance industry in Australia and represents approximately 89% of private sector general insurers. Our membership is diverse, ranging from large ASX-listed companies to medium and smaller insurers who offer bespoke products.

General insurers perform a critical role in the Australian economy, assisting individuals, small business and communities to become more resilient and financially recover from loss or damage to their insured assets (for example car, home and contents, or an investment property). In support of the claims handling service outcomes provided to customers who might make a claim on their policy, general insurers have supply chain networks with builders, car repairers and other service suppliers to be able offer rebuild, replacement or repair claims resolution outcomes. These outcomes may complement other claims resolution options, such as cash settlement payments.

We appreciate the CRIS is focused on whether to introduce an unfair trading practices prohibition in the Australian Consumer Law (ACL) and if so, its possible design features, with a follow up consultation in the new year potentially extending any ACL changes to the *Australian Securities and Investments Commissions Act 2001* (ASIC Act) by incorporating equivalent ACL provisions. We identify that while reforms to the ACL will likely impact the side of our members' business associated with supply chains and other non-financial service law aspects as a possible unintended impact, changes to the ASIC Act will impact our members' business regulated by the Australian Financial Service (AFS) Licence. The Insurance Council and its members look forward to participating in Treasury's further consultation process next year.

General insurers support fair treatment of customers, and therefore fair trading practices.¹ The ways in which general insurers are obliged to conduct their business, by interacting fairly with customers across the customer experience life-cycle, including at sales and renewal time, while handling claims and complaints, and also when providing extra care and support to vulnerable consumers, is already highly regulated by the AFS Licence issued by ASIC, the ASIC Act, the *Insurance Contracts Act 1984*, the *Privacy Act 1988* (currently under reform) and the best practice standards in the 2020 General Insurance Code of Practice (Code). Code subscriber performance against the Code is independently

¹ ICA [News Release](#) *Comprehensive review released into insurers' response to 2022 flood* (31 October 2023)

monitored and enforced by the General Insurance Code Governance Committee.² The Insurance Council recently announced an Independent Review of the Code as part of a regular three-year cycle of continuous improvement.³

A strong and stable general insurance industry that provides affordable general insurance products requires an efficient and effective regulatory system that delivers good policy outcomes for everyone – consumers (individual and small business), and the entire business community including small, medium, and large participants. The addition of inefficient or unnecessary regulatory layers creates further risk of increasing operational and related costs that could worsen the availability and affordability of insurance in Australia, particularly at a time of sustained cost pressures on insurers and a growing insurance protection gap in Australia.⁴ Such regulatory layers may impact the sustainability of general insurers, especially small to medium-sized insurers, who may find it increasingly challenging to continue to operate a viable general insurance business. We would not wish to see unintended consequences on this segment of the general insurance market, which could have flow on consequences for competition, and pose a significant countervailing cost to consumers and the economy which might outweigh any possible benefits an economy-wide unfair trading practices prohibition might achieve.

The Insurance Council and its members support CRIS Option 1 to maintain the status quo and not introduce an economy-wide unfair trading practices prohibition. Regardless of the approach taken to introducing such a prohibition, we do not believe reforms to introduce a prohibition would be an appropriate policy response to address the consumer harms identified by the CRIS. Introduction of a prohibition could create unnecessary uncertainty about the standard the law requires, be expensive for industry to understand and implement, be intrusive on customers having to understand their protections, and add unnecessary complexity to the regulatory system which is at odds with recent Australian Law Reform Commission work to simplify and streamline financial services laws. There are already many specific regulatory protections in place to protect against exploitation of the customer interaction. Further reasons for this position are outlined in the **attached**.

We would welcome further engagement with Treasury to ensure fair trading practices are promoted and supported in the most efficient and effective manner, without creating any unintended consequences. To continue this discussion, please feel free to contact Ai-Lin Lee, Senior Policy Advisor, Regulatory and Consumer Policy, at _____ or _____.

Yours sincerely,

Andrew Hall
CEO and Executive Director

² General Insurance [Code Governance Committee](#)

³ ICA [News Release](#) *Independent Review of the 2020 General Insurance Code of Practice* (14 November 2023)

⁴ ICA [News Release](#) *Andrew Hall's speech at the National Press Club on the importance of addressing the protection gap* (23 November 2023)

ATTACHMENT

ICA SUBMISSION TO TREASURY'S CRIS: PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES

1. Identification of the potential consumer harms seeking to be addressed and whether another regulator already has remit

The Insurance Council and its members believe an important first step in considering whether an unfair trading practices prohibition is needed, is to clearly identify the existing harms and business practices Government is seeking to address. Consideration might then be given to prioritising those harms posing greatest threat to consumer well-being and a thriving economy (e.g. scams / fraudulent activity having high priority) and whether those harms might be better addressed through other regulatory mechanisms and regulators, with in-progress reforms in mind.

We encourage Treasury to undertake this mapping exercise to consider where greatest regulator attention and limited resources might be best focused, and to avoid regulatory confusion and duplication where multiple regulators have remit for regulating the same policy area without any additional benefit to consumers and business.

Treasury's CRIS suggests a possible unfair trading practices prohibition in the ACL might respond to consumer harms associated with the inappropriate collection and use of customer personal data in the digital economy, including dark patterns and consumer tracking without consent.⁵ The recent Privacy Act Review by the Federal Attorney-General's Department and the Government's response provides in-principle support for an uplift in protections for the handling of personal information in a digital economy. These uplifts include introducing a requirement for consumer consent to trade personal information (Proposal 20.4) and introducing a requirement for fair and reasonable information-handling to respond to dark patterns (Proposals 12.1-12.2).⁶ The Insurance Council and its members are firmly of the view the remit for protecting personal information, including emergent privacy-related issues associated with consumers participating in the digital economy should remain with the Office of the Australian Information Commissioner (OAIC) as the Privacy Act Review outlines.

Similarly, our recent submission to the Department of Industry, Science and Resources' (DISR) consultation on *Safe and responsible AI in Australia* noted existing consumer protections administered by a range of regulatory agencies and the importance of ensuring novel regulatory schemes are pro-innovation.⁷ We again note these points and recommend close consultation with DISR (and other relevant departments and agencies) to avoid duplication where particular technologies may be concerned. Cross-government consultation will empower business with the confidence to invest in and deploy new technologies that can drive productivity and improve consumer outcomes.

⁵ Treasury [CRIS](#), *Protecting consumers from unfair trading practices* (August 2023), pages 9 – 11

⁶ Federal Attorney-General's Department, [Report Privacy Act Review](#) (2022); Australian Government, [Government Response to the Privacy Act Review Report](#) (28 September 2023)

⁷ Insurance Council of Australia. [Submission](#) *Safe and responsible AI in Australia* (2023)

To assist Treasury's identification of possible consumer harms, we provide in a separate **confidential** annexure to this submission, more information about two current scenarios our members have identified as potentially involving unfair practices (as well as practices arguably caught within existing regulation), and which create poor consumer outcomes as well as adversely impacting on claims costs – contributing to concerns about affordability of insurance and the widening insurance protection gap in Australia. The Insurance Council and its members would welcome the opportunity to discuss these scenarios further, including aspects that could be addressed through enforcement of existing regulation.

2. How a possible unfair trading practices prohibition might interact with other regulation to minimise unintended consequences

We encourage careful consideration of how a possible unfair trading practices prohibition might interact and co-exist with other existing laws, especially with respect to:

- (a) innovation and competition;
- (b) Federal, State and Territory laws that recognise general insurance is ultimately a product that prices according to risk and that certain customers who might be considered as having protected attributes (for example older Australians, or those with a disability), who may also be considered a 'vulnerable customer' may be treated differently in terms of price, and policy terms and conditions in certain circumstances, without general insurers breaking the law;
- (c) existing protections in already highly regulated sectors such as the financial services sector which promote fair treatment of customers and fair trading practices.

As part of a broader regulatory mapping exercise suggested *above*, we encourage Treasury to undertake a stocktake of the existing regulatory protections, some which have only been recently introduced and being embedded into insurers' operations, as the many consumer protections already in place may already provide a robust regulatory protection framework for fair trading practices and to protect against exploitation of the customer interaction. To advance thinking, *below* is an indicative **Summary Table A** of the key fair trading practice protections already in place for general insurance customers and suppliers.

We highlight the Insurance Council has recently launched an independent review into the 2020 General Insurance Code of Practice (Code) as part of the regular 3-year cycle of continuous improvement.⁸ The independent review will present a valuable opportunity to hear how stakeholders view the performance of the Code and opportunities to improve the best practice standards for how general insurers interact with consumers. These best practice standards cover interactions when customers buy or renew insurance, claims and complaints handling, as well as supporting customers experiencing vulnerability, including those experiencing family violence or financial hardship. A number of these Code commitments go towards fair customer treatment and fair trading practices. The Insurance Council intends to apply to ASIC for approval of the version of the Code that is developed through the independent Code review process.

⁸ As above for note 3

2.1 Interaction with innovation and competition law

The Insurance Council and its members do not wish to see new, poorly defined regulation dampen innovation and competition in the insurance industry. Promoting innovation and competition can deliver considerable benefits to consumers in terms of products and services which better meet consumer needs. We identify for example, that if there is no clear guidance in the law or accompanying regulatory guidance produced by regulators as to what might be considered 'objectively' fair in the circumstances, with fairness an evolving concept that might change according to society's expectations, the times and different people's perspectives, there might be considerable uncertainty for industry as to what the law protects by the introduction of an unfair trading practices prohibition. In the absence of a clear bright line law that sets the standard that needs to be met, we anticipate that innovation and competition on the quality or price of goods and services may slow while industry participants seek further clarification and guidance, so as not to risk their activities being prosecuted as an unfair trading practice. We identify that existing laws that already govern the relationship between insurers and their customers or suppliers provide a bright line standard for certainty and clarity of what the law requires.

We observe the CRIS calls out an important feature of the United States' approach which includes an important clarification that a trading practice would not be 'unfair' if it is outweighed by countervailing benefits to consumers or to competition. As this would appear to be a discretionary test open to interpretation, greater insights into the effectiveness of this feature and exploration of whether there might be alternative ways to embed a pro-innovation and competition principle could be considered.

2.2 Interaction with Federal and State/Territory laws that already recognise general insurance prices according to risk

An established body of Federal, State and Territory laws already recognises that general insurance is a product that prices according to risk and that general insurers may treat certain customers with protected attributes, who may otherwise be considered vulnerable, differently in terms of price, and policy terms and conditions in certain circumstances, without general insurers breaking the law.⁹ These circumstances include if the general insurer has actuarial data or there are other relevant factors to substantiate the level of risk.

It is critical that legal recognition of risk-based pricing, and associated contractual terms and conditions is maintained and not over-ridden by an unfair trading practices prohibition should this be advanced in an upcoming CRIS for the financial services sector.

2.3 Interaction with other consumer protections in financial services laws applicable to general insurers

⁹ For example at the Federal level: [Disability Discrimination Act 1992](#), section 46; [Age Discrimination Act 2004](#), section 37, [Sex Discrimination Act 1984](#), section 41

The financial services regulator, the Australian Securities and Investments Commission (ASIC), appears active and successful in prosecuting actions involving unfair trading practices under existing unconscionable conduct and misleading and deceptive conduct protections.¹⁰

We observe several of the illustrative Australian examples in the CRIS involve business sectors that do not appear to be as highly regulated as the financial services sector. For example, unlike general insurers, they do not appear to have to be licensed, to have to participate in an industry Ombudsman scheme for effective customer complaint resolution, as such schemes can also perform an important role in facilitating industry best practice fair trading practices and customer remediation. Nor are they members of an industry association or subscribers of an industry Code of Practice that sets additional best practice standards for fair treatment of customers in addition to the law.

¹⁰ For example, see ASIC's successful and in-progress court actions mentioned in ASIC [Report 777](#) *ASIC enforcement and regulatory update: July to September 2023* (November 2023)

SUMMARY TABLE A

To assist a stocktake of existing regulation that might already provide for fair trading practices, we provide an indicative summary table *below* of key fair trading practice protections applicable to the general insurance industry and the consumer and supplier harms they seek to address.

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
1	PROTECTIONS OWED TO INDIVIDUAL AND SMALL BUSINESS GENERAL INSURANCE CUSTOMERS		
1.1	Fair trading practices when providing general insurance and claims handling	General obligation to provide general insurance efficiently, honestly, fairly	<p>As a condition of the AFS Licence, general insurers are required to act efficiently, honestly, fairly when providing general insurance.¹¹ This also applies to claims handling, with claims handling becoming a financial service on 1 January 2022.¹²</p> <p>We note the Australian Law Reform Commission recently recommended improvements to simplify the drafting and clarify meaning.¹³</p>
		Duty of good faith	As regulated by the <i>Insurance Contracts Act</i> , insurers are obliged to act in good faith. This applies to all aspects of the relationship between the insurer and the insured, and insurer and a third party, including during claims handling. ¹⁴
		ASIC Act consumer protections	These include ACL equivalent protections for unconscionable conduct and other consumer protections in financial services (including prohibitions against misleading and deceptive conduct, false and misleading representations, and unfair contract terms). ¹⁵
		Extra care and support for	The Code provides additional best practice standards for providing extra care and support to vulnerable customers, including those

¹¹ *Corporations Act 2001*, section 912A(1)(a); ASIC [Regulatory Guide 104](#) *AFS licensing: Meeting the general obligations* (June 2022); ASIC [PF 209](#) *Prof Forma Australian financial services licence conditions* (October 2023)

¹² ASIC [INFO 253](#) *Claims handling and settling: How to comply with your AFS licence obligations*

¹³ ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation*, [Interim Report A](#), *Proposal A20 Clarifying the 'efficiently, honestly and fairly' obligation*, pages 510 - 522

¹⁴ [Insurance Contracts Act 1984](#), Part II (sections 12 – 15)

¹⁵ [ASIC Act 2001](#), Part 2, Division 2

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
		vulnerable customers	<p>experiencing family violence or financial hardship.¹⁶</p> <p>The Code also provides best practice standards for fair and timely claims decisioning and customer communication, as well as best practice standards for claims investigations.¹⁷</p>
1.2	Fair handling of customer complaints	Customer complaints are resolved fairly by the general insurer or independent Ombudsman, AFCA	<p>As a condition of the AFS Licence, general insurers must have fair, efficient and effective complaints resolution processes for responding to customer complaints. The standards for these dispute resolution processes are highly regulated by ASIC and involve in-house complaints handling processes and a mandatory requirement to be a member of AFCA.¹⁸</p> <p>AFCA performs a role in facilitating industry best practice through its fairness decisioning, systemic issues remit and reporting obligations to regulators like ASIC and APRA.</p> <p>AFCA can also consider aspects of a complaint that involve privacy protections.¹⁹</p> <p>Additional best practice standards are included in the Code, including in relation to fair handling of complaints about other related parties, such as distributors, service suppliers and complaints management companies.²⁰</p>
1.3	Fair customer compensation arrangements	Customers receive fair and timely	<p>As a condition of the AFS Licence, general insurers must have arrangements in place to be able to fairly compensate customers.²¹</p>

¹⁶ [2020 General Insurance Code of Practice](#), Parts 9 *Supporting Customers experiencing vulnerability* and 10 *Financial Hardship*

¹⁷ As above for note 17, Code, Parts 8 *Making a Claim* and 15 *Claims investigation standards*

¹⁸ *Corporations Act 2001*, sections 912A(g) and 1017G(1); ASIC [Regulatory Guide 271](#) *Internal Dispute Resolution* (September 2021); [ASIC Regulatory Guide 267](#) *Oversight of the Australia Financial Complaints Authority* (September 2021); As above for note 12, ASIC PF 209

¹⁹ The Office of Information Commissioner (OAIC) has [recognised](#) AFCA as an Ombudsman scheme for the purposes of handling particular privacy complaints under s 35A of the *Privacy Act 1988*; AFCA's remit for handling privacy complaints is set out in [AFCA Rules](#) (13 January 2021)

²⁰ As above for note 17, Code, Parts 4 *Standards for us and our Distributors*, 5 *Standards for our Service Suppliers* and 11 *Complaints*

²¹ *Corporations Act 2001*, section 912B; ASIC [Regulatory Guide 126](#) *Compensation and insurance arrangements for AFS licensees* (July 2022); and as above for note 12, ASIC PF 209

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
		compensation payments	To support this, reforms to introduce a compensation scheme of last resort (CSLR) have been enacted, with administration for the CSLR the responsibility of AFCA, and with large general insurers having to financially contribute to the scheme's establishment which is expected to commence operations in April 2024. ²²
		Fair and timely refunds when cancelling an insurance policy	The Code provides additional best practice standards for the fair and timely refund of customers who have cancelled an insurance policy. ²³
1.4	Fair customer disclosures and contracts	Disclosure, and policy terms and conditions are fair	<p>The disclosure in Product Disclosure Statements (PDS),²⁴ and policy terms and conditions must be fair, and not include unfair contract terms.²⁵</p> <p>Insurers must also provide customers with disclosure about their claims settlement options through a Claims Settlement Fact Sheet (with exceptions to respond to customers in urgent financial need and to safeguard customers experiencing family violence).²⁶</p> <p>The Code provides additional best practice standards to assist consumer decision-making when applying for or renewing insurance policies, such as the provision of information about access to sum insured calculators for home insurance policies, and disclosures regarding automatic renewal and premium comparison.²⁷</p>

²² [Treasury Laws Amendment \(Financial Services Compensation Scheme of Last Resort\) Act 2023](#); ASIC [information](#) about compensation scheme of law resort

²³ As above for note 17, Code, Part 7 *Cancelling an insurance policy*

²⁴ *Insurance Contracts Act 1984*; *Corporations Act 2001*, Div 2 of Pt 7.9; ASIC [Regulatory Guide 168](#) *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

²⁵ *Australian Securities and Investments Commission Act 2001*, Part 2, Div 2, Subdiv B (sections 12BF – 12BM); ASIC [INFO 210](#) *Unfair contract term protections for consumers*

²⁶ *Corporations Act 2001*, sections 948B–948F and 952A–953C; ASIC INFO 253 as above for note 9; ASIC Media Release [22-034MR](#) *ASIC streamlines process for insurers to provide consumers cash in emergency situations* (2 March 2022); ASIC Media Release [22-261MR](#) *ASIC helps insurers to respond to family violence* (28 September 2022)

²⁷ As above for note 17, Code, Part 6 *Buying Insurance*

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
			Reforms adjusted a customer's duty of disclosure owed to a general insurer to a duty to take reasonable care not to make a misrepresentation to an insurer from 5 October 2021. ²⁸ These changes make it fairer for customers to maintain their insurance coverage at claim time.
1.5	Fair sales tactics and product design	Customers are protected from high pressure sales tactics	<p>General insurers must not take advantage of customer vulnerability by using high pressure sales tactics.</p> <p>Recently introduced protections include:</p> <ul style="list-style-type: none"> • a hawking prohibition which responds to unsolicited sales;²⁹ • a deferred sales model for add-on insurance;³⁰ and • product design and distribution obligations which require that insurers design insurance consistent with the likely objectives, financial situation and needs of the consumers for whom they are intended.³¹ <p>The Code includes additional best practice standards, for example in relation to pressure selling and Consumer Credit Insurance.³²</p>
1.6	Other fair trading protections for specific lines of general insurance business	Motor safety protections	For insurers that offer motor vehicle insurance, and the side of the business that handles motor insurance claims and repairs, State and Territory motor vehicle registration and written off vehicle register scheme laws provide motor

²⁸ As above for note 15, *Insurance Contracts Act*, Part IV, Div 1A

²⁹ *Corporations Act 2001*, sections 992A and 992AA; ASIC [Regulatory Guide 38](#) *The hawking prohibition* (September 2021)

³⁰ *Australian Securities and Investments Commission Act 2001*, Part 2, Div 2, Subdiv DA (sections 12DO – 12DZA); ASIC [Regulatory Guide 275](#) *The deferred sales model for add-on insurance* (July 2021)

³¹ *Corporations Act 2021*, Part 7.8A; ASIC [Regulatory Guide 274](#) *Product design and distribution obligations* (December 2020)

³² As above for note 17, Code, Part 6 *Buying insurance* (Code paragraphs 44 and 52-54)

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
			vehicle safety and anti-theft regimes that general insurers participate in. ³³
		Residential tenancy laws	For insurers that offer residential landlord insurance, State and Territory residential tenancy laws provide tenants with protections. These protections include in relation to supporting the safety and well-being of tenants who are survivors of family violence. ³⁴
2 PROTECTIONS OWED TO SMALL BUSINESS SUPPLIERS			
2.1	Fair trading practices	ACL consumer protections	Prohibitions against unconscionable conduct, misleading and deceptive conduct, false and misleading representations, and unfair contract terms.
2.2	Small business suppliers	Timely payment by larger general insurance businesses	A regulator is already in place as part of the Federal Payment Times Reporting Scheme to improve payment times for Australian small businesses. ³⁵ This reporting regime is complemented by the Small Business and Family Enterprise Ombudsman being able to assist a small business if they have a dispute about an unpaid invoice.
2.3	Smash repairers	Arrangements for fair trading practices between general insurers and smash repairers	Insurers that offer motor vehicle insurance, are subject to the Motor Vehicle Insurance and Repair Industry (MVIRI) Code, an initiative that is jointly governed by the repair and insurance industries. In Dec 2022 – April 2023, there was an independent review of the MVIRI Code. The

³³ For example: [Road Transport \(General\) Act 1999 \(ACT\)](#); [Road Transport \(General\) Regulation 2000 \(ACT\)](#); [Road Transport Act 2013 \(NSW\)](#); [Road Transport \(Vehicle Registration\) Act \(NSW\)](#); [Road Safety Act 1986 \(Vic\)](#); [Road Safety \(Vehicles\) Regulations 2021 \(Vic\)](#); [Road Transport Act 2013 \(NSW\)](#); [Road Transport \(Vehicle Registration\) Act \(NSW\)](#); [Road Safety Act 1986 \(Vic\)](#); [Road Safety \(Vehicles\) Regulations 2021 \(Vic\)](#)

³⁴ [Residential Tenancies Act 1997 \(ACT\)](#), [Residential Tenancies Act 2010 \(NSW\)](#), [Residential Tenancies Act 1999 \(NT\)](#), [Domestic and Family Violence Act 2007 \(NT\)](#); [Residential Tenancies and Rooming Accommodation Act 2008 \(Qld\)](#), [Residential Tenancies Act 1995 \(SA\)](#) [Residential Tenancy Act 1997 \(Tas\)](#), [Family Violence Act 2004 \(Tas\)](#), [Residential Tenancies Act 1997 \(Vic\)](#), [Residential Tenancies Act 1987 \(WA\)](#)

³⁵ [Payment Times Reporting Act 2020](#)

NO	EXISTING FAIR TRADING PRACTICE REQUIREMENT	KEY PROTECTIONS	FURTHER INFORMATION
			review delivered recommendations for improvement currently under consideration. ³⁶

³⁶ Motor Vehicle Insurance and Repair Industry (MVIRI) [Code of Conduct](#) (1 May 2017); ICA [News Release Independent Review Recommends Improvements To The Motor Vehicle Insurance And Repair Industry Code Of Conduct](#) (10 May 2023); [Report Review of the Motor Vehicle Insurance and Repair Industry \(MVIRI\) Code of Conduct](#) (April 2023)