

Protecting consumers from unfair trading practices

Consultation Regulation Impact Statement
August 2023

Submission to Treasury Consultation

29 November 2023

National Legal Aid acknowledges Traditional Owners of Country through Australia and recognises the continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures; and to Elders both past and present.

Introduction

National Legal Aid (NLA), representing the directors of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to make a submission in response to The Treasury's Regulation Impact Statement on *Protecting consumers from unfair trading practices*, August 2023. The individual LACs are also generally known as Legal Aid.

NLA aims to ensure that the protection or assertion of the legal and related rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

This submission:

- is based on LAC experience
- includes illustrative client stories such as:
 - a client who was pressured into having solar panels installed onto his property that he was told were 'free', without knowing that he was also signing up to an unaffordable credit contract;
 - a client who signed up to an online subscription program for a maths course after a sales representative took advantage of her fear about her child's level of education.
- makes the following recommendations:

Recommendation 1

NLA recommends that the Australian Consumer Law should be amended to prohibit unfair trading practices in Australian markets.

Recommendation 2

NLA recommends that there should be a specific prohibition against:

- Door-to-door sales practices and unsolicited phone sales;
- Predatory commercial practices; and
- Misleading omissions.

Recommendation 3

NLA recommends that a broad definition of 'unfairness' be adopted that is informed by the existing elements in the Unfair Contract Term prohibitions and in the Australian Financial Complaints Authority's fairness jurisdiction.

Recommendation 4

NLA recommends that Treasury adopt 'Option 4' by introducing a combination of general and specific prohibitions on unfair trading practices.

About the work of Australia's legal aid commissions

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

The work of our solicitors, including our specialists in consumer law, focuses on assisting the most vulnerable consumers in our community, including persons with disability and cognitive impairment, persons with low literacy, young persons, First Nations persons, culturally and linguistically diverse persons, and consumers who are experiencing or have experienced domestic and family violence. Often people who need to access LAC services are experiencing multiple intersecting circumstances of disadvantage.

NLA also acknowledges research, which is consistent with the experience of our solicitors and the financial counsellors, and social workers employed by LACs or with whom we partner, that indicates everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.¹

LACs with consumer protection units have extensive experience in providing specialist advice to clients as well as lawyers and financial counsellors in relation to mortgage stress, housing repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

¹ O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre*, 1 November 2019.

Response to questions

- *Question 1: Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide any evidence to support your position.*

A prohibition on unfair trading practices is necessary to protect vulnerable consumers

NLA agrees with Treasury's representation and scope of unfair trading practices identified in this paper.

While we acknowledge the need for unfair trading prohibitions to prevent misconduct on digital platform services, our casework experience highlights the fact that unfair trading practices are not confined to the digital economy. Unfair and predatory sales tactics outside of the digital space continue to disproportionately impact disadvantaged members of the community.

Our casework experience shows that unfair trading practices have become embedded in the broader consumer landscape, for example extending across a range of misconduct from predatory door to door sales to the sale of junk educational subscription programs.

Unfair trading practices often target and take advantage of vulnerable groups, including older people, people from culturally and linguistically diverse backgrounds and people living in Aboriginal and Torres Strait Islander communities.

We also see consumer harm resulting from predatory and aggressive conduct, the sale of products that are difficult to opt out of or cancel, as well as misleading omissions and hidden information.

It is crucial that the law is equipped to prevent trader conduct that may fall outside existing protections under the Australian Consumer Law (ACL), but that is nevertheless causing significant consumer harm.

Existing protections under the law are inadequate

We agree with Treasury's characterisation of the problem, that there are a range of unfair business practices that are causing significant harm to consumers, but that are not currently prohibited by existing consumer laws.

While existing laws relating to misleading and deceptive conduct and unconscionability play an important role in protecting consumers from egregious and serious misconduct, they are ill-equipped to deal with the broad range of trader misconduct that we see in our casework that is better characterised as 'unfair'.

We continue to see examples of conduct that causes significant consumer harm but may not be misleading or deceptive and may not meet the high threshold placed by courts to establish unconscionability.

For example, the need to establish *special disadvantage* to be successful in an equitable unconscionability claim requires a binary approach that focuses on the victim's characteristics and the deliberate actions of an immoral or unscrupulous trader to take advantage of those characteristics. These protections do not reflect the reality of modern-day consumers interactions with traders and do not prevent conduct that falls below the threshold, but that would be widely considered as 'unfair'.

The matter of *ACCC v Mazda* referred to in Treasury's discussion paper illustrates how difficult it is to establish unconscionability, even where conduct was found to involve '*appalling customer service*'. Trader misconduct is not unconscionable just because it is unfair, unjust, wrong or unreasonable, though that misconduct should still be prohibited under the law.

The case study below highlights the way in which poor trader conduct in the form of aggressive sales tactics and high pressure selling may fall short of existing prohibitions under the ACL, like unconscionability or misleading and deceptive conduct, but is nevertheless harmful to consumers.

Case study – Cameron's story

Cameron is a single father of 2 children, one of whom has a disability. Cameron does not work and receives a carers pension. He needed to buy a new car after his old one broke down, so he attended a local dealership to have a look at second-hand cars. He has limited literacy but can read and understand basic documents.

He told the dealer the limit of his budget but was pressured by the dealer into looking at more expensive cars and directed to a linked credit provider associated with the dealership. He said that he did not want to buy such an expensive car but was pressured into agreeing. He was told where to sign without being given the chance to read the documents or to give it any thought. He felt that he was rushed through the transaction.

The next day, he tried to cancel the credit contract and take the car back but was told that he had signed away his right to a cooling off period.

While it is unlikely that this conduct would meet the threshold for unconscionability, it would nevertheless be considered 'unfair' on an everyday interpretation of the term.

The door-to-door sale of solar panels under finance to vulnerable consumers is another example of how existing laws fail to protect consumers from harmful conduct, as shown in Mable's story below.

Case study – Mable's story

Mable is a 40-year-old Aboriginal woman who owns her own home in a regional part of NSW. She has low literacy and struggles to understand complex documents. One day, a man knocked on her door and said that he was selling solar panels.

He told her that if she signed up for the solar panels they would '*basically be free when you take into account government subsidies and the money you'll save compared to normal power*'. Mable did not understand what the representative meant by those things, but he was forceful and insisted that she would save money.

After some persuasion from the sales representative, she agreed to have the solar panels installed on her roof. She was told where to place her signature, without understanding the documents that she was being asked to sign.

Several months later, she was surprised to receive a letter of demand from a credit provider. The letter said that they were chasing her for payment for a credit contract that she entered for the installation of solar panels.

Specific prohibitions – door-to-door sales practices and unsolicited phone sales

Door-to-door sales practices and unsolicited phone sales should be banned altogether. This could fall under a specific prohibition under unfair trading practices legislation.

Specific prohibitions – predatory commercial practices

In addition to a general catch-all prohibition on unfair trading practices, there should be a specific prohibition against predatory commercial practices. In our casework experience, unfair traders use such practices as a way of distorting a consumer's freedom of choice and manipulating transactions to their strategic advantage.

We note that the list of prohibited specific practices under 'aggressive commercial practices' and 'misleading commercial practices' adopted in the European Union includes phony 'free' offers, manipulation of children, phony 'special' advantages, and persistent unwanted offers.²

Similar indicative examples could be included to illustrate further unfair trading practices which should be prohibited in the Australian context and would help prevent the kind of conduct outlined in Cathy's story below.

Case study – Cathy's story

Cathy is a 32-year-old mother of 3 children and is from a culturally and linguistically diverse background. She came across an online advertisement for a maths 'subscription program' that promised to significantly improve the skills of children struggling at school with maths.

Cathy's youngest child was having difficulties at school, so she called the number listed on the advertisement. The sales representative told her that *you have to do something now or your child will fail at school*. This caused Cathy to panic; and she immediately agreed to purchase a 'subscription service' on the understanding that her child would receive one-on-one, and face-to-face support as well as ongoing supervision with homework.

This was not the case; and the service was not what she was given to expect. There was no ongoing support, and the Centre was only contactable by phone. She spoke with a different person every time and the support was not tailored to her child's school curriculum.

Cathy was astonished to learn that she had signed up to a subscription program that would require her to pay \$10,000 over 12 months for the service.

Specific prohibitions – misleading omissions

A key aspect of unfair trading business models involves traders failing to provide consumers with a complete understanding of the product purchased.

Unfair trading practices which omit or hide material information, or provide it in an unclear, unintelligible, ambiguous or untimely manner should be specifically prohibited. This kind of prohibition may have provided some protection to Jackson in the case study below.

² Treasury paper page 27, footnote 36.

Case study – Jackson’s story

Jackson hired a truck to move his belongings interstate from Sydney. He told the truck-hire company that he would need the truck for two days and that he would need the truck to be delivered early on the first day so that he could undertake the 12-hour drive to country Victoria. Jackson paid \$250 to have the excess reduced to \$0 in the case of an accident for which he was at fault.

The truck was delivered late on the first day resulting in Jackson setting off later than expected and arriving in Victoria after 9.00pm. Whilst parking the truck, Jackson reversed into another car causing minor damage.

He notified the truck-hire company, expecting that he would be covered by their insurance and would not have to pay an excess. Jackson was surprised to learn that the excess reduction was void due to a condition hidden deep in the contract that stated: *‘excess reduction is void if the customer drives the hire vehicle after sunset’*.

The truck-hire company omitted providing this information to Jackson when he entered the contract and again when the company was late in delivering the truck to him, even though the company knew that Jackson would now be driving the truck at night.

Recommendation 1 – That the Australian Consumer Law should prohibit unfair trading practices in Australian markets.

Recommendation 2 – There should be a specific prohibition against:

- Door-to-door sales practices and unsolicited phone sales;
- Predatory commercial practices; and
- Misleading omissions.

- *Question 2: How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?*

Broad definition of ‘unfair’

The concept of ‘unfairness’ is well understood in the community. It is a clearer and more accessible concept than ‘unconscionability’ or ‘misleading and deceptive conduct.’

Any definition of ‘unfair’ must be sufficiently broad to encompass the wide range of misconduct that constitutes unfair trading practices, as demonstrated in the above case-studies.

The elements of unfair contract term prohibitions in the ACL could provide a starting point to inform a definition of ‘unfair’ in the context of unfair trading prohibitions.

The concept of ‘unfairness’ is also embedded in the decision-making process adopted by the Australian Financial Complaints Authority (AFCA). The principles embodied in AFCA’s fairness jurisdiction could also inform a definition of ‘unfairness’ for the purpose of unfair trading prohibitions.³

Recommendation 3 – That a broad definition of ‘unfairness’ be adopted that is informed by the existing elements in the Unfair Contract Term prohibitions and in the Australian Financial Complaints Authority’s fairness jurisdiction.

- *Question 3: Do you have any specific information, analysis or data that will help measure the impact of the problems identified?*

Case studies

Our submission is informed by case-studies from LACs detailed in our answer to question 1 above.

The case-studies highlight the extent and impact of the problem of unfair trading practices against groups in our community who are experiencing disadvantage, including Aboriginal people, older people and people with limited English literacy skills.

The case-studies also indicate the way in which existing provisions under the ACL are often ill-equipped to protect these consumers from harm.

- *Question 4: Do you agree with the consultation objectives as outlined? If not, why not.*
- *Question 5: Are there any other consultation objectives that should be considered in addressing unfair trading practices in Australia?*

We broadly agree with the consultation objectives as outlined in Treasury’s paper.

In particular, we welcome Treasury exploring policy options that address harmful and unfair practices that are causing detriment to consumers but that are not currently captured under the ACL or other laws.

However, the consultation objectives could have included financial services.

If financial services had been included it would have provided an opportunity to ensure consistent consumer protections against unfair trading practices and the harm they cause, in both areas, in a timely way.

We welcome any future consultation on parallel changes to the ASIC Act.

³ See for example the principles in AFCA’s ‘Fairness Navigation Tool’ contained in AFCA’s Fairness Jurisdiction Report, pg 13. <https://www.afca.org.au/news/latest-news/afca-publishes-fairness-jurisdiction-project-outcomes-report> and AFCA’s Operational Guidelines, page 72.

- *Question 8: What is your preferred reform option, or combination of options? What are your reasons?*

Option 4 is our preferred reform option

We recommend that Treasury adopt Option 4 by introducing a combination of general and specific prohibitions on unfair trading practices. A combined approach would provide the flexibility needed to deal with emerging unfair practices in a rapidly evolving consumer market.

A general and broad principles-based provision would act as an effective ‘catch-all’ for poor trader conduct. This should operate alongside, and be supported by:

- provisions that aim to prevent specific conduct that has been identified as harmful, such as predatory sales tactics, door-to-door selling and unsolicited phone sales; and misleading omissions
- a non-exhaustive list of indicative examples of unfair trading practices.

There should be the ability to easily and quickly add to the list of examples of unfair trading practices. It is essential that law makers are able to tackle emerging harmful practices before they become embedded in the consumer landscape.

Breaches of a combined general and specific prohibition should attract civil penalties. There should also be remedies available for individual consumers so that they can seek damages for breaches of the provisions.

Recommendation 4 – That Treasury adopt Option 4 by introducing a combination of general and specific prohibitions on unfair trading practices.

Conclusion

Thank you for the opportunity to provide a submission to this consultation.

Should you require any further information from us please be in touch with the NLA Secretariat on
or

Yours sincerely,

Louise Glanville
Chair