ASIC
Australian Securities &
Investments Commission

Unfair trading practices: Consultation on the design of proposed general and specific prohibitions

Submission by the Australian Securities and Investments Commission

December 2024

Contents

Introduction

1 The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to make a submission to Treasury in response to the *Unfair trading practices—Consultation on the design of proposed general and specific prohibitions* (current consultation paper). The current consultation paper seeks feedback on a proposal to amend the Australian Consumer Law (ACL) to introduce general and specific prohibitions on unfair trading practices. The paper notes that once options to amend the ACL have been considered and agreed, the Australian Government will consider what changes are required to financial services regulated by the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to ensure appropriate alignment across the ACL and financial services laws.

2 ASIC supports the introduction of a general prohibition on unfair trading practices, covering both financial and non-financial services. Through our work we encounter unfair trading practices in financial services that have, and continue to cause, significant consumer detriment and that are not clearly captured within the current regulatory framework.

3 ASIC considers the mirroring of an unfair trading practices prohibition in the ASIC Act as the most effective response to these unfair practices for the following reasons:

(a) The nature of financial services means that consumers are more susceptible to unfair practices than in some areas of the economy;

(b) The level of harm that can be experienced by consumers as a result of unfair practices in financial services can be particularly high;

(c) The sophistication of online marketplaces has enhanced the ability of businesses to engage in unfair practices to the detriment of consumers in financial services;

(d) Current laws limit ASIC's ability to take action in response to unfair trading practices—specifically:

(i) there are a range of financial services that are captured by the ASIC Act but are not subject to licensing obligations, including the efficiently, honestly and fairly (EHF) obligation; and

(ii) there are limitations to the effectiveness of the EHF obligation in circumstances where it does apply.

4 Submissions to the first *Unfair trading practices—Consultation Regulation Impact Statement* (August 2023) (first consultation process) noted that a failure to respond to limitations in the ACL could lead to a race to the bottom in business practices and an uneven playing field for those who do not engage in unfair practices. These outcomes are equally a risk in the financial services market. Many of the specific

examples of problematic conduct leading to consumer detriment outlined in the current consultation paper also occur in financial services.

5 It would be an arguably perverse outcome if those forms of conduct were effectively banned in other sectors but not in financial services, given the risks of significant consumer harm in financial services (as noted in Section A of this submission).

6 The current consultation paper notes that Australia faces similar challenges to other countries in adapting consumer protection laws in light of technological change. Other international jurisdictions—such as the United Kingdom, European Union and United States—have introduced specific regulations targeting unfair commercial conduct. To our knowledge, financial services are included in the scope of relevant laws in each of these jurisdictions.

7 In our submission to the first consultation process, we noted that we are supportive of continued harmonisation between the ACL and the ASIC Act to maintain the integrity and the original intent of a single, nationally coherent consumer law framework. This single framework reduces the risk of jurisdictional complexity between regulators and during litigation, and the risk of unintentional regulatory gaps. It also reduces the risk of regulatory arbitrage, where unscrupulous operators design their business models to avoid more comprehensive regulation. We continue to hold these views.

8 On the question of design of the proposed prohibition, ASIC supports the proposal to introduce a principles-based general prohibition that can effectively address unfair practices. If the proposed law is to list specific prohibitions, along with a grey list of examples of unfair practices, ASIC is of the view that the proposed law should clearly articulate that these are not intended to limit the application of the general prohibition.

9 To have sufficient deterrent effect, ASIC also submits that any unfair trading prohibition should be subject to civil penalties if breached. Lastly, we would support an approach that protects business-to-business dealings at the same time as business-to-consumer dealings.

A The need for an unfair trading practices prohibition in financial services

Key points

This section sets out why we see a need for an unfair trading practices prohibition in financial services. It covers:

- the consumer harms we see in financial services;
- how the digital age is affecting consumers of financial services; and
- how other jurisdictions approach unfair trading practices in financial services.

Consumer harms in financial services

10 The risks and harms that arise in the financial sector—including banking, credit, insurance, superannuation, financial advice and managed investments—can cause significant detriment to consumers. This is evidenced by a 2021 review of over 100 of ASIC's published reports, which uncovered many instances where businesses created, amplified, exploited or ignored the harmful effects of behavioural and situational vulnerabilities in their product design, processes, communications and other choice architecture.

> Note: For examples of the harms exposed by ASIC, see 'Helping or harming? How behavioural levers can influence people's financial outcomes', *The Behavioral Economics Guide*, 2022, 45–51; Report 470 *Buying add-on insurance in car yards: Why it can be hard to say no* (REP 470); Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms* (REP 465); Report 603 *The consumer journey through the Internal Dispute Resolution process of financial service providers* (REP 603).

11 The current consultation paper notes that stakeholders cited a range of harms and impacts to consumers resulting from unfair trading practices in non-financial services, including financial loss, time loss, inconvenience, loss of privacy, loss of autonomy and psychological harms. These outcomes are equally a risk (if not greater) to consumers in financial services.

12 We have focused our discussion of consumer harms on two key features that set financial services apart from non-financial services and demonstrate increased risk and impact of harms to consumers. We also reflect on challenges that arise equally across both financial and non-financial services.

Financial decisions and products are inherently complex

13 Consumers may be particularly susceptible to harm in financial settings because there are few (if any) financial products and services that are *not* complex. While complexity does not equate to unfairness, it can exacerbate the impact of business

practices that distort or manipulate the decision making or behaviour of a consumer and the extent of the risk of consumer detriment.

14 Even the most common financial products, like credit cards and insurance products, have multiple features. For example, choosing a credit card can involve decisions about features like interest rates, fees, charges, insurance and balance transfer offers. In selecting a credit card, not only must consumers trade-off the features within a product, but they are also expected to compare those features against other credit cards in the market.

15 We consistently see in our regulatory work other examples of complexity that can make financial services extra difficult for consumers to navigate. For example, making products and processes more complex (e.g. through bundled products and pricing, confusing and opaque 'discounts', loyalty rewards), confusing and conflicting information (e.g. unclear pricing, unclear fee descriptors), complicated and/or inconsistent terms (e.g. from superannuation investment labels to insurable events), lengthy and complex disclosure (e.g. Product Disclosure Statements (PDSs)), and a lack of clear information or communication. Financial firms can also add unnecessary frictions to processes that can make it difficult for consumers to achieve their objective.

> Note: For examples, see Report 632 *Disclosure: Why it shouldn't be the default* (REP 632), Report 768 *Navigating the storm: ASIC's review of home insurance claims* (REP 768), Report 752 *Review of written responses to superannuation complaints* (REP 752), Report 729 *Review of trustee communications about the MySuper performance test* (REP 729).

16 Decisions about financial products and services are particularly complex because they are often made infrequently, are intangible, may require trade-offs between present and future benefits, may involve uncertainty, and often involve risk (e.g. insurance products, investment products, credit products). Some decisions—such as decisions about retirement income or insurance products—may also have an emotional or psychological dimension, because of the impact they may have on a consumer's sense of security or wellbeing: see REP 632.

17 While these examples of complexity are not of themselves unfair, some financial firms can exploit or compound this complexity in a way that leads to consumer harm.

18 As the current consultation paper and the Australian Competition and Consumer Commission's (ACCC) submission to the first consultation process note, consumers face information asymmetries and bargaining power imbalances in most, if not all, transactions, making them more vulnerable to unfair trading practices. The complexity of financial services and the information asymmetry it creates exacerbates the power imbalance between consumers and businesses, and therefore the susceptibility of consumers to unfair practices.

Harms and losses in financial services

19 The consumer harm from unfair practices in financial services is often far greater than in other areas of the economy. Factors that can amplify the impact on consumers of financial services include the long-tail exposure of any loss or harm, the amounts of money involved, and the considerable impact on consumers when things go wrong. The misconduct reported to ASIC sometimes sees people lose their entire retirement or life savings.

20 The economic and psychological impact of these unfair trading practices on the consumers who fall victim to them will in some circumstances be far greater than the impact of some examples of unfair practices in the broader economy—such as drip pricing practices or subscription-related practices—as they can include ruinous losses that impact on a victim's general sense of security, their relationships, confidence and happiness.

21 Decisions about financial products are not made in a vacuum. Financial decisions are often made in the context of personal life events, such as divorce, retirement, poor health, or the experience of natural disasters, as well as the broader economic context, which increasingly includes cost-of-living pressures. The impact of these situational vulnerabilities can be fleeting or lasting, and they can range from minor to catastrophic. They can cause stress and other emotions that impact decision making and put consumers at risk of significant detriment.

Consumers in the digital age

22 As the current consultation paper notes, the sophistication of online marketplaces and associated technology has enhanced the ability of businesses to engage in unfair practices to the detriment of consumers. These risks apply equally in the provision of financial services.

The digitalisation of financial services in Australia

23 In recent years there has been a seismic shift in consumers' use of digital markets and e-commerce across all sectors, and the digitalisation of financial services in Australia is no exception. For example, in 2023 the majority (99.1%) of Australian bank customers interacted with their bank through online banking and apps, with only 0.6% via a branch. Australians were also found to be interacting with their banks more than ever before, with a 37% growth in banking interactions between 2019 and 2023.

Note: See Australian Banking Association, *Bank on it: Customer trends 2024* [report], June 2024.

24 The use of cards (both debit and credit cards) has continued to increase since 2007 and, consequently, Australians' use of cash has declined. Cash made up only 13% of day-to-day transactions in 2022, compared to 70% in 2007.

Note: See T Nguyen and B Watson, *Consumer Payment Behaviour in Australia* [Bulletin], Reserve Bank of Australia, June 2023.

25 The use of buy now pay later (BNPL) digital payment services among Australians has also increased in recent years, with almost one-third using the service in 2022 (up 8% since 2019) across all age groups.

> Note: See T Nguyen and B Watson, *Consumer Payment Behaviour in Australia* [Bulletin], Reserve Bank of Australia, June 2023.

Dark patterns

26 As acknowledged in the current consultation paper, dark patterns can be used in ways that involve unfair practices. As described by the Organisation for Economic Cooperation and Development (OECD), dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision making or choice. They deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways. Dark patterns may make it deliberately difficult for consumers to access certain services (e.g. interface interference), or hard to cancel a service (e.g. obstruction).

> Note: See OECD, *Dark commercial patterns*, OECD Digital Economy Paper No. 336 [paper], October 2022.

27 With the almost ubiquitous digitalisation of financial services in Australia, the use of dark patterns is also a concern in this sector. Consumer Policy Research Centre's (CPRC) research on the use of dark patterns on Australian consumers found businesses from almost every sector—including financial services—had used dark patterns on their website and apps.

> Note: See CPRC, *Duped by design—Manipulative online design: Dark patterns in Australia* [report], June 2022.

28 The use of dark patterns (a subset of digital engagement practices) in online trading platforms has been examined by several regulators. For example, the Ontario Securities Commission (OSC) reviewed 10 investing platforms, including major online trading and investment services and crypto trading platforms, and found dark patterns were prevalent and had the potential to negatively impact investor wellbeing. The OSC found techniques that disguised the cost of investing (e.g. hidden fees and information), obtained personal information without informed consent, and made it harder to withdraw funds, close an account, or stop a premium subscription service.

> Note: See OSC, *Digital engagement practices: Dark patterns in retail investing* (PDF 931 KB) [report], February 2024.

29 ASIC's regulatory work has also found that retail investors who use online trading platforms are exposed to a variety of digital engagement practices. Our review of online trading providers found that digital engagement practices were used by some providers with the intention to increase client transaction activity to generate fees from frequent trading. Some providers used design features to cross-sell high-risk

products, such as the use of online presentation and framing techniques that made high-risk products appear to have more benefits and a lower risk profile than shares.

Note: See Report 778 *Review of online trading providers* (REP 778).

30 A broad prohibition on unfair practices is likely to be responsive to future needs and to respond to this fast-paced digitisation of financial services—combatting exploitative digital choice architecture that steers consumers to making choices that are not in their best interest and dark patterns that disadvantage and harm consumers, as well as black-box algorithms and possible unfair practices in artificial intelligence.

Other jurisdictions' approach to financial services

31 As noted in the current consultation paper, other international jurisdictions, such as the United Kingdom, the European Union and United States, have a general ban or prohibition on unfair trading practices and have introduced specific regulation targeting unfair commercial conduct resulting from evolving business practices, particularly digitally enabled commerce. To our knowledge, financial services are included in the scope of relevant laws in each of these jurisdictions.

32 In the European Union, the Directive on unfair business-to-consumer commercial practices in the internal market (UCPD) allows Member States to impose requirements in relation to financial services that go beyond the EU provisions to protect the economic interests of consumers. The main reasons for this exception are the inherent complexity and higher financial risk of financial services, the inexperience of consumers combined with the lack of transparency of financial providers, vulnerabilities that make consumers susceptible to both promotional practices and pressure, and the experience of financial enforcement bodies.

B Limitations of the financial services consumer protection legal framework

Key points

This section sets out the limitations of the financial services consumer protection legal framework in responding to unfair trading practices. It covers:

- the consumer protection framework for financial services;
- the limitations of the efficiently, honestly and fairly licensing obligation;
- financial services that are not subject to licensing obligations; and
- the risks of a lack of harmonisation between the ACL and the ASIC Act.

ASIC's consumer protection framework

33 In broad terms, the consumer protection framework for financial services in Australia comprises:

(a) the tailored regimes for licensed financial services and credit activities. This includes licensing obligations found in the *Corporations Act 2001* (Corporations Act) and *National Consumer Credit Protection Act 2009* (National Credit Act), such as the obligation for licensees to act efficiently, honestly and fairly (the EHF obligation), and provide access to dispute resolution for consumers and small businesses; and

(b) the broader consumer protection provisions in the ASIC Act, which apply to licensed and unlicensed firms, such as prohibitions on unconscionable conduct and misleading and deceptive conduct.

34 There are also other laws (e.g. the design and distribution obligations) that are unique to the financial services context.

35 Submissions to the first consultation process provided information to Treasury about the limitations of the general conduct requirements in the ACL in responding to unfair practices. A number of submissions particularly highlighted the high threshold required to establish unconscionable conduct and limitations on the capacity of the misleading or deceptive conduct provision to respond to silence or omissions. Those submissions were consistent with ASIC's observations as a result of administering the equivalent provisions in the ASIC Act.

36 Some submissions noted the existence of licensing obligations for those providing financial services and credit activities, which include the concept of 'fair'. Several submissions suggested that—given this—further laws responding to unfairness are unnecessary, while others argued that these obligations would not provide commensurate consumer protection to an unfair trading practices prohibition.

37 As explained below, not all products and services that are covered by the ASIC Act—and are therefore excluded from the scope of the ACL—are subject to licensing obligations. Where licensing obligations do apply, their capacity to respond effectively to unfair trading practices is limited.

Overview of the efficiently, honestly and fairly obligation

38 AFS licensees have a general obligation to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly': see s912A(1)(a) of the Corporations Act. An analogous provision exists at s47 of the National Credit Act, which applies to Australian credit licensees (credit licensees), and courts have applied a similar interpretation to both provisions. Both provisions are civil penalty provisions.

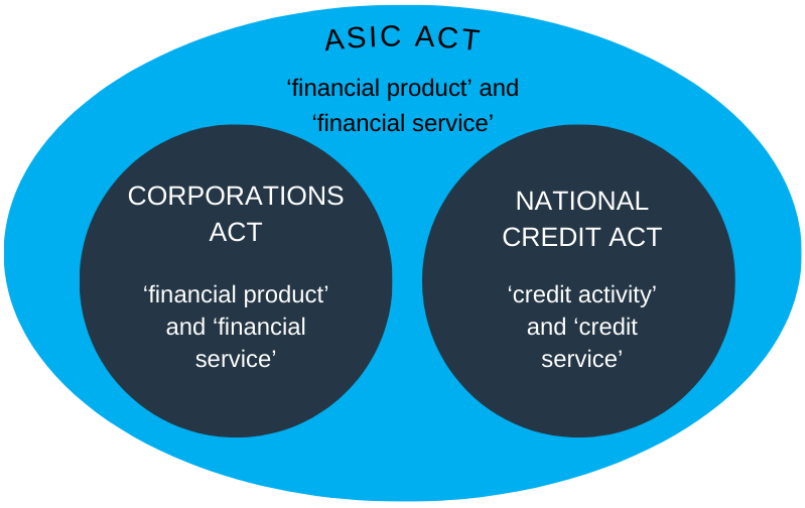
Note: Courts have applied a similar interpretation, see: *ASIC v Membo Finance Pty Limited* (No 2) [2023] FCA 126; *ASIC v Darranda Pty Ltd* (Liability) [2024] FCA 1015.

Financial services that are not subject to licensing obligations

39 There are some limitations, however, to the EHF obligation in its capacity to respond to unfair trading practices in the provision of financial services. We see the clearest limitation as the fact that the obligations only apply to licensed conduct and cannot respond to misconduct by those who provide unlicensed financial services.

40 At a high level, the ASIC Act definitions of 'financial product' and 'financial service' are broader than the definitions in the Corporations Act and the definition of activities or services contained in the National Credit Act. Accordingly, a narrower range of financial services are caught for the purposes of licensing (under the Corporations Act and National Credit Act) than those covered by the general consumer protection provisions of the ASIC Act: see Figure 1.

Figure 1: Products and services regulated by financial services legislation



Source: Adapted from Australian Law Reform Commission (ALRC), *Financial services legislation: Interim report A* [report], November 2021, p. 277

41 This means that there are a range of financial products and services—some of which that can cause consumer harm—that are not subject to licensing obligations and will not be covered by any unfair trading practices prohibition under the ACL.

42 As explained further in Section C, ASIC frequently receives reports or evidence of exploitative or harmful business practices in this periphery area of the regulatory framework, particularly in relation to:

(a) exploitative business models or practices employed by unlicensed parties in First Nations communities (e.g. book-up style services);

(b) unlicensed or perimeter products and services—where provision of the product or service does not require licensing, or it is unclear without significant investigation whether provision of the product or service requires licensing;

(c) avoidance models constructed to circumvent licensing requirements;

(d) 'like' products or services that are treated differently due to the technical operation of the laws (e.g. debt collection);

(e) new and emerging products or services that may be causing consumer detriment; and

(f) products or services that contain both financial and non-financial components (e.g. door-to-door sales using BNPL products).

Limitations of the EHF obligation: Licensed conduct

43 Even in relation to those who hold a licence, the judicial interpretation of the concept of 'fairly' limits or, at best, renders uncertain, its ability to respond to unfair trading practices. Case law also suggests that the principal focus of the obligation is on the processes or systems of licensees, rather than consumer outcomes.

Process focused rather than consumer-outcomes focused

44 Authorities such as *ASIC v Commonwealth Bank of Australia* [2022] FCA 1422 and *ASIC v National Australia Bank Limited* (2022) 164 ACSR 358 support the proposition that the EHF obligation is limited. In these cases, where bank errors resulted in millions of dollars of incorrectly charged fees to bank customers, the court determined there to be no breach.

45 The above cases, as well as more recent cases such as *ASIC v Diversa Trustees Limited* [2023] FCA 1267, indicate that the EHF obligation is process focused and requires the identification or establishment of steps that a licensee should have taken, but failed to do. This interpretation directs the focus away from consumer outcomes produced by the misconduct. This can be contrasted with the way general consumer protection provisions under the ASIC Act are interpreted. These general provisions tend to be more focused on the consumer impact of the conduct and can be more responsive to non-systemic conduct.

A compendious obligation and uncertain scope of 'fairly'

46 The prevailing judicial trend is that the EHF obligation should be read compendiously. This means the concept of 'fairly' may be moderated (and diluted) with reference to the other norms ('efficiently' and 'honestly'), rather than interpreted as a discrete conduct standard.

> Note: See *ASIC v Westpac Securities Administration Limited* [2019] FCAFC, *ASIC v Australia and New Zealand Banking Group Ltd* [2023] FCA 1150, *ASIC v AGM Markets Pty Ltd (in liq)* (No 3) (2020) 275 FCR 57 (*ASIC v AGM Markets*).

47 Furthermore, recent case law in *ASIC v AGM Markets* suggests that, as one part of a composite phrase, emphasis should not be put on 'fairly' to create 'unsatisfactory asymmetry in favour of those with whom the licensee deals'. Rather, the court has suggested that 'fairness' is to be judged having regard to the interests of both parties, including the legal and commercial interests of the licensee. On this reading, the EHF obligation does not prioritise the fairness of consumer outcomes.

48 'Fairly' is not defined under the Corporations Act. This sets a broad, 'open-texture' obligation that presents more challenges of interpretation and application for courts and regulators. While open-textured standards can apply to a wider range of conduct than more rule-like or prescriptive standards, this relies on robust case law. In practice, there is considerable uncertainty about the meaning and scope of 'fairly' under s912A(1)(a) of the Corporations Act and s47(1)(a) of the National Credit Act. This uncertainty frustrates its application to different types of unfair conduct and risks divergence from the policy intent.

49 As His Honour Justice Beach observed in *ASIC v AGM Markets*, courts have tended to avoid defining 'fairly' except to explain its structural setting in the 'compendious' phrase—due, in part, to its 'intrinsic circularity'.

50 This opaque and narrow interpretation of the EHF obligation can be contrasted to what we might expect from a prohibition on unfair trading practices. A standalone prohibition against unfair trading practices would appropriately tilt the focus to consumer outcomes. Further, it can balance a need for clarity without harming its scope via the use of carefully framed interpretation aids, such as a statutory definition of 'unfair' and the proposed 'grey list' of examples.

Not enforceable by consumers

51 Contraventions of the EHF obligation are only actionable by ASIC. By contrast, contraventions of consumer protections under the ASIC Act are also actionable by consumers, who have access to a range of remedies under s12GD, s12GF and s12GM, among other provisions. We consider an unfair trading prohibition would afford consumers greater opportunities of relief for unfair conduct that is out of scope or has not been prioritised by ASIC for enforcement action.

Risks of a lack of harmonisation

52 We consider that reforms to the ACL (including the introduction of a prohibition on unfair trading practices) should assume continued harmonisation between the ACL and the ASIC Act.

53 The establishment of a single national and harmonised consumer law was a key recommendation of the Productivity Commission's 2008 *Review of Australia's consumer policy framework*. The Commission recommended the establishment of a nationally coherent consumer policy framework through the introduction of a generic consumer law applying to all sectors, including financial services. As a result of these recommendations, the consumer law protections in the *Competition and Consumer Act 2010* extend to financial products and services through mirrored provisions in the ASIC Act.

54 We consider that a lack of harmonisation in the consumer law can pose various risks that can leave consumers exposed to harm and markets functioning sub-optimally.

55 ASIC notes that a lack of harmonisation can pose the following risks:

(a) jurisdictional complexity, leading to potential regulatory inefficiencies and higher cost litigation:

  (i) where there is uncertainty about the application of the ACL versus the ASIC Act; and

  (ii) for proceedings where both breaches of ACL and ASIC Act provisions are alleged;

(b) regulatory gaps and the possibility of regulatory arbitrage;

(c) inconsistent outcomes for consumers depending on the technical definition of the product or service they have purchased; and

(d) confusion for consumers and for businesses.

56 A harmonised system offers greater simplicity. As ASIC has previously noted, simpler and clearer legislation can be more effectively enforced.

Note: See *ASIC Annual Forum 2024: Bridging generations—regulating for all Australians*, keynote opening address by ASIC Chair, Joseph Longo, ASIC Annual Forum, 14 November 2024.

C Examples of misconduct that would benefit from an unfair trading prohibition

Key points

This section sets out an overview of the gaps and challenges in the consumer protection framework. It also includes examples of conduct, products or services that fall through those gaps. Namely:

- exploitative forms of book-up in First Nations communities;
- debt collection practices;
- debt management services;
- digital assets; and
- products or services that contain both financial and non-financial components (e.g. BNPL, superannuation related networks and strata management companies).

Overview of the gaps and challenges in the consumer protection framework

57 There are gaps and challenges in the consumer protection framework for financial services when it comes to unfair trading practices. The following examples demonstrate that:

(a) the legislative definitions of financial products and services are complex. Significant resources can be taken up establishing that a service is a financial service under the Corporations Act or a credit activity under the National Credit Act and that, therefore, licensing obligations apply. In some cases regulatory efficiencies can be achieved through broader, principles-based provisions in the ASIC Act;

(b) the licensing regime does not apply to all products and services that can cause consumer harm. The question of whether somebody is required to hold a licence can turn on technicalities, regardless of the consumer harm involved, and licensing obligations do not always respond adequately to the harm in question;

(c) where there are bundled products and services that cross jurisdictions and regulatory requirements, ASIC's powers to respond to a network of misconduct involving both licensed and unlicensed operators may be limited; and

(d) exploitative, unlicensed conduct will not always be a breach of the current ASIC Act consumer protection provisions.

58 For some misconduct we may be able to use available laws to pursue narrower enforcement action—targeting, for example, instances of misleading or deceptive

conduct, or an unlicensed conduct breach. However, challenging the overall legitimacy or 'fairness' of a business model is more difficult. This means that the most problematic misconduct may be able to continue without comprehensive redress. This reduces the deterrent effect, efficiency, and overall regulatory impact of our enforcement work.

Exploitative business models or practices

59 The case of *ASIC v Kobelt* [2019] HCA 18 is an example of what we consider to be an exploitative or unfair business practice employed by an unlicensed person in a First Nations community. Mr Kobelt was the operator of a general store in remote South Australia who provided a system of book-up credit to his customers—most of whom were Aboriginal residents of the APY Lands—which allowed them to purchase goods and second-hand motor vehicles on credit. We considered that Mr Kobelt's business model was unconscionable, and that he was engaging in unlicensed conduct.

60 Mr Kobelt required his customers to provide him with their debit cards, personal identification numbers (PINs) and details of their income, which he then used to withdraw all, or nearly all, of the customer's money from their bank account on or around the day they were paid. At his discretion Mr Kobelt would, for a fee, provide cash advances to enable his customers to shop at other stores. Otherwise, the customers became 'tied' to the store with the only option to purchase goods from the store that held their cards.

61 The credit charges were not disclosed, and the credit provided was expensive. The records of the arrangements were unintelligible. The customers were not provided with information about the transactions or statements of account.

62 While ASIC was successful in establishing unlicensed credit conduct by Mr Kobelt, the majority of the High Court found that his conduct did not give rise to statutory unconscionability in breach of s12CB of the ASIC Act.

Debt collection practices

63 Consumer advocates who participate in ASIC's consultative processes frequently raise concerns about unfair practices in debt collection. Debt collection is subject to different regulation depending on the type of debt that is collected, rather than on level of risk and harm posed to consumers. Debt collection activity in relation to a financial product or service is subject to the consumer protection provisions of the ASIC Act, and these practices would not be covered by a prohibition within the ACL. Further, debt collectors who collect debts relating to a financial product or service are only subject to licensing under the National Credit Act if they own the debts they collect. Debt collectors who merely act as an agent of the person who

owns the debt are generally not required to hold a credit licence and are regulated under state laws.

64 ASIC and the ACCC are responsible for administering the Commonwealth consumer protection legislation in relation to the debt collection industry and have jointly issued guidance on debt collection activities. Having different laws apply to different activities would impede ASIC and the ACCC's ability to effectively co-regulate debt collection. It would be an incongruous outcome for an unfair trading practices prohibition to apply to only some debt collection practices, leaving some consumers protected and others not.

Note: See Regulatory Guide 96 *Debt collection guideline: For collectors and creditors* (RG 96).

65 Serious harms that can arise in the debt collection space are illustrated by one matter involving an indefinite payment arrangement. Indefinite payment arrangements are payment arrangements under which the amount of the agreed weekly or fortnightly repayment is less than the interest accruing on the debt (meaning that the debt is forever increasing). In this case, an elderly consumer obtained a personal loan in 1989 to purchase household items. She subsequently fell into financial hardship, and in 2006 her account was sold to a debt collector. The amount owing at the time the account was sold was $4,003. In 2007, she entered into a payment arrangement with the debt collector to pay $10 per fortnight. These payments continued until 2021. Due to a 20% interest rate that attached to the personal loan, the debt accrued interest of approximately $67 per month. By 2021, the outstanding balance was $11,860.

66 Depending on the nature of the underlying debt, the consumer in question may or may not benefit from an unfair trading practices prohibition within the ACL, as she could only be assured protection if the prohibition applied across the whole economy.

Debt management services

67 Debt management firms (DMFs) are a category of businesses that promise to help consumers in financial hardship or those with payment defaults on their credit reports. DMFs offer to negotiate with creditors and 'repair' default listings on credit reports.

68 Depending on the business model in question, we have seen examples of harmful business practices in the provision of debt management services. Concerns relate to the charging of high fees (despite the availability of free alternatives); the provision of poor quality or inappropriate services that can leave consumers worse off; and unfair—in some cases, predatory—conduct towards consumers in financial hardship (e.g. using court listings to market their services to consumers subject to court recovery proceedings).

69 Since 1 July 2021, DMFs are required to hold a credit licence with an authorisation that covers debt management services. While welcome, the licensing regime does not provide comprehensive consumer protection against the harms listed above. For example:

(a) the licensing requirements apply only to debt management services provided in relation to credit contracts, and not to other debts (e.g. those in relation to utilities or telecommunications providers); and

(b) the licensing framework does not include targeted obligations for DMFs (for example to provide appropriate advice, or to prioritise a client's interests) and is unlikely to address the key harm in this space—high-cost services that frequently do not meet the needs of the vulnerable consumers to whom they are aggressively marketed.

Example 1: Challenges in obtaining relief in actions against DMFs

In the case of *Wade v J Daniels & Associates Pty Ltd* [2020] FCA 1708, the Consumer Action Law Centre (CALC) initiated proceedings in the Federal Court on behalf of a vulnerable consumer. The consumer had responded to a marketing letter from the company purporting to be able to 'save' her home and assist with obtaining home loan refinance.

Ms Wade engaged J Daniels & Associates (JDA) for debt management services and in doing so incurred significant fees. The fees were secured against her home by way of a caveat. Regardless, her home was foreclosed for a debt of less than $10,000 and there was no realistic prospect of obtaining a refinance due to her financial situation. CALC alleged that JDA had failed to provide debt negotiation and credit repair services with due care and skill, and also engaged in misleading or deceptive conduct and unconscionable conduct. The applicant was largely unsuccessful in her claims.

The court found that the credit repair services that were provided did not provide any practical benefit to Ms Wade and were unconscionable. However, the court also found that the debt negotiation services provided by JDA did not breach consumer laws. On the question of jurisdiction, the court found that JDA's services did not constitute financial services for the purposes of the ASIC Act.

70 While the Wade decision pre-dates the licensing reform, it highlights the difficulties of responding to consumer harm related to debt management services. In finding that the provided services were not financial services for the purposes of the ASIC Act, the decision highlights the complex and nuanced nature of regulating 'perimeter' products and the inconsistent outcomes for consumers should there be an unfair trading prohibition that applies to some services and not others.

New and emerging products or services

71 The digital asset sector is an example of a rapidly evolving sector where the question of whether a particular product or related service is a financial one is complex. It is also a sector where there is a need for comprehensive consumer protection, regardless of the technical categorisation of a particular asset.

72 While the Australian Government has proposed law reform in relation to digital assets and platforms, these reforms are not intended to displace the existing financial services laws. This means it will still be necessary to distinguish between what is a financial product and what is not. Depending on whether a digital asset is a financial product, different rights and obligations may attach.

73 Whether a digital asset is a financial product that requires licensing under the Corporations Act, or is regulated under the ASIC Act, requires analysis of the rights and benefits that attach to the asset. These rights and benefits may be determined by assessing a combination of the underlying source code, 'white papers' or other documents that were issued with the initial sale of the asset, or other marketing materials. Rights and benefits may change over time if there are changes in the features or uses of the digital asset, if common use of the digital asset evolves, and if there are any changes to the marketing of the digital asset.

74 Platforms that sell or facilitate trading in digital assets may seek to use behavioural techniques or user experience design to entice consumers to over-invest or take on an exposure that is not aligned with their objectives or risk appetite. Often this results in consumers taking on an exposure to digital assets greater than what they are prepared to lose. This can be particularly harmful if the consumer has taken on leverage to invest.

75 While the proposed reforms will extend some existing protections under the Corporations Act and ASIC Act to customers of digital asset platforms, the limitations of existing laws to respond to unfair practices, as noted above, will continue to apply. Extending an unfair trading practices prohibition to the ASIC Act would provide ASIC with a more appropriate tool to respond to consumer harm in this rapidly evolving area.

Products or services that contain both financial and non-financial components

76 There are many products and services available to consumers that bundle financial and non-financial components and licensed and unlicensed conduct. These bundled products can cause significant harm to consumers. Should the proposed prohibition not extend to financial services, this will lead to situations where some consumers will be protected from unfair practices and others not. In some cases, this may lead to regulatory arbitrage, where unscrupulous operators design their business models to avoid more comprehensive regulation.

77 Depending on the nature of the business models and practices, bundled models can also make it challenging to comprehensively respond to an 'arrangement' of misconduct. This is when different entities, or different elements of the conduct, fall into the jurisdictions of different regulators, each of whom have jurisdiction over only a fragment of the laws necessary to respond to the arrangement as a whole.

78 Paragraphs 79–91 provide some examples of issues that fall across multiple jurisdictions, and in between various laws.

BNPL products

79 Consumer advocates have recently raised concerns with ASIC about practices in the door-to-door sale of rooftop solar products to consumers—including those that are vulnerable and low-income—that are financed by BNPL products. The cost of the rooftop solar products typically range from $5,000 to $30,000. Reports identify the following areas of detriment including:

(a) unsolicited and high-pressure sales practices;

(b) inadequate fee disclosure about the terms of the BNPL arrangement;

(c) the quality and suitability of the rooftop solar products;

(d) repayments to the BNPL provider offsetting any reduction in energy bills; and

(e) consumers falling into hardship and problematic debt collection practices.

80 Since the passage of the *Treasury Laws Amendment (Responsible Buy Now Pay Later) Act 2024* (BNPL Act), the National Credit Act and the National Credit Code apply to the provision of credit under BNPL contracts. The BNPL Act introduced a modified responsible lending regime for BNPL providers.

81 While this reform brings BNPL products within the credit regime, it allows for the provision of unlicensed credit activities in specific circumstances, including (where various criteria are met) at the point of sale or if providing referral services. Similarly, while there is a prohibition on visiting a home to induce a person to apply for credit under s156 of the National Credit Code, this does not apply if a person visits a home to sell goods or services and offers to assist or provide credit for the purchase. That is, the sales representative would not violate the prohibition on visiting a home if their purpose is to sell solar panels with the BNPL contract offered to pay for that purchase.

Note: See reg 23 and 25 of the *National Consumer Credit Protection Regulations 2010*.

82 An economy-wide unfair trading prohibition would allow for a comprehensive response to such conduct, regardless of whether an activity requires licensing. Further, such a prohibition would allow for a streamlined regulatory response by multiple regulators who could be working together to gather evidence for the same contravention.

Superannuation related networks

83 Some bundled products and services are designed to be provided in a deliberately fragmented way to ensure no one entity can be held responsible for the overall conduct of the network. In many instances, the key person behind the network is not a regulated participant of a financial services market and the regulated entities in the network can be easily replaced.

SMSF networks

84 We have seen examples of these types of networks in the self-managed superannuation fund (SMSF) space. Typically, these networks include:

(a) an unregulated property spruiker;

(b) a licensed financial adviser that provides the advice to establish an SMSF;

(c) an unregulated SMSF establishment entity;

(d) a licensed credit provider who funds a limited-recourse borrowing arrangement for the SMSF;

(e) a property developer or real estate agent;

(f) an SMSF accountant; and

(g) an SMSF auditor.

85 In nearly all cases these businesses are related, pay referral fees to each other or benefit from the referred business.

86 We have seen many instances of networks encouraging clients to inappropriately rollover their existing superannuation into newly established SMSF for the purposes of investing into property, leading to consumer harm in the form of:

(a) exposure to inappropriate or high-risk investments;

(b) the inappropriate establishment of SMSFs; and

(c) the erosion of superannuation balances as a result of upfront advice fees for inappropriate and unnecessary advice, ongoing high fees, and inappropriate insurance premiums.

Superannuation advice networks

87 We have also seen telemarketing superannuation advice networks—in some instances run by unlicensed persons or entities falling outside or operating on the fringes of the remit of most regulatory regimes.

88 The models generally involve:

(a) a data broker or lead provider;

(b) a boiler room operator with unregulated telemarketing staff;

(c) a licensed financial advice provider or firm;

(d) a licensed superannuation fund or platform operator, or a newly created SMSF; and

(e) in some instances, an associated investment opportunity.

89 The networks use high pressure or misleading sales techniques to induce consumers to switch their superannuation in circumstances where it is not in their interest to do so.

Strata management companies

90 Consumer representatives and media outlets have highlighted concerning practices that are occurring in the strata management industry that may be considered unfair, including:

(a) the payment of large commissions for strata insurance;

(b) lack of transparency around remuneration models;

(c) overcharging of fees; and

(d) problematic debt collection practices.

Note: See L Besser, C Mayeta, E Hui, 'Strata companies' hidden fees, secret kickbacks and developer deals costing apartment owners', *ABC News,* 9 September 2024; L Besser 'The Strata Trap', *ABC Four Corners*, 9 September 2024.

91 These practices typically include insurers and insurance brokers (who would generally hold AFS licences) and strata managers (who would not hold an AFS licence, nor be regulated by ASIC). Both the brokers and the strata managers allegedly receive significant fees and/or commissions. This type of conduct would be suitably addressed with an economy-wide unfair trading prohibition, which would allow a streamlined regulatory response across different jurisdictions.

Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASIC v AGM Markets	*ASIC v AGM Markets Pty Ltd (in liq)* (No 3) (2020) 275 FCR 57
BNPL	Buy now pay later
BNPL Act	*Treasury Laws Amendment (Responsible Buy Now Pay Later) Act 2024*
CALC	Consumer Action Law Centre
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
CPRC	Consumer Policy Research Centre
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
current consultation paper	Treasury, *Unfair trading practices—Consultation on the design of proposed general and specific prohibitions*, November 2024
design and distribution obligations	The obligations in Pt 7.8A of the Corporations Act
DMF	Debt management firm
EHF obligation	The general obligation to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly' in s912A(1)(a) of the Corporations Act and s47(1)(a) of the National Credit Act
first consultation process	Treasury, *Unfair trading practices—Consultation Regulation Impact Statement*, August 2023
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	Sch 1 to the *National Consumer Credit Protection Act 2009*

Term	Meaning in this document
OECD	Organisation for Economic Co-Operation and Development
OSC	Ontario Securities Commission
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s9761A for the exact definition.
s912 (for example)	A section of the Corporations Act (in this example numbered 912), unless otherwise specified
SMSF	Self-managed superannuation fund