

16 December 2024

Director
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Market Conduct Division
Treasury
Langton Cres
Canberra ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Director

Unfair trading practices – supplementary consultation paper

The Insurance Council of Australia (Insurance Council) welcomes the opportunity to comment on the Treasury's supplementary consultation paper '*Unfair trading practices: Consultation on the design of proposed general and specific prohibitions*' ('the consultation').¹

The Insurance Council is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

The Insurance Council supports appropriate consumer protections and regulation to safeguard consumers from harmful unfair trading practices. Our members are committed to improving customer outcomes, demonstrated in the General Insurance Code of Practice ('the Code'), first introduced in 1994.² This sets out standards that general insurers must meet when providing services to their customers, such as being open, fair and honest.³

The consultation focuses on a proposal to amend the Australian Consumer Law (the 'ACL') to introduce general and specific prohibitions on unfair trading practices. We note that the Australian Government will consider changes to financial services regulated by the *Australian Securities and Investments Commission (ASIC) 2001* ('the ASIC Act'), once options to amend the ACL are agreed.

It is important to recognise that the general insurance industry is subject to an extensive regulatory regime. General insurers conduct their business and interact with their customers in a highly regulated environment as required of holders of an Australian Financial Services Licence ('AFSL') issued by ASIC, as well as a range of regulatory requirements set by the ASIC Act, the *Insurance Contracts Act 1984*, the *Corporations Act 2001* and the *Privacy Act 1988* (currently under reform), as well as the Code and monitoring by the General Insurance Code Governance Committee.

¹ Treasury. (2024). [Unfair Trading Practices: Supplementary Consultation Paper](#). Australian Government.

² [Insurance Council of Australia Code of Practice](#)

³ The 2020 General Insurance Code of Practice is currently subject to an independent review. Please see here: [Independent Review of the 2020 General Insurance Code of Practice](#).

If legislative reforms are to be considered to the ASIC Act, these need to be carefully reviewed to ensure the existing regulatory burden is not further exacerbated. We recommend a full gap analysis is undertaken in the first instance, to avoid regulatory duplication, which risks increasing compliance costs and stifling innovation.

We have included a non-exhaustive summary of existing regulation that provide requirements for fair trading practices in a general insurance context within **Appendix A**.

We recognise the need to target emerging and evolving practices that are not currently captured by the ACL. We support the intent of the reforms where they will capture business practices that are currently underregulated, including aspects of the insurance supply chain. It is crucial that the risk of unintended consequences on the general insurance market is considered, such as any impact on competition or cost to consumers and the economy.

Please find our more detailed comments and recommendations within **Appendix B**. Our submission builds on our previous response to Treasury's Consultation Regulation Impact Statement.⁴

The Insurance Council's comments and recommendations include:

- The general prohibition proposed is broad and there is a need to understand the intersection of these proposals with existing regulations. We recommend a full gap analysis is undertaken to assist considerations in relation to the ASIC Act, to help avoid regulatory duplication and unintentionally weakening existing consumer protections.
- There are a number of Australian Government-led reforms underway that will directly intersect with the ACL proposals, including reforms to the *Privacy Act 1988* and the financial services advice regime. These should be included in the mapping exercise recommended above.

Further consultation with industry should take place where changes are expected to be applied to financial services.

We look forward to further engagement with Treasury on their unfair trading practices proposals and future consultation on any potential application of the ACL provisions to the financial services sector.

If you have any questions related to our submission, please contact Brooke Noorbergen, Senior Strategic Policy Adviser, at

Yours sincerely

Andrew Hall
Executive Director & CEO

⁴ Insurance Council of Australia. (2023). [Protecting consumers from unfair trading practices](#). Insurance Council of Australia.

Appendix A

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	<p>General obligation to provide general insurance efficiently, honestly, fairly</p> <p>Duty of good faith</p> <p>ASIC Act consumer protections</p> <p>Extra care and support for vulnerable customers</p>	<p>As a condition of the Australian Financial Services (AFS) Licence, general insurers are required to act efficiently, honestly, fairly when providing general insurance.⁵ This also applies to claims handling, with claims handling becoming a financial service on 1 January 2022.</p> <p>As regulated by the <i>Insurance Contracts Act 1984</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.</p> <p>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).</p> <p>The Code provides additional best practice standards for providing extra care and support to vulnerable customers, including those experiencing family violence or financial hardship.</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.</p>
1.2	Fair handling of customer complaints	<p>Customer complaints are resolved fairly by the general insurer or independent Ombudsman, AFCA</p>	<p>As a condition of the AFS Licence, general insurers must have fair, efficient and effective complaints resolution processes for responding to customer complaints.</p> <p>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.</p> <p>AFCA mediates complaints against financial services and reports to regulators like ASIC and APRA.</p>

⁵ Australian Securities and Investments Commission. (2024). [AFS licensee obligations](#). Australian Government.

<p>1.3 Fair customer compensation arrangements</p>	<p>Customers receive fair and timely compensation payments</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.</p> <p>As a condition of the AFS Licence, general insurers must have arrangements in place to be able to fairly compensate customers.</p>
	<p>Fair and timely refunds when cancelling an insurance policy</p>	<p>To support this, a compensation scheme of last resort (CSLR) has been enacted, with AFCA managing its administration.⁶ This external dispute resolution body pays compensation to those suffering from financial misconduct. The Code provides additional best practice standards for the fair and timely refund of customers who have cancelled an insurance policy.</p>
<p>1.4 Fair customer disclosures and contracts</p>	<p>Disclosure, and policy terms and conditions are fair</p>	<p>The disclosure in Product Disclosure Statements (PDS), and policy terms and conditions must be fair, and not include unfair contract terms as per the <i>Australian Securities and Investments Commission Act 2001</i>.</p> <p>Insurers must also provide customers with disclosures 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).⁷</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.</p>
<p>1.5 Fair sales tactics and product design</p>	<p>Customers are protected from high pressure sales tactics</p>	<p>Under the Code, insurers must not use high pressure sales tactics. Protections include:</p> <ul style="list-style-type: none"> • a hawking prohibition which responds to unsolicited sales; • a deferred sales model for add-on insurance; and

⁶ Compensation Scheme of Last Resort. (2024). [About Us](#). Compensation Scheme of Last Resort.

⁷ Australian Securities and Investments Commission. (2021). [Claims handling and settling: How to comply with your AFS licence obligations](#). Australian Government.

- 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.

1.6	Other fair trading protections for specific lines of general insurance business	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.
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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. 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	The Motor Vehicle Insurance and Repair Industry (MVIRI) Code of Conduct sets minimum standards for insurer-repairer interactions, focusing on: <ul style="list-style-type: none"> • Transparency and Cooperation • Efficient Dispute Resolution • Professional Repair Standards

Most insurers are MVIRI signatories, with compliance mandated in New South Wales and South Australia. The Code Administration Committee is revising the Code in response to recommendations from Dr. Michael Schaper's 2023 independent review. A draft will be released for industry consultation in early 2025.

APPENDIX B

Proposed general prohibition

1.1 Approach

We note the consultation proposes a general prohibition on unfair trading practices to capture a businesses' conduct where it:

- Unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and
- Causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.⁸

We understand the intent of a general prohibition, however the broad nature of the proposed reform risks capturing legitimate business exercises. A more targeted approach to unfair trading practices would have the ability to better address material consumer harm. The Government should define what is meant by "unfair" and look at the unfairness principles already used by the general insurance sector.⁹

We note that the Government will consider changes to financial services regulated by the ASIC Act once options to amend the ACL are agreed. Any application to the ASIC Act would need to be carefully considered. We recommend a full gap analysis is undertaken in the first instance, to avoid regulatory duplication, which risks increasing compliance costs and stifling innovation.

The Government has committed to reducing regulatory burden in the financial services sector and made a commitment to develop and publish a 'regulatory initiatives grid', which will better coordinate regulation in the sector and reduce compliance burden and costs.¹⁰ The general insurance industry is subject to an extensive regulatory regime and any unintended consequences on the general insurance market must be considered, such as any impact on competition or cost to consumers and the economy. Treasury should consider appropriate exemptions for financial licensees where necessary.

This submission highlights risks of applying aspects of the reforms to the financial services sector.

1.2 Addressing gaps

The Insurance Council sees value in the general prohibition where it can capture some practices that are currently unregulated by the existing financial services regulatory framework, such as the operations of Claimant Intermediaries and Credit Hire Companies ('CHCs').

Claimant Intermediaries intercept the claims process and often exploit consumers in high-stress and vulnerable situations, such as following an accident or disaster. They offer to manage the claim process on behalf of the consumer but often charge excessive fees, misrepresent their affiliation with insurers, or encourage exaggerated claims.

CHCs are a type of Claimant Intermediary and can include motor vehicle hire, towing and smash repair companies. Motor insurers can vertically integrate with CHC providers in order to provide an end-to-end service for not-at-fault customers from the point of the accident through to the settlement of the claim. CHCs play a critical role in disaster response for motor insurers as they are usually local

⁸ The Treasury. (2024). [Unfair Trading Practices: Supplementary Consultation Paper](#). Australian Government.

⁹ The general insurance sector's conduct is regulated by the existing controls in Australian Consumer Law, the *Contracts Act 1984*, the *Corporations Act 1984* and the Code. The Australian Financial Complaints Authority independently monitors compliance with these principles.

¹⁰ Hon Dr Jim Chalmers MP. [11 March 2024]. [Better coordinated financial sector regulation](#) [Press release].

operators and can respond quickly. However, CHCs are not currently captured by ASIC's regulatory framework, which highlights a legitimate gap that the ACL proposals could address. Some concerning activity from CHCs include pressuring consumers to sign contracts at the scene of an accident and providing misleading quasi-legal advice to customers about their rights to claim legal costs from at-fault parties and their insurers.

We recognise that the circumstances which trigger the need for involvement by CHC are likely to be stressful for consumers and that their decision making may be impaired depending on what they've experienced. To ensure the operations of CHCs are captured by the reforms, the legislation should target unlicensed entities and the definition of 'material detriment' could consider customer vulnerability where their decision making may be impaired. Businesses could also be required to obtain point-in-time consent with electronic signatures to ensure consumers have been informed of their rights.

1.3 Grey List

The consultation proposes that the general prohibition be accompanied by a non-exhaustive list of examples of conduct ('the grey list'), which may satisfy the general prohibition test. The grey list includes subjective terms such as "overwhelm," "ambiguous," and "unintelligible".

We note that detailed, legally required information can be perceived as overwhelming or ambiguous, depending on the individual. The general insurance industry provides Product Disclosure Statements ('PDSs') to customers which provides important information about a product's coverage. PDSs are legal documents and subject to regulation under the *Insurance Contracts Act 1984* and the *Corporations Act 2001*. The Parliamentary Inquiry into insurers' response to the 2022 floods described PDSs as "complex" and "lengthy".¹¹ The industry is considering improvements to how this information is presented to customers. This example highlights the importance of conducting a regulatory gap analysis to understand where the ACL could undermine or contradict existing regulation and reform in financial services.

Given the subjectivity of the terms "overwhelm," "ambiguous," and "unintelligible", we recommend more guidance be provided as to the application of these terms and that legally mandated documents be exempt from the general prohibition and supporting grey list.

1.4 Scope

The general insurance sector supports the regulation of dark patterns. Financial services licensees are regulated by ASIC's Design and Distribution Obligations (RG274), which requires insurers holding a financial licence to take a consumer-centric approach to the design and distribution of their products and services. Treasury should include this in its regulatory mapping exercise when looking to apply the ACL reforms to financial services.

We recommend that the prohibition of dark patterns be subject to an appropriate assessment of the terms "unreasonable" and "material detriment" and avoid capturing non-harmful marketing practices. Some of the examples provided in the discussion paper, such as the use of testimonials, are useful marketing tools and help inform consumer choice.

Additionally, elements such as '*forced action*' where it relates to the forced capture and use of personal information, should continue to be the regulatory remit of the Office of the Australian Information Commissioner (OAIC) and covered by requirements under the *Privacy Act 1988*.

¹¹ House of Representatives Standing Committee on Economics. (2024). [Flood failure to future fairness](#). Parliament of Australia

We support business-to-business transactions being included in the reform's scope.

1.4 Implementation and costs

The general insurance industry is actively seeking ways to put downward pressure on insurance premiums, recognising the current cost-of-living crisis and the impact this is having on consumers, including the widening insurance gap in Australia.

With any increase in, or changes to, regulation there are costs involved with implementation. These changes usually impact smaller businesses more than larger operators who are likely to have internal legal resources and more flexible IT systems. Costs of implementation will vary depending on the size of the business.

We support a proportionate transition period, such as two-three years, to allow time for the changes to be implemented appropriately and avoid sudden increases in operating costs and overwhelming smaller operators. This would align with implementation of parts of Phase 1 reforms to the *Privacy Act 1988*, specifically where automated decision making is involved¹². This allows the Government time to correct any unintended consequences of overlapping regulation, including AI and privacy regulation. This transition period should be consistent across both general and specific prohibitions.

Specific prohibitions

2.1 General approach to subscriptions

The Insurance Council supports the principle of simplifying subscription cancellations and supports industries being exempt where they are subject to their own regulations and enforceable standards for managing subscriptions.

In the absence of an exemption, we recommend Treasury provide special consideration for essential services, such as general insurance. Unlike social or retail subscription services, inadvertent cancellation of insurance renewals could result in significant consumer detriment, such as lapses in critical coverage during emergencies. To mitigate this risk, reforms should allow reasonable checks and balances to ensure account security and informed decision-making. For example, two-factor authentication or similar verification methods should be permitted during cancellations to protect consumers and prevent unauthorised actions. These measures align with Treasury's broader objectives of protecting consumers while ensuring subscription processes remain fair and accessible.

The treatment of general insurance customers and the delivery of products and services, including insurance renewal processes, is regulated by the Code and the *Insurance Contracts Act 1984*. If the ACL is expanded to the financial services sector, the Government should consider risks where consumer protections could be negatively impacted or weakened.

As part of the Code, insurance providers are required to:

- a. remind customers about the automatic renewal process;
- b. remind customers that they can opt-out of that process; and
- c. remind customers to check the amount of their sum insured to see if the level of insurance cover is still appropriate.¹³

¹² Griffiths, O. & McGovern, D. (2024). [Privacy and Other Legislation Amendment Bill 2024](#) (Bills Digest No. 16, 2024-25). Parliament of Australia.

¹³ Insurance Council of Australia. (2021). [General Insurance Code of Practice](#). Insurance Council of Australia.

The importance of clear communication with customers, especially regarding product terms and conditions, was raised as part of the Parliamentary inquiry into insurers' response to the 2022 floods.¹⁴ The ACL reforms should avoid overprescribing information required to be provided to consumers, as it may interfere with sector-specific information that is required by other regulation or may cause information overload for consumers.

2.2 Pricing and accounts

The Code prohibits pressure selling.¹⁵ We support prohibiting exploitative pricing tactics such as drip-pricing and dynamic pricing, but legitimate risk-based pricing models should be clearly excluded from these definitions.

The general insurance industry is underpinned by risk-based pricing, which means personal information gathered (such as location and demographics) can influence the premium charged. To ensure healthy competition, risk models are designed by each insurer and the risks considered will vary. The legislation should differentiate between exploitative practices and legitimate risk-based models, to avoid unintentionally capturing risk-based pricing.

2.3 Barriers to customer support

The Insurance Council and its members support customer services that are responsive, accessible and adaptable to customer needs.

Any expectations on customer access to support should be consistent with existing regulation and external dispute resolution services, such as the Australian Financial Complaints Authority ('AFCA') and target direct service lines to avoid capturing complete supply chains. If whole supply chains are captured, this will require some businesses to establish new customer service centres that are currently outsourced to third party providers, significantly and unnecessarily increasing operating costs.

Requirements should also target business-as-usual services and provide exceptions where these services may be unavailable or disrupted as a result of unforeseen circumstances, including a disaster or a large influx of claims that may overwhelm systems.

¹⁴ House of Representatives Standing Committee on Economics. (2024). [Flood failure to future fairness](#). Parliament of Australia

¹⁵ Insurance Council of Australia. (2021). [General Insurance Code of Practice](#). Insurance Council of Australia.