



ASIC
Australian Securities &
Investments Commission

Consultation regulation impact statement on unfair trading practices

Submission by the Australian Securities and Investments Commission

November 2023

Consultation overview

- 1 The Australian Securities and Investments Commission (ASIC) welcomes the release, in August 2023, of the [Consultation regulation impact statement on unfair trading practices](#) (Phase 1 CRIS). The consultation regulation impact statement seeks evidence on the nature of unfair trading practices in Australia and the extent of consumer and small business harm arising from potential gaps in the Australian Consumer Law, as well as feedback on possible policy responses.
- 2 We note that the Phase 1 CRIS confines its attention to a possible unfair trading prohibition under the Australian Consumer Law and does not consider the extension of reforms to ASIC-regulated financial services in the *Australian Securities and Investments Commission Act 2001* (ASIC Act). The application of an unfair trading prohibition to ASIC-regulated financial services will be considered through a separate regulation impact statement (Phase 2 CRIS) in 2024. We welcome the opportunity to contribute to these consultations and, in addition to this submission, intend to make a detailed submission to Phase 2.

Support for introduction of a prohibition on unfair trading practices

- 3 We are supportive of a whole-of-economy prohibition on unfair trading practices. We are aware of unfair trading practices that have caused, and continue to cause, consumer harm and are not clearly captured in the current regulatory framework.
- 4 To respond to these consumer harms, ASIC sees merit in Option 3—that is, the creation of a general prohibition on unfair trading practices—across all sectors. We are of the view that a general prohibition has the benefit of being responsive to current, as well as new and emerging, unfair practices, including those that cannot yet be envisaged. We also view Option 4—that is, a combination of general and specific prohibitions—to be worth consideration.
- 5 We are mindful, however, of the administrative challenges of maintaining an up-to-date list of prohibitions. There are also challenges involved in framing prohibitions with sufficient, but not excessive, specificity (such that the provisions do not capture unintended conduct but are not so limited in application as to be ineffective).
- 6 We are of the view that, by focusing on fairness as a core consumer law requirement, an unfair trading prohibition will reduce the need for complex and drawn-out regulatory interventions. It will also encourage confident and informed participation by investors and consumers across all markets.

- 7 A well framed general prohibition is likely to respond to the fast-paced digitisation of services, including:
 - (a) exploitative digital choice architecture that steers consumers towards making choices that are not in their best interests (e.g. subscription traps);
 - (b) digital engagement practices including dark patterns; and
 - (c) algorithms that disadvantage and harm consumers.
- 8 As a whole of economy reform, it will assist regulators to respond more effectively to perimeter and avoidance misconduct and complex business models that cross regulatory boundaries. A prohibition is also likely to increase regulatory efficiency and reduce enforcement complexity by providing a law that is responsive to the problem.
- 9 Most importantly, we believe that such a reform will assist regulators to better respond to exploitative business models or practices (often seen in First Nations' communities or involving consumers experiencing situational vulnerability) that do not meet the threshold for unconscionable conduct.
- 10 We look forward to providing more comprehensive detail on these issues, as well as relevant case studies and examples in the context of financial services in our submission to the Phase 2 CRIS in early 2024.

Harmonisation across consumer law

- 11 The unfair trading reforms explored above would provide a strong foundation for future harmonisation across the consumer law. It is our view that reforms to the Australian Consumer Law (including the possible introduction of a prohibition on unfair trading practices) should assume continued harmonisation between the Australian Consumer Law and the ASIC Act. We note this position aligns with the [agreed 2024 priorities of Australia's consumer affairs ministers](#).
- 12 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](#) (PDF 549 KB). 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* (Competition and Consumer Act) extend to financial products and services through mirrored provisions in the ASIC Act.

- 13 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. These risks include jurisdictional complexity between regulators and during litigation, as well as unintentional regulatory gaps and the possibility of regulatory arbitrage. We look forward to addressing these issues in our submission to the Phase 2 CRIS.
- 14 On this point, we note that the [Treasury Laws Amendment \(More Competition, Better Prices\) Bill 2022](#) passed Parliament in 2022. The legislation introduced increased maximum penalties for breaches of certain provisions of the Competition and Consumer Act, including unconscionable conduct. At the time, the penalty increases were not extended to the ASIC Act. Consistent with views expressed above, we support uniform penalties for breaches of mirror provisions in the Australian Consumer Law and the ASIC Act and look forward to the opportunity to provide feedback via the [consultation process proposed by the Government](#) in 2022. We note that this harmonisation is a [2024 priority of Australia's consumer affairs ministers](#).
- 15 We appreciate the work that Treasury has done on these important reforms and look forward to contributing to the Phase 2 CRIS in early 2024. Please do not hesitate to contact us if you wish to discuss this submission or matters relating to the reforms more generally.