



Unfair Trading Practices: Design of General and Specific Prohibitions

Submission to The Treasury
13 December 2024

Introduction

The Australian Chamber of Commerce and Industry (ACCI) appreciates the opportunity to provide comment on Unfair Trading Practices consultation on the design of proposed general and specific provision.

ACCI is Australia's largest and most representative business association. Our members are all state and territory chambers of commerce, which in turn have 430 local chambers as members, as well as over 70 national industry associations. Together, we represent Australian businesses of all shapes and sizes, across all sectors of the economy, and from every corner of our country.

ACCI is disappointed at the approach taken in the reforms to unfair trading practices (UTP). In response to the earlier consultation, the most burdensome regulatory option has been chosen, introducing both general and specific prohibitions on business.

The case that there is a problem with the UTP component of Australian Consumer Law (ACL) has not been made. Yet, the opportunity to introduce greater restrictions on business appears too good to pass up. This is an example of the government taking an effective regulatory regime that is operating well and making it even more restrictive on business, with no clear gain to the consumer.

Recently we have seen the government increasing its influence across a range of business activities through the mandatory food and grocery code of conduct, merger reforms, climate related financial disclosure and multinational national tax transparency. This new burden of government regulation is stifling business activity and undermining productivity. This is particularly the case for small businesses, which make up over 97 per cent of Australian businesses. Australia's productivity growth is anaemic and this is at least partially the result of the increasing regulation being imposed to business. The government must take pause and consider the impact the increasing regulatory burden is having on business activity.

In the case of UTP, the option chosen, with a combination of general and specific prohibitions, places an excessive administrative burden and disproportionate compliance constraint on business.

Australia already has a comprehensive consumer protection framework regulating unfair trading under the ACL. As identified in the consultation paper, in the earlier consultation there was a large cohort of stakeholders supporting Option 1 – the status quo, agreeing the current regulations are effective. The problem the government is trying to address through the changes of UTP component of the ACL has not been clearly articulated. It is not evident that there is a gap to be filled.

The ACL is intended to set the **baseline minimum standard** for business conduct, not an aspirational high bar. As outlined in Appendix A of the consultation paper, the ACL already sets a high standard, with provisions for misleading and deceptive conduct, unconscionable conduct, unfair trading terms, unfair practices, bait advertising and drip pricing. These have been sufficient to deter unfair trading by businesses and provide access to redress for consumers where found to have occurred. The consultation paper fails to show any examples where the current ACL has not been effective.

It is important that the requirements of the ACL balance the need to protect consumers with the impact it has on business activity.

General Prohibitions

The proposed general prohibitions to be included in the ACL are vague and ill-defined. They are unlikely to improve the protection of consumers, but will lead create greater uncertainty for businesses.

The term ‘unreasonably distorts or manipulates’ is very subjective. At the extreme, it could be applied to any marketing practice, as the intention is to influence a customer’s decision and persuade them to purchase an item. There needs to be boundaries and clear parameters defining what is considered ‘unreasonable’. Otherwise, what is deemed unreasonable may not always be grounded in fact or have a clear test. Furthermore, a lack of clarity will result in the need for case law to define the parameters – this will be costly for both consumers and businesses to establish, as well as for the court system in terms of resources.

It becomes even more unclear when the potential to ‘... cause, or is likely to cause, material detriment’, particularly when the detriment is extended to be ‘financial or otherwise’. Broadening the scope to indefinite terms, such as ‘likely to cause’ detriment becomes very subjective. Also, by expanding the impacts to include emotional distress, inconvenience and other forms of disadvantage, the materiality of these is very difficult to quantify and would come down to individual circumstance. How is emotional distress, inconvenience or other forms of harm to be determined and how is this measured? ACCI asserts that what constitutes ‘detriment’ needs to be clearly defined and that it should be confined to financial impacts that are circumscribed and quantifiable.

The grey list

The proposed 'grey list' opens more questions than it answers. The 'grey list' is open-ended, as a non-exhaustive list, such that any business conduct can be added to the list over time. It is also vague and undefined, without boundaries, as it can be applied to any conduct 'depending on the circumstances'. The examples listed in the consultation paper are very subjective and open to interpretation. At what point does the omission of information become material and likely to cause detriment to a consumer? Further, the omission of information conflicts with the provision of information that is likely to overwhelm the consumer. How is it determined what is not enough information and what is too much information?

ACCI is concerned that the 'grey list' will become a 'black list' of banned activities. Any activity on the 'grey list' will be put under the microscope and deemed to be unfair trading. While ACCI agrees that plain, intelligible, explicit, obvious and timely information is important, including a 'grey list' of activities in the legislation that are prohibited 'depending on the circumstances' will only create confusion for both businesses and consumers.

Dark Patterns

Labeling actions as 'dark patterns' is emotive and implies malicious intent and unscrupulous actions. Yet, what are identified as 'dark patterns' may in some case be of benefit to consumers. For example, for scarce goods the introduction of a count-down timer to indicate the expiry of a deal or discount ensures fairness for both the person buying the good and also other consumers that may want to buy the good. For scarce goods (where stock is low), it is unreasonable for an individual to sit online for an extended period of time, blocking others who may want to purchase the good. Where a customer is asked to register or provide contact information to obtain a good, the business is then able to follow up with customer in the provision of the good or service.

The ACL already includes provisions to prevent harmful actions identified under the list of 'dark patterns' in the consultation paper, through prohibitions on misleading and deceptive conduct, unconscionable conduct and bait advertising. It is not necessary to augment the ACL with additional requirements to prevent 'dark patterns'.

Remedies for breach of a General Provision

The consultation paper proposes a range of compliance and enforcement tools for contraventions of the proposed General Provisions under the ACL, including infringement notices, enforceable undertakings and legal action. It also includes recommendations that propose applying the maximum penalties for breaching the existing consumer protections provisions, which are the greater of \$50 million or 3 times the value of the contravention or 30 per cent of the company's turnover during the breach.

ACCI considers a penalty such as this to be excessive and grossly disproportionate to the action and the detriment to the consumer. In particular, for activities that are included on the 'grey list', such as the omissions on information, which may be inadvertent, penalties such as these are extreme.

If the government does decide to proceed with the expansion of the ACL to include UTP General Provisions (which ACCI oppose), then the penalties should reflect the loss suffered

by the consumer associated with the breach. An initial contravention should involve a warning and may include guidance on what is required to improve business practices. For serial breaches, or where there is clear intent, the penalties should be sufficient to act as a deterrent, but also bear a reasonable relationship to the loss likely to be suffered by the complainant. These losses are more likely to be in the thousands of dollars than the tens of millions of dollars range.

Specific Provisions

Subscription related practices

ACCI is not opposed to requiring business to provide greater information to consumers that subscribe to a service, that they are entering a contract, the duration of the contract, details of the arrangements for introductory offers and 'free-trials', frequency of payment and total amount of the contract. These details are typically included in the terms and conditions of the subscription agreement. We agree they are necessary to inform a consumer's decision to buy and do not oppose introducing a requirement to provide this information if it is deemed necessary.

ACCI does not disagree that for a continuing service, the consumer should be notified that the automatic renewal unless cancelled and when issuing a receipt for payment an option be included to cancel or modify the subscription. This is standard practice for the majority of businesses providing subscription services.

In the case of 'opt-in' requirements at the end of introductory offers, ACCI considers the consumer should also be required to take some personal responsibility. For free trial periods, the consumer would be aware when signing up for a free-trial or introductory offer, particularly when they provide credit card details, that at the end of the period, unless they are dissatisfied and chose to unsubscribe, that they have agreed to subscribe to the service at the end of the period. This information is provided when the consumer signs up to the service and the consumer signs a contract agreeing to the terms at that time. Requiring the customer to re-sign for the product at the end of the trial period is an unnecessary administrative burden on both the business and customer.

ACCI agrees that terminating a subscription should be as straightforward and easy as subscribing to it and businesses should not put in place unnecessary barriers to make it difficult to end a subscription contract. However, as the subscription is a formal contract, the subscriber may need to provide more information than simply clicking 'unsubscribe' at the bottom of a message.

Drip Pricing

In many cases, the full cost of the transaction is not apparent until the transaction is concluded. The transaction can involve both variable costs, i.e. the price for each item selected, as well as fixed costs, which can include an administrative or service fee, freight costs, etc. Therefore, the total cost cannot be determined until each of the items is selected and the fixed costs then added. If the fixed costs are added to each individual item, then it would increase the cost to the consumer.

As noted in the consultation paper, the ACL currently prohibits disclosing part of the price of a good or service, without disclosing the minimum quantifiable price. ACCI considers that protections against drip pricing are already adequately covered in the ACL.

Dynamic Pricing

The consultation paper provides the example of dynamic pricing as when queuing for concert tickets the price increases while the consumer waits to get to the front of the line. While there is a recent example of prices increasing while consumers queued for hours to get Oasis concert ticket in the United Kingdom, there has not been similar example in Australia. We appear to be jumping at shadows.

It is a basic principle of economics that prices increase in response to scarcity. Consumers will bid up the price of an item as it becomes harder to obtain. It is legitimate for a business to respond to scarcity by increasing the price of an item. In the case of concert tickets, a sporting event or an airline ticket, there may be different prices for different categories of tickets and these prices may increase as the event gets closer, reflecting the demand for and scarcity of the item. Increasing prices is legitimate as long as customers are aware when they are purchasing the ticket the price of the item at that time.

The ACL provides protections against misleading and deceptive conduct, which would apply to the misrepresentation of prices as occurred with the Oasis concert in the UK. There is no need for further restrictions to be included in the ACL.

Online requirements

There are legitimate reasons why a business requires information to set up an online account, relating to the service provided to the customer. As noted in the consultation paper, the recent revisions to the Privacy Act provide adequate protection around how businesses collect and retain personal information. The ACL should not seek to duplicate the requirements of the Privacy Act, or worse, include provisions that are inconsistent with the Privacy Act.

Barriers to accessing customer support

ACCI does not disagree that businesses should be required to provide some degree of access to their customers should issues with the goods or services arise. However, the level of customer support a business is able to provide will depend on the type of business and its scale. While businesses should provide customers with access to customer support services, what is 'adequate' is very subjective. For example, small and medium businesses don't have the capacity to provide call centers and afterhours services, and it is unreasonable to expect them to have the same ability to provide this support as larger businesses. As such, it is unreasonable to include specific requirements for customer support in the ACL that do not take these considerations into account.

Treatment of small businesses

The consultation paper proposes a two-step implementation process for any changes to the UTPs, which would provide for consumer-to-business first before potentially extending to

business-to-business. This is despite the consultation paper recognising that small businesses are often consumers of larger businesses.

As has been addressed through this submission, we have concerns about the ability of small businesses to be able to comply with some of the proposals set out within the consultation paper. Generally, if the proposals are onerous for larger businesses, undoubtedly it is even more difficult for smaller businesses to comply. As such, we recommend extreme caution when considering broadening protections for small businesses especially.

Further, consideration should be given to extending the two-step implementation process to all businesses – particularly small businesses – as well as consumers should any or all of the proposals put forward proceed. Without providing support for the proposals in the consultation paper, it is unreasonable to extend protections to consumers without providing that same support to businesses who operate within the same system.

Conclusion

Overall, ACCI asserts that these General Provisions and Specific Prohibitions are unnecessary, and worse, are likely to lead to greater confusion and uncertainty for businesses and customers. The ACL already includes protections against unfair practices, which cover false and misleading representation. It also deals with unconscionable conduct that can include undue influence, pressure and other tactics, as well as the provision of information and the requirement that all parties act in good faith. These are sufficient for dealing with UTP without the need for embellishment.

About the Australian Chamber of Commerce and Industry

The Australian Chamber of Commerce and Industry (ACCI) is Australia's largest and most representative business network. We facilitate meaningful conversations between our members and federal government – combining the benefits of our expansive network with deep policy and advocacy knowledge. It's our aim to make Australia the best place in the world to do business. ACCI membership list can be viewed at www.australianchamber.com.au/membership/current-members/

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