ADMA Association for data-driven marketing & advertising

1 Introduction

ADMA is the principal industry body for Australian entities (including, but not only, businesses) seeking to ensure that they implement best practice in responsible and trustworthy data-driven marketing and advertising.

Data driven marketing collects, uses, discloses, and manages data that drives decision–making by an entity.

Data-driven marketing drives growth and engagement with customers. However, if uses of data for marketing are not responsibly planned and fairly managed, those uses can erode consumer trust and create substantial risk exposure for a business.

For this reason, ADMA's community prioritises upskilling marketers in their responsibilities to nurture data trustworthiness, as well as ensuring regulatory compliance.

2 Executive Summary

This short submission responds to The Treasury's consultation on the design of proposed general and specific prohibitions associated with unfair trading practices of November 2024 (**Consultation Paper**).

ADMA supports three recommendations for amendments to Australian Consumer Law (**ACL**) to address unfair trading practices:

(a) introduction of a new provision addressing a standard form contract that has been entered into by a consumer who has been subject to unfair trading practices (effectively, treating that contract as containing unfair contract terms);

(b) provision of guidance to businesses on how to avoid engaging in unfair trading practices that could lead to such a standard form contract being entered into; and

(c) application of existing pecuniary penalty provisions and other remedies provided by the ACL to businesses that have unfair contract terms in their standard form contracts.

Addressing unfair trading practices requires a substantial uplift in levels of data maturity, data governance and associated assurance controls of many entities (including many businesses), to bring practices and processes up to emerging good practice.

That lift in capabilities may be prompted by new legal requirements, and incentivised by legal exposures and potential penalties. However, policymakers and legislators should also be cognisant that there is an increasingly complex web of legally enforceable requirements as interpreted and applied by multiple regulators and bodies developing mandatory industry codes. Many businesses are unable to address this complex web. Building an economy-wide, robust and effective compliance environment requires regulators to assist businesses to understand how to effect good practice processes and practices, including avoiding unfair trading practices. That need is especially acute for small to medium businesses that engage in and depend upon data-driven marketing, but do not

have either in-house capabilities or financial resources to navigate this increasingly complex web of legal requirements.

Some new rules are required to address unfair trading practices. Additional complexity is therefore inevitable. However, government and regulators should play an active role in mitigating complexity and assisting businesses, and in particular small to medium businesses, to understand and effect best practice and avoid unfair trading practices.

Complexity is best addressed by strong guidance from the ACCC, and close coordination across the DP-REG regulators: that is, the ACCC, ACMA, eSafety Commissioner, and the OAIC. In particular, the DP-REG regulators should be resourced and encouraged to issue joint guidance materials that assist businesses to navigate the expectations around unfair trading practices. Close coordination will also assist effective enforcement by the regulators, and improve predictability for regulated entities as to application of laws and regulations.

The DP-REG has already demonstrated that they together can agree joint communiques.[1] It would be reasonable to expect that enforcement coordination between the regulators could extend to issue of joint guidance. This is required in an environment where the OAIC[2] has expressed interest in unfair trading practices. Drafting of joint guidance materials can be supported by industry and industry associations. In turn, this can lead to industry associations being actively involved in reinforcement of that guidance.

3 Context

3.1 The ACL

The Australian Consumer Law (**ACL**) is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**). The ACL is 'principles-based' legislation. Principles-based legislation relies on principles to articulate the outcomes to be achieved by the regulated entities.[3] Citing Black,[4] the ALRC noted that the guiding purpose of a principles-based approach is to shift the regulatory focus from process to outcomes. The rationale for this is described as follows:

> *Regulators, instead of focussing on prescribing the processes or actions that firms must take, should step back and define the outcomes that they require firms to achieve. Firms and their management will then be free to find the most efficient way of achieving the outcome required.*

In practice, the Australian Competition and Consumer Commission (**ACCC**) assists firms by providing guidance to both firms and consumers. The formal case law supplements this. Further

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[1] https://www.accc.gov.au/about-us/news/media-updates/communique-digital-platform-regulators-forum-2024.

[2] OAIC, 'GPEN Sweep finds majority of websites and mobile apps use deceptive design to influence privacy choices', <https://www.oaic.gov.au/news/media-centre/gpen-sweep-finds-majority-of-websites-and-mobile-apps-use-deceptive-design-to-influence-privacy-choices>.

[3] ALRC, 'Regulatory Theory', *ALRC* (2010) <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/4-regulating-privacy/regulatory-theory/>.

[4] Julia Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) <https://eprints.lse.ac.uk/62814/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Black,%20J_Principles%20based%20regulation_Black_Principles%20based%20regulation_2015.pdf>.

guidance is provided through ACCC media releases on enforcement actions which do not rely on the courts, such as enforceable undertakings[5] and infringement notices.[6]

3.2 Scope of the ACL

Clarity in scope and application of the CCA, including the ACL, is important for all businesses. The CCA should not become reactive to technology, and continue to be based upon clearly stated principles.[7] Amendments to the ACL that are responsive to technological developments should continue the principles-based approach. More specific and predictable technological harms not clearly addressed by principles can be addressed through selective exercise of Ministerial power to create regulations, following appropriate consultation. Section 134 of the ACL provides that the Minister may make an information standard for one or both of: goods of a particular kind; or services of a particular kind. Section 139G of the CCA relevantly permits the making of regulations: prescribing matters required or permitted by the ACL to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to the ACL. Section 139G of the CCA also provides protections by requiring assessment of the impact of any regulations. Section 139G(5) of the CCA includes:

> *Strict compliance with a form of application or notice prescribed for the purposes of [the ACL] is not, and is taken never to have been, required and substantial compliance is, and is taken always to have been, sufficient.*

3.3 Protection of classes of consumers

It is also important that the scope of the ACL remains consistent with focus upon harms to classes of consumers. The CCA protects and promotes the competitive process: the CCA does not protect individual competitors. Similarly, the ACL deals with conduct that affects groups of consumers, protecting individual consumers by virtue of those individuals falling within a group (or class) that a regulated entity ought reasonably identify and consider when determining that entity's conduct in the market.

For example, a section 29 misrepresentation is actionable because an entity ought reasonably have considered a relevant class or group of consumers before making a representation - not because a particular individual consumer was misled. Contrast the operation of consumer guarantees, which confer protection upon individual consumers. That consumer guarantee protection is a right for an individual consumer to obtain redress from the supplier of the goods or service. That right is not enforcement by a regulator: the regulator only gets involved if the consumer guarantees are breached by a supplier and a class of consumers are affected.

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[5] Australian Competition and Consumer Commission, 'Guidelines on ACCC Approach to Court Enforceable Undertakings' (Text, 10 September 2024) <https://www.accc.gov.au/about-us/publications/guidelines-on-accc-approach-to-court-enforceable-undertakings>.

[6] Australian Competition and Consumer Commission, 'Guidelines on the Use of Infringement Notices' (Text, 10 July 2020) <https://www.accc.gov.au/about-us/publications/guidelines-on-the-use-of-infringement-notices>.

[7] See, for example, Lyria Bennett Moses, 'Agents of Change: How the Law "Copes" with Technological Change' (2014) 20(4) *Griffith Law Review* 763; Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change' 2007(2) *Journal of Law, Technology and Policy* 239; Lyria Bennett Moses, 'Adapting the Law to Technological Change: A Comparison of Common Law and Legislation Courts and Parliament' (2003) 26(2) *University of New South Wales Law Journal* 394.

Accordingly, the CCA (including the ACL) focuses upon outcomes effected upon classes of people, and is principles-based.

3.4 Unfair trading practices prohibition is welcome

In this context of principles-based legislation, ADMA agrees that there is a need to address unfair trading practices in the Australian context. While we believe that most businesses strive to treat consumers fairly, there are instances where unfair practices can harm consumers and undermine confidence in the fair business operations of others.

ADMA also acknowledges that existing provisions in the ACL may not be sufficient to capture all forms of unfair trading practices. The proposal to introduce a general prohibition on unfair trading practices is a positive step towards providing greater protection for consumers. That noted, the ACL already captures some forms of unfair trading practices beyond misleading or deceptive conduct, unconscionable conduct, and unfair contract terms: for example, through prohibitions on practices like bait advertising, pyramid schemes, and harassment or coercion. ADMA considers that both drip pricing and dynamic pricing fall within existing ACL provisions where those practices are misleading or deceptive (as they often will be). That noted, the ACL may not be sufficient to capture other forms of unfair trading practices, such as:

- Subscription traps,
- Drip pricing where this is not misleading or deceptive,
- Dynamic pricing where this is not misleading or deceptive,
- Mandatory online accounts, and
- Barriers to customer support.

Having regard to more egregious examples of such practices, ADMA supports the overall objective of the proposed general prohibition. However, some ADMA members have expressed concern as to the potential scope and application of a broad general prohibition and its potential to capture a wide range of legitimate (fair and reasonable) business practices. ADMA members believe that the focus of the prohibition should be on practices that are that cause significant economic detriment to consumers. We are concerned that the proposed definition could capture practices that are merely unfair or that cause only minor detriment.

3.4.1 Jurisprudence on unconscionable conduct is clear

Judicial decisions as to unconscionable conduct under ACL is now developing consistently with the expectation of the legislature. This means that any unfair trading practices provisions do not need to address unconscionability. The ACL includes prohibitions on unconscionable conduct under the unwritten law or 'equitable unconscionability' (in ACL section 20) as well as statutory unconscionable conduct (ACL section 21). Section 22 of the ACL provides guidance to the Courts on matters to be considered. There is clarity here, reinforced by the High Court in *Productivity Partners Pty Ltd v Australian Competition* and Consumer Commission and *Wills v Australian Competition and Consumer Commission*.[8] The Court made clear that insofar as a factor in section 22 of the ACL is applicable "that matter must be considered. If not applicable, the matter need not be considered"

[8] [2024] HCA 27.

(Gageler CJ and Jagot J at [57]). Section 22 of the ACL does not "codify the values of Australian statute and common law" or "resolve such difficulties in its application". Instead, it articulates "a list of wide-ranging matters to consider when applying these values" (Edelman J at [234]). "It is the totality of the circumstances relevant to the conduct being considered (as required by s 21(1)) which dictates if any matter in s 22 applies" (Gageler CJ and Jagot J at [57]). Section 22 of the ACL does not act as "statutory criteria" that determine the "metes and bounds within which the normative standard prescribed by s 21(1) is to be applied" (Gordon J at [102]). Unconscionable conduct is "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience" (Gageler CJ and Jagot J at [60]; Gordon J at [101]; Steward J at [289]). The High Court has also confirmed that it is "not necessary in every case to plead and adduce evidence directed to the factors in s 22(1)" (Gordon J at [102]).

3.4.2 'Unfair' provides the key

ADMA takes the view that 'unfair' is reasonably well-understood in the context of the prohibition of unfair contract terms in standard form contracts. That is, the concept of 'unfair' as used in sections 23–28 of the ACL is reasonably well understood and should be used as the driver of any new prohibition and any proposed 'Grey List.' The effect of 'trading' which is unfair might be either the purchase of a good or service, or entering into a standard form contract.

Many unfair trading practices occur in the process of leading a consumer into a contract. That resultant contract is usually a standard form contract. Here are a few examples:

- **Drip pricing**: A business advertises a product at a low price, but adds hidden fees during the checkout process, increasing the final price. The consumer often goes on to enter into a standard form contract.
- **Bait advertising**: A business advertises a product at a low price to lure customers in but has no intention of selling the product at that price. The goal is to switch consumers to a different, more expensive product. Again, the consumer often goes on to enter into a standard form contract.
- **High-pressure sales tactics**: A business uses aggressive or manipulative sales techniques to pressure consumers into making a purchase, even if they don't need or want the product. This could occur in person, over the phone, or through online interactions. Again, the consumer often goes on to enter into a standard form contract.

This leads to a solution. This is to legislate that any standard form agreement that is entered into by a consumer who has been subject to unfair trading practices contains unfair contract terms. This removes the need to determine 'material detriment.' Instead, the contract that is formed is prohibited. There are already significant penalties for prohibited standard form contracts that contain unfair contract terms.

4 Recommendations

Accordingly, ADMA supports three recommendations for amendments to Australian Consumer Law (**ACL**) to address unfair trading practices:

(a) introduction of a new provision addressing a standard form contract that has been entered into by a consumer who has been subject to unfair trading practices (effectively, treating that contract as containing unfair contract terms);

(b) provision of guidance to businesses on how to avoid engaging in unfair trading practices that could lead to such a standard form contract being entered into; and

(c) application of existing pecuniary penalty provisions and other remedies provided by the ACL to businesses that have unfair contract terms in their standard form contracts.