

Unfair Trading Practices

AFCA submission

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Contents

- 1 Introduction 1**
- 2 Executive Summary 1**
- 3 AFCA’s lens on unfair trading 3**
 - 3.1 Unfair practices evident in AFCA’s complaints experience 3
 - 3.2 Emergent risks and challenges 6



1 Introduction

The Australian Financial Complaints Authority (AFCA) is the external dispute resolution (EDR) scheme for the financial services sector.

For over 25 years, AFCA and its predecessor schemes have provided a free, fair and independent forum for the resolution of consumer and small business complaints in the financial sector.

We welcome the opportunity to provide feedback on the proposed introduction of a prohibition against unfair trading practices. We believe this represents an important opportunity to set standards and expectations of business behaviour that are in line with community expectations.

2 Executive Summary

We welcome and support the introduction of a prohibition on unfair trading practices (UTP) to close a gap in the Australian Consumer Law (ACL) provisions in the *Competition and Consumer Act 2010* (CCA).

We note the current consultation is confined to the proposal to amend the ACL as set out in the CCA with the intention to consider changes to the mirror provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), once options to amend the ACL have been agreed to.¹

We strongly support the earliest possible extension of unfair trading practices (UTP) reforms to financial services. This is in line with the objective to develop a single national, harmonised consumer law applying across all sectors of the economy, including financial services.

The Productivity Commission (PC) recommended the establishment of a nationally coherent consumer policy framework through the introduction of a consistent and uniform consumer law applying to all sectors, including financial services. As a result, the key consumer law protections in the CCA, such as prohibitions on misleading conduct and unconscionable conduct, and the requirement to deliver services with due care and skill, extend to financial products and services through mirrored provisions in the ASIC Act.

In recommending the development of a single national consumer law in 2008, the PC set out their analysis concluding that the generic law should apply to all relevant activities, noting that:

¹ We note that the CRIS released in August 2023 referred to advancing a separate impact regulation statement relating to potentially extending unfair trade practices reforms to financial services in 2024, however the current consultation paper does not provide a specific timeline for this work.

More generally, statutory ‘carve outs’ ... can potentially provide unscrupulous operators with opportunities to make minor changes to their activities so as to slip between the regulatory cracks. To avoid this, there should be no exclusions of particular sectors from the new national generic consumer law.²

In AFCA’s complaints experience, we see conduct involving business models, often operating on the financial services regulatory perimeter, causing consumer harm. We consider the policy rationale for the development of an unfair trading prohibition applies equally to firms operating both within and outside the financial services sector.

We recommend the adoption of a prohibition on unfair trading practices, with a timely extension to the financial sector, as a critical step to mitigate regulatory arbitrage and prevent unfair consumer outcomes.

This approach aligns with the ongoing evolution of the ACL and ensures Australia’s consumer protection framework remains responsive to new and emerging products, markets, and business models. It addresses predatory practices and systemic unfairness that may not meet the legal threshold for unconscionable conduct.

We consider an economy-wide prohibition on unfair trading practices would be a helpful mechanism to:

- **Encourage fairness by design:** Shifting firms’ focus toward creating fair and transparent business practices.
- **Address systemic unfairness:** Providing stronger tools to tackle pervasive unfair practices.
- **Support fair competition:** Levelling the playing field by setting consistent unfair trading standards across all businesses, licensed or unlicensed.
- **Equip regulators and dispute resolution schemes:** Enabling regulators to address unfair practices causing consumer harms, particularly in new and emerging markets, and empowering external dispute resolution schemes to respond to poor outcomes resulting from unfair practices both in individual complaints and in their systemic issues work.

A whole of economy prohibition on unfair trading practices also aligns with other broader reforms to modernise Australia’s laws for the digital age, better protect consumers in areas of privacy, payments, responsible use of artificial intelligence, cyber security and scams.

² See Productivity Commission’s 2008 [Review of Australia’s Consumer Policy Framework](#), p. 24.

A timely extension of the reforms to financial services will also support regulatory efficiency where it is uncertain if a product or service is specifically regulated and requires a financial services or credit licence.

3 AFCA's lens on unfair trading

Fairness is at the heart of AFCA's dispute resolution service. Fairness in product design, distribution and outcomes is essential to building and maintaining consumer trust in financial products and services.

As the EDR scheme for financial and credit services we see an ongoing need to address unfair trading practices that fall into existing gaps and grey areas within the consumer protection framework.

The proposals set out in the consultation paper are important and timely given:

- AFCA's prior experience of predatory or unfair business models that have resulted in poor consumer outcomes
- evidence of how dark patterns and other forms of online manipulation can distort consumer outcomes and competition in an increasingly digital world
- the distinctions between consumer goods and services and financial products becoming increasingly blurred, with products and services increasingly bundled with or embedded within financial products and services, with the potential to amplify consumer risks.

The growing complexity and sophistication of online marketplaces and technologies used to influence consumer decision-making can heighten and exacerbate consumer vulnerability. This includes exposure to manipulative product or service designs, personalised distribution tactics, and misconduct by unscrupulous actors.

Adopting an unfair trading perspective provides a broader, systemic view of business models and trading practices across an entire sector. This approach is likely to address unfair practices more effectively than focusing solely on individual remedies, such as challenging specific contractual terms or isolated instances of misconduct. It empowers regulators, dispute resolution schemes, and courts to respond more comprehensively to systemic unfair trading practices.

3.1 Unfair practices evident in AFCA's complaints experience

AFCA received and dealt with more than 100,000 consumer and small business complaints about financial services firms in the financial year 2023/24.³ AFCA's complaints experience evidences a long history of financial firms—often operating on the regulatory perimeter—engaging in unfair practices and causing consumer harms.

³ See AFCA's [Annual Review 2023-24](#), p. 4.

Examples occur across the financial services sector including insurance (and insurance-like warranty products), credit and payment products, debt collection and third-party representatives (debt management and claims agents) or involving new asset classes such as digital assets where regulatory settings are uncertain. Some examples are outlined below:

Insurance

Youpla Group, also known as the Aboriginal Community Benefit Fund (ACBF), sold funeral plans primarily to First Nations consumers who put money into ACBF funds to help avoid placing a financial burden on family at times of Sorry Business. The conduct of the firm and its subsequent collapse had devastating effects on many First Nations people and communities.

ACBF issued funeral plans were financial products under the ASIC Act, but the firm operated under an exemption from the requirement to hold an Australian Financial Services Licence (AFSL) until law reform in 2020 closed the exemption. In determinations AFCA issued, we found ACBF had engaged in misleading and deceptive conduct and other misconduct. In AFCA's view, a prohibition on UTP may have supported earlier regulatory intervention to target the persistent unfair practices engaged in by this firm over many decades.⁴

Consumer credit and debt collection

A prohibition on UTP may enable regulators to more effectively respond to consumer harms arising from new or emerging payment and credit-like products where it is uncertain if the financial services or credit licensing requirements apply. Early intervention may mitigate the need for subsequent litigation or law reform.

AFCA sees continuing unfair practices in the debt collection sector. Despite efforts to clarify conduct obligations among debt collectors—regardless of the origin of the debt or if it has been on-sold—AFCA continues to see heavy-handed and unfair debt collection practices that may not reach the threshold of unconscionable conduct.⁵

A harmonised approach to unfair practices in the debt collection sector would support regulators to resolve regulatory ambiguity and lift standards regardless of whether the underlying debt arose from a credit card, car loan, telecommunications or utility debt. Harmonisation would reduce complexity and improve industry standards and consumer outcomes.

⁴ [24-033MR ASIC successfully appeals ACBF and Youpla misrepresentations case | ASIC](#)

⁵ As a way to try and address this regulatory ambiguity, ASIC and ACCC publish a joint [debt collection guideline for collectors and creditors](#) to assist collectors and creditors to understand their obligations.

Debt management and claims agents

AFCA has seen debt management firms engaging in unfair, predatory conduct toward financial distressed consumers. This conduct includes charging exorbitant fees for debt reduction or debt negotiations to consumers to whom such services would be of limited use and in the worst cases, amplify their hardship. In many cases, consumers could achieve similar debt reductions for free on their own or with the assistance of a free financial counsellor.

Another concerning trend is credit repair companies charging high fees to ‘clean’ credit reports for consumers by challenging default listings on credit reports, even where the circumstances do not fall under any of the limited criteria for removing defaults under the law, leaving the consumer with further financial loss and no benefit.

Claims agents are increasingly active lodging complaints with firms and dispute resolution schemes across a range of product types and services including energy, water, telecommunications and financial services. Unfair practices involving such firms can result in consumers paying significant sums for services of limited utility and engaging in conduct which can undermine the timeliness, cost and efficiency of dispute resolution schemes that consumers can access at no cost. A prohibition on UTP may respond to misconduct in a sector where specific conduct obligations may not apply across a mix of licensed and unlicensed operators.

We note risks reported in the UK relating to the increasing activity of claims agents under recent scams reforms.⁶ An UTP prohibition may be an effective tool to respond to such conduct as Australia’s Parliament considers a whole of eco-system response to scams.

Superannuation, financial advice

High-pressure practices have emerged involving ‘cold-calling’ and clickbait advertising to promote superannuation switching. These schemes act as ‘introducers’ to financial advice, targeting superannuation members and referring them to licensed financial advice firms, which may then recommend rolling over their superannuation from existing funds to self-managed super funds (SMSFs)⁷.

While the financial advice is regulated, the ‘introducer’ activity may fall into a regulatory gap, to which a UTP may more appropriately respond. As Australia’s super balance exceeds \$4 trillion⁸, we can expect more opportunistic and

⁶ In the 1 April – 31 June 2024 quarter, The UK Financial Ombudsman Service [reported](#) that around 44% of fraud and scam complaints were submitted by professional representatives, including claims management companies.

⁷ While anti-hawking legislation introduced in 2020 prohibits the cold calling of financial products, it does not extend to certain financial services. ASIC has expressed concerns that some financial advisers, licensees, and superannuation funds are benefiting from high-pressure sales tactics employed by cold-calling operators and clickbait advertisers to promote inappropriate superannuation switching. These concerns were detailed in ASIC’s report titled report [Exposing high-pressure cold calling tactics and social media click-bait leading to superannuation switching](#), 7 May 2024.

⁸ Total superannuation assets increased by 3.7 per cent over the quarter to reach \$4.1 trillion as at September 2024 – APRA Media Release [‘APRA releases superannuation statistics for September 2024’](#), 27 November 2024.

potentially predatory business models to emerge to target consumers' superannuation savings.

3.2 Emergent risks and challenges

In 2024, ASIC issued [Report 798](#) *Beware the gap: Governance arrangements in the face of AI innovation* (REP 798) on the use of AI by financial services licensees. ASIC found that nearly half did not have policies in place that considered consumer fairness or bias, and even fewer had policies governing the disclosure of AI use to consumers.⁹

ASIC highlighted that the increased use of AI could elevate risks such as misinformation, unintended discrimination or bias, manipulation of consumer sentiment, and failures in data security and privacy. These risks have the potential to harm consumers and undermine market confidence.

These potential risks are emergent in both financial services and non-financial services markets.

Given the significant risks to consumers posed by a poorly governed rollout of AI across the economy, AFCA supports timely introduction of an economy-wide unfair trading prohibition. Such a measure would empower consumer law regulators to address business models that misuse AI, leading to systemic unfairness and poor consumer outcomes, whether these practices arise in product design, distribution, or business processes.

⁹ [REP 798 Beware the gap: Governance arrangements in the face of AI innovation | ASIC](#)