



18 December 2024

Mr James Kelly  
Deputy Secretary  
Markets Group  
Treasury  
Langton Crescent  
PARKES ACT 2600

Via e-mail: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Mr Kelly

## **UNFAIR TRADING PRACTICES – SUPPLEMENTARY CONSULTATION**

The Australian Finance Industry Association (AFIA) appreciates the opportunity to respond to the Unfair trading practices – supplementary consultation.

AFIA is the only peak body representing the entire finance industry in Australia<sup>1</sup>. We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia. We support measures that facilitate the growth of the financial services industry through the promotion of innovation, competition, and enhanced consumer outcomes through proportionate and scalable regulation.

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<sup>1</sup> Australian Finance Industry Association ([afia.asn.au](http://afia.asn.au))

AFIA's position regarding the regulatory reforms is that they should be:

1. Be targeted and right sized – proportionate, scalable, functions-based, and tech-neutral where possible.
2. Support competition and innovation.
3. Balance financial stability and consumer protection, which is particularly important to ensure vulnerable customers are not disadvantaged with this next evolution and we avoid a new 'digital divide' in Australia.
4. Exist alongside self-regulation, which should continue to play an important role in setting high standards, getting ahead of change and customer expectations, and adapting existing frameworks to drive better customer outcomes.
5. Be efficient and effective – supportive of Australia retaining its global position as a financial centre and an incubator for ideas and responsive to this dynamic environment.
6. Aim for international interoperability to ensure Australia is an attractive market for investment, noting our members operate within other jurisdictions, and thus we support global regulatory alignment to facilitate compliance, where appropriate.

## **AFIA SUPPORTS FAIR TRADING**

AFIA strongly supports fair trading and accept that there is evidence of unfair practices across our economy. It is important that existing laws are enforced to ensure consumers and small businesses, particularly, are not disadvantaged or otherwise excluded from reasonable and fair participation in our economy.

Many businesses, including the financial firms, have adopted increasingly sophisticated new technologies to develop their online presence. Businesses are doing this because there are cost saving benefits and operational efficiencies, but also because overwhelmingly, customers are embracing our digital economy, expecting financial products and services to be available 24/7 and increasingly moving towards purchasing and paying for goods and services online.

Online presence is now indispensable for many because the benefits are compelling, including reduced transaction costs in time, effort and money for all users. Consumers can also easily compare prices, obtain ratings and reviews from other consumers and seamlessly pay for purchases with a variety of payment options and mechanisms.

AFIA has recently commissioned independent research into customer attitudes. The number one characteristic that consumers and SMEs want from finance is "efficiency". Therefore, it is critical that we ensure our legal and regulatory frameworks promote our digital economy as well as efficient, competitive and innovative markets, while safeguarding customers from unfair trading practices.

AFIA is keen to address unfair practices and problematic 'grey areas' as identified in the supplementary consultation. This is because unfair practices undermine the benefits and trust of conducting business online. All marketplaces not just digital enabled experiences for consumers should be fair and safe.

AFIA is a strong advocate for reforms that are proportionate, scalable and targeted. Reforms to consumer law should support efficiency, competition and innovation for the benefit consumers and businesses. They should be targeted where possible because 'one size fits all' regulations can have adverse and unintended consequences for consumers and businesses. They should support a strong complaints resolution function. We are concerned that the proposed general prohibition does not meet these aspirations.

### THE PROPOSED GENERAL PROHIBITION

A general prohibition on unfair trading practices (page 12 of the Supplementary Consultation) would capture a business's 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.

Additionally, it is proposed to contain a non-exhaustive list (or grey list) of examples of conduct that may, depending on the circumstances, meet this test. The proposed grey list includes the following examples:

- the omission of material information,
- the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer,
- impeding the ability of a consumer to exercise their contractual or other legal rights, or
- use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.

Our concerns in relation to the above proposal is set out below.

### **The proposed general prohibition of business conduct is very broad**

The proposed general prohibition introduces a new concept of *unreasonable distortion and manipulation* in relation to a business conduct impacting consumers.

AFIA is concerned that the proposed general prohibition is excessively broad. The proposed prohibition does not make it apparent the specific poor conduct it is seeking to target. The prohibition would undoubtedly lead to a new layer of uncertainty to business conduct, which will need to be assessed for compliance whether or not the conduct relates to the problems as described.

AFIA queries the need for all business activity, and therefore, every interaction with consumers to be captured in circumstances where there is no safe harbour, where the impact is economy-wide, and where there is no limit to the potential detriment, even if actual detriment may be comparatively small and where the prohibition is not risk based. For these reasons, we are concerned that the costs and exposure to businesses will be high.

Furthermore, the untested nature of the proposal could be far reaching. Its lack of clarity will unnecessarily add to compliance costs and complexities, raise new business cost of entry and hinder economic productivity and growth, and act as significant constrain to innovation.

Therefore, we support reconsideration of the application of a prohibition taking a more proportionate, scalable and targeted approach to addressing the potential identified problems.

**Consumers will benefit from a more proportionate, scalable and targeted regulatory approach**

AFIA believes that a more proportionate, scalable and targeted regulatory regime to address the “gaps” in the context of the digital economy is needed to fix the problems for the benefit of consumers. The problems relating to subscription practices, drip and dynamic pricing, hidden fees, accounts related requirements and even certain elements of ‘dark patterns’ can be more swiftly addressed through targeted reforms. Consumers would benefit from this clarity because the problems will be explicitly identified and standards established. Where standards are not met, remedies may be more readily determined.

Therefore, we support the ACCC and ASIC forming a new industry and business taskforce to develop further guidance building on existing laws and consumer protections.

**Grey list and identified problems could form targeted reform and be given greater prominence**

AFIA is of the view the grey list of examples in support of the current misleading and deceptive general prohibition comes closer to targeted reforms. We support the examples relating to material omission, provision of material information and ability of consumers to exercise their contractual or other legal rights. The example relating to design elements should be subject to further consultation so that it is clear that principles of good and poor design are clearly articulated. Further examples to be added could include:

- “drip and dynamic pricing and hidden fees”, where principles of good and bad practices in relation to appropriate price signals for an informed purchasing decision may be articulated, recognising the realities of supply and demand factors across different markets
- “accounts related requirements”, where excessive information gathering and poor processes could be addressed via privacy laws

- “subscription practices”, where subscription services could be clearly defined and appropriate requirements established so consumers can terminate in accordance with their legal rights, and
- “dark patterns” could form part of the further consultation relating to design elements, where principles of good and bad design could also be clearly set out and articulated, and design benchmarks established for the benefit of consumers.

### **Complaints function**

AFIA believes that businesses should have an adequate complaints functions and disputes resolution mechanisms. An accessible and affordable dispute resolution mechanism could go a long way to ensure that poor conduct may be addressed to remedy any consumer detriment. We consider that complaints should be handled in a fair and timely way. A good complaints handling system represents a more affordable and accessible way of addressing both disputes and systemic concerns arising from poor conduct than the huge costs required to take matters to the courts.

### **CONCLUSION**

AFIA has significant concerns about the proposed general prohibition and possible adverse and unintended consequences given its breadth, specifically for consumers, businesses and, broadly across our economy. We favour a more principles-based approach to ensure the risks of unreasonable distortion and manipulation may be addressed. We also support a more proportionate, scalable and targeted approach lifting from existing laws and consumer protections. Business and consumers would be given clear benchmarks for good business conduct and clear indication for remedies for when these standards are not met. Poor conduct could also be addressed via an accessible and affordable complaints handling system before the matter is taken to a court process.

Please do not hesitate to Li Chang at his e-mail address or via his mobile at  
if you have any questions about our submission.

Yours sincerely

Diane Tate  
Chief Executive Officer