

December 11th, 2024

Director
Consumer Policy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: consumerlaw@treasury.gov.au

RE: Australian Lottery and Newsagents Association (ALNA) Submission to Unfair trading practices – supplementary consultation paper

Executive Summary

The Australian Lottery and Newsagents Association (ALNA) welcomes the opportunity to provide input into Treasury's supplementary consultation paper on unfair trading practices. Representing the interests of over 4,000 small, family-run businesses across Australia, ALNA strongly supports reforms aimed at addressing unfair trading practices that disproportionately impact both consumers and small businesses.

ALNA has been consistently supportive of the ACCC's proposals to address gaps in the Australian Consumer Law (ACL). These gaps allow harmful practices to persist unchecked, often affecting our members, who are small businesses operating in a complex and competitive retail landscape. While existing ACL provisions have been highly effective in addressing misleading or deceptive conduct, further reforms are needed to ensure protections keep pace with evolving business practices and emerging digital manipulation.

About ALNA

The Australian Lottery and Newsagents Association (ALNA) is the peak national body representing lottery agents, retail newsagents, and distribution newsagents. Operating across rural towns, regional centres, and metropolitan areas, these businesses are a vital part of Australia's community and retail fabric, serving approximately 2.5 million Australians daily. As trusted retailers, our members provide essential services and foster local economic activity, particularly in areas underserved by larger corporations.

Small businesses in our sector face significant challenges from unfair trading practices that often escape regulation under current ACL provisions. Our members are frequently intermediaries or competitors to large suppliers and require robust legal protections to ensure they can continue to operate fairly and competitively.

Unfair Practices

Australian Consumer Law prohibits specific misleading or deceptive conduct such as bait advertising and pyramid schemes. That is in addition to the general misleading and deceptive conduct prohibition. This mix has been highly successful and is all under the heading of “Unfair Practices”.

Then came unconscionable conduct and then unfair contract terms. The latter very beneficial for small business; yet as the ACCC has pointed out in recent years there is a gap in relation to unfair commercial practices.

The unfair business practices reforms are expected to expand the legal framework to cover a wider variety of unfair conduct that the government considers currently escapes regulation, including conduct which is:

- harmful but does not reach the legal threshold for unconscionable conduct.
- not misleading or deceptive but distorts consumer choice by creating confusion or hiding or omitting relevant information.
- not captured by the unfair contract term provisions as harmful terms in non-standard form contracts or unfair conduct engaged in pursuant to a contract term that is, on the face of it, a reasonable contract term.

ALNA Support for Reforms

ALNA supports the proposed amendments to the ACL, to address business conduct which the ACCC says is “unlikely to breach the Australian Consumer Law but causes real harm to consumers”, including the introduction of a principles-based general prohibition on unfair trading practices. While the government has not yet released any draft legislation for consultation, this proposed prohibition must be accompanied by targeted specific prohibitions to address clearly identified harmful practices. The following issues are of particular concern:

- **Subscription Traps:** that use arduous and confusing steps to make cancelling a subscription difficult
- **Drip Pricing:** practices where fees are hidden or added throughout the stages of a purchase.
- **Deceptive and Manipulative Online Practices:** that aim to confuse or overwhelm consumers, omit or hide material information, or create a false sense of urgency or scarcity (e.g., “only one item left”) – this can include warnings that a customer only has limited time to purchase a product.

- **Dynamic Pricing:** where a product's price changes during the transaction process, creating financial disadvantages.
- **Account Requirements:** requiring consumers to set up an account and provide unnecessary information to make an online purchase.
- **Barriers to Support:** where a business makes it difficult for a consumer to contact them when they have a problem with their product or service or want to dispute something.

These practices harm not only consumers but also small businesses, which often act as intermediaries in supply chains dominated by large corporations, or as purchasers in the marketplace.

Key Concerns and Recommendations

1. Inclusion of Small Businesses from the Outset

ALNA strongly opposes the proposed staged approach, which would initially apply protections only to consumers in business-to-consumer (B2C) transactions. Small businesses face the same power imbalances and harm from unfair practices as consumers. Protections must be equitable and inclusive from the beginning, ensuring all those affected by unfair practices can seek recourse.

2. Avoiding Thresholds

We recommend avoiding arbitrary thresholds for determining what constitutes an unfair practice, as these can create unnecessary complexity and disputes. The law should remain accessible and applicable to all unfair practices, regardless of scale or context, as outlined in Section 52 of the ACL.

3. Focus on Preventing Harm, Not Punishment

ALNA supports a civil-focused enforcement approach aimed at stopping unfair conduct rather than punitive measures. The goal should be fostering fair and competitive markets, not penalising businesses unnecessarily.

4. Clarity and Guidance for Small Businesses

To minimise compliance burdens, regulatory bodies must prioritise education and guidance for small businesses. ALNA believes most small businesses already adhere to ethical trading practices and will benefit from clear guidelines on compliance.

5. Proactive Measures Against Emerging Practices

The inclusion of examples such as dark patterns, dynamic pricing, and manipulative subscription practices demonstrates the need for flexibility in the law. ALNA

recommends adopting a principles-based prohibition that can evolve with technological advancements, ensuring emerging practices are addressed effectively.

Compliance Costs

ALNA agrees with Treasury that compliance costs for businesses, particularly small businesses, are unlikely to be onerous. Most ethical businesses naturally avoid unfair practices, and effective regulator education will further reduce implementation barriers.

Alignment with ALNA's Position

This submission builds on our November 2023 position, which emphasised the need for reforms that comprehensively address gaps in the ACL, ensure small business inclusion, and remove unnecessary thresholds. ALNA maintains that genuine market competition cannot thrive while unfair practices go unchecked. Small businesses are vital to the Australian economy and deserve equitable protection under the law.

Conclusion

ALNA strongly urges the government to adopt a comprehensive, principles-based general prohibition on unfair trading practices, with immediate inclusion of protections for small businesses. Delaying such protections creates further inequity in the market. By fostering fairer trading conditions, these reforms will benefit not only consumers but also small businesses, ensuring resilience and growth across Australia's communities.

ALNA remains committed to working with Treasury and other stakeholders to ensure the success of these reforms and the creation of an equitable trading environment for all.

We appreciate the opportunity to contribute to this important review and welcome further discussions on these proposals.

Yours sincerely,

Ben Kearney
Chief Executive Officer
Australian Lottery & Newsagents Association