Unfair trading practices

Submission in response to Treasury Supplementary Consultation Paper ("SCP")
(November 2024)

The introduction of a general prohibition is supported because, as the SCP notes, this would increase the capacity of the ACL to deal with forms of offensive behaviour that currently fall outside the scope of its existing prohibitions and (most importantly) would enable it to "address newer, emerging forms of misconduct … that distort or manipulate consumer choice" (p4). The following suggestions regarding the details of the new prohibition are made in response to the questions posed by the SCP.

[Focus Q 1] The general prohibition would be clearer if it referred to unfair "conduct" rather than "practices". This would avoid any suggestion that the misconduct being addressed must be recurring before a contravention occurs, an interpretation that could arise because "practice" is commonly defined as being an habitual or repeated action.[1] Referring to "conduct" would also be consist with the other generic prohibitions in Chapters 2-4 of the ACL that extend beyond representations; for example s 18, 20 and 21; 31, 33, 34. Using the word "conduct" as in those prohibitions, would avoid any suggestion that by using a different word ("practices") in the new prohibition, Parliament must have intended it to have a different meaning. Conversely, nothing would be gained by using the word "practices" as part of the new prohibition; currently, it appears only in heading to ACL Part 3-1 and was apparently designed to capture the variety of proscriptions in that Part.

[Focus Qs 2 and 3] Subject to the observations made in response to Focus Questions 4, 5 and 35, the proposed general prohibition would address unfair trading practices relating *to pre-transactional* and *transactional conduct* that may not be addressed by current provisions of the ACL. Importantly, it would be broad enough to catch new and emerging unfair practices of that nature, thereby enabling it to play a role similar to that played by s 18 in relation to misleading or deceptive conduct (ie) ensuring that "the law is not to be continually one step behind businessmen who resort to smart practices."[2]

On the other hand, because the definition of unfair refers to conduct that distorts or manipulates the "economic decision-making or behaviour" of the victim it may not address post transaction conduct such as the following, noted on p 5of the SCP:

- *Suppliers ignoring "all contact from consumers about delivery delays post-sale".* This problem identifies a gap in the consumer guarantees regime that would best be remedied by amending that regime. This could be done by including a guarantee that suppliers will supply in accordance with the terms of the contract of supply or (if no time is specified) within a reasonable time.[3] An obligation along these lines exists in the various Sales of Goods Acts but not the ACL (other than a limited obligation created by s 62 in relation to services). Such an amendment would give consumers access to the ACL consumer guarantees remedy regime.

- *Subscription cancellation difficulties*. Whilst the proposed general prohibition will address the non-disclosure of material relevant to cancelling subscriptions, it may not (without "Grey list" guidance)

[1]. See, for example, the Australian Oxford Dictionary: "1. habitual action or performance; 2 a habit or custom; 3 a repeated exercise"; Black's Law Dictionary (1979): "repeated or customary action; a succession of acts of a similar kind; custom; usage".

[2] Commonwealth of Australia, *Parliamentary Debates*, Senate 30 July 1974, 54 (Senator Murphy).

[3]. See Clarke P, "Prepayments for Goods or Services and the Australian Consumer Law" (2023) 51 *Australian Business Law Review*, 239 at 241-244.

address cancellation procedures and requirements that are calculated to make it very difficult for victims to cancel their subscriptions, but which only come into operation post-transaction. From bitter personal experience, I am aware that this practice is prevalent and designed (so it would seem) to take advantage of the victim's likely disinclination to continue pursuing cancellation – their initial attempts having failed - because of the relatively small sums involved. However, I note below that it is proposed to cover this by a new specific prohibition.

[Focus Q 4] The conduct element of the prohibition should not include the concept of reasonableness. The definition of "unfair" should mirror Article 5 of the UCPD and refer to conduct that materially distorts or manipulates or is likely to materially distort or manipulate the economic behaviour of the victim. Whilst still focusing on the effect on the victim of the proscribed conduct (was it a significant influence?) this would avoid questions such as whether there can be "reasonable" distortion or manipulation and whether unreasonableness is to be determined from the perspective of the victim or the perpetrator. Mirroring the UCPD would also have the advantage of making its interpretation and jurisprudence directly relevant to that of the new ACL provision.

The conduct element should also *not* include a legitimate interest limb. Although there may be superficial attraction in drawing upon the "not reasonably necessary" element of the definition of unfair in s 24 of the ACL, that element addresses a significantly different issue, namely, striking a fair balance in the rights and obligation of the two parties to a contract who have (notionally at least) agreed upon its terms. A prohibition of unfair conduct, on the other hand, is directed at the unilateral conduct of the perpetrator; if such conduct distorts or manipulates the economic behaviour of the victim it would be perverse to then say that the perpetrator can be excused because it had a legitimate interest in doing this, or that it was reasonably necessary. Such a requirement would also be inconsistent with the approach taken in ss 18, 21 and the prohibitions of false representation in ACL Chapter 3, none of which have an equivalent requirement. Further, including such element in the definition would increase the matters about which there could be dispute, thereby making its application less certain and litigation more protracted.

[Focus Q 5] The general prohibition should *not* include a "material detriment" or any other detriment requirement. Although there is a similar element in the ACL s 24 definition of unfair, such a requirement is inappropriate in relation to a provision concerned with prohibiting unfair unilateral conduct, rather than with balancing the rights and obligations of perpetrator and victim. Including such an element would also be inconsistent with the ACL's existing prohibitions of misleading or deceptive conduct and unfair practices, none of which have such an element; they can be contravened whether or not contravention causes detriment – that matter being relevant only in relation to the penalty imposed, or the remedy granted. Including such an element would, therefore, make the new prohibition more restrictive and less helpful to victims. It would also make ACCC enforcement more challenging and prolix as an additional element would need to be established.

[Focus Q 6] A the inclusion of a grey list would be valuable guidance for suppliers and regulators. However, the examples given in such a list should be expressed as specifically as possible - as they are in ACL s 25 in relation to unfair contract terms. Thus, under the headings set out on SCP 14-15, precise illustrations should be given of the forms of conduct that may incur liability and therefore should be avoided. Assistance in this regard can be drawn from s 250 and the subscription contracts provisions of the (UK) *Digital Markets, Competition and Consumers Act 2024*

[Focus Q 7] The principal benefit to consumers of introducing a general prohibition of unfair conduct would be through the enhanced ability it would give the ACCC to take action against those

contravening the prohibition. As has been the case with the prohibitions of the specific forms of unfair conduct already proscribed by ACL Part 3-1, individual consumers are unlikely to take private action based on a contravention. On the other hand, if the prohibition was not restricted to conduct directed at consumers, private actions would be expected – as has been the case with ACL s 18.

[Focus Q 10 and 11] The maximum civil penalty for contravention of the proposed general prohibition should be that prescribed by ACL s 224(3A). This would make it the same as the maximum penalty that can be imposed for contravention of the unfair conduct prohibitions created by ACL s 23(2A) and Part 3-1 (other than s 47). Any lesser penalty would undermine its value as a deterrent and enforcement tool.

A transition period following the introduction of the general prohibition, during which penalties are not imposed, would be appropriate. This should be long enough to enable suppliers to tailor their supply arrangements so that they avoid liability; a two-year period should be adequate for this purpose.

[Focus Qs 17-22] All of the subscription options outlined on SCP 20 should be adopted. Currently, customers can too easily be lulled into entering subscription contracts, or to doing so without realizing the full ramifications of the contract they are making. And most importantly, in many cases, extracting oneself from such a contract can (as a practical matter) be almost impossible. Adoption of Options 1-4 would address all these concerns. The suggestions made in Options 1 and 2 about the material to be disclosed are appropriate and sufficient; it should be provided in the form used to make the initial contract. Option 4 should include a simple click to cancel option to make it as easy for the customer to cancel a subscription contract as it was to enter into it. However, it would be reasonable expect to pay for any goods or services they have received before cancellation and to pay a cancellation fee of some form where much of the supplier's costs were front-load.[4]

[Focus Q24] As per the response to Questions 10 and 11.

[Focus Qs 25-27] The current ACL provisions specifically relevant to dynamic and drip pricing, ss 35 and 48 respectively, should be strengthen, notwithstanding the potential to combat those practices using ss 18 and 29 and a new general prohibition of unfair trading conduct.

Section 35(1): the ability of this provision to address dynamic pricing is limited by the requirements that (i) there be "reasonable grounds for believing that" the advertiser will not be able to supply at the specified price and that (ii) the advertiser be aware or ought reasonably to be aware of those grounds. These requirements should be removed so that liability will arise if, once having advertised goods or services at a specified price, the advertiser did not have those goods or services available for supply at that price for a reasonable time and in reasonable qualities. This would make it an offence for a person, once having advertised a product for supply at a specified price, not to supply at that price in reasonable qualities and for a reason able time[5], thus precluding them from increasing the advertised price merely because demand makes it possible for them to do so. It would also be consistent s 35(2) which imposes an obligation to supply at the advertised price for a time and in quantities that are reasonable.

Section 48: adding extra changes for taxes or handing is clearly within the scope of s 48 and there are several reported cases attesting to its utility in this regard and to the disinclination of the courts to

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[4]. For an unfair contract terms example, see *ACCC v Employsure Pty Ltd* [2020] FCA 1409 at [441].

[5]. These "reasonable" limits and the ability of suppliers to indicate that supply is finite are sufficient to protect the supplier from liability arising in cases of unexpected high demand.

interpret it narrowly.[6] For this reason, the DMCC provisions seem to add little, if anything, to the obligations imposed by the current s 48(3). However, a gap that has emerged recently is the ubiquitous practice of charging customers for using a credit card to pay for purchases. This is not covered by s 48 as the customer has the option of using cash to pay, rather than their card, so that the price quoted is not *part* of the consideration (as quired by s 48) for the goods or services being acquired but the whole. This option is, however, unrealistic for those many customers who (thanks to the changes wrought by Covid-19) now do not use cash, or do not have it readily available. Suppliers should be required to include their credit card expenses in their quoted prices so that credit card users know the full cost of their purchase upfront; suppliers could then still offer a cash discount if they wished.

[Focus Q 35] The new prohibition should not be limited to conduct directed at consumers, or to consumers and small businesses. Rather, it should extend to all commercial conduct, regardless of the nature of those at whom it is directed. If not, the new prohibition would be more limited than most of the unfair conduct prohibitions in the ACL which are not restricted to consumer transactions. As well as the inherent value of establishing a behavioral norm of general application, (albeit one that as a practical matter is more likely to be relevant in business to consumer transactions than in business to business transactions) this would avoid the need to draw a distinctions between different transactions and to periodically update them as was the experience with the ACL's prohibition of statutory unconscionable conduct and the regulation of unfair contract terms in small business transactions (noted at 25). Although extending liability to business to business transaction may increase the compliance costs of potential transgressors, it is likely that this would be offset by the savings made by businesses being protected from unfair trading conduct as well as by enhanced fair trading.

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[6] *ACCC v TPG Internet* (2011) ATPR 42-383 at 44,698-44,700*;* *viagogo v ACCC* [2022] FCAFC 87 being examples.