



Unfair trading practices

Consultation on the design of proposed general and
specific prohibitions

November 2024

Acknowledgement of country

National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities.

We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders both past and present

Introduction

National Legal Aid (NLA), representing the directors of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to make a submission in response to Unfair trading practices: Consultation on the design of proposed general and specific prohibitions November 2024 from the Treasury. The submission is based on LAC experience and refers to illustrative client stories.

NLA aims to ensure that the protection or assertion of the legal and related rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Focus questions – general prohibition

1. Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?

Yes, it is clear.

2. Do the proposed elements for a general prohibition accurately reflect the gaps in the ACL that an unfair trading practices intervention could address?

NLA supports both of the proposed elements for a general prohibition, being a conduct element and a detriment element. In particular, NLA supports the detriment element including detriment other than financial loss. With regard to conduct, NLA would note that regulatory guidance should not just focus on online conduct, as LACs have experience with examples of unfair conduct where transactions are in person. These include through door-to-door sales or sales of second-hand vehicles in caryards.

The grey list that exists for unfair contract terms has been effective, and as such NLA would support a similar list being used for an unfair trading provision. The four examples suggested for the grey list are appropriate and things LACs experience on a reasonably regular basis.

3. Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections?

It is possible that the use of warranties that provide no extra value on top of ACL protections is not covered by the proposed elements and existing ACL protections. Similarly, the provision may not capture unfair conduct that causes harm where the person does not end up entering into the contract or transacting with the business. For example, LACs have assisted clients who have attended a caryard to purchase a second-hand motor vehicle and have been subjected to unfair conduct in sales practices. The client ultimately did not purchase the car and so did not become a “consumer” under the ACL, however they suffered financial (in one case, the car dealer fraudulently transferred car from the client’s name to the car dealer’s business name) and non-financial harm, such as stress and inconvenience.

4. Should the proposed prohibition only apply where the conduct is unreasonable (that is, where it unreasonably manipulates or distorts, or is likely to unreasonably manipulate or distort, the economic decision making or behaviour of a consumer)? Or would an alternative approach of only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests provide a better level of protection for consumers?

NLA supports the prohibition applying where the conduct manipulates or distorts or is likely to manipulate or distort. The alternative, where businesses could unreasonably manipulate a consumer's behaviour if it was in their legitimate business interests, is not supported as it does not protect consumers sufficiently. Further, businesses should not be allowed to reasonably distort or manipulate consumers, which could be inferred from the inclusion of where it unreasonably manipulates or distorts, or is likely to unreasonably manipulate or distort in the explanation of unreasonable conduct. As such, the proposed prohibition should apply where the conduct is unreasonable (that is, where it manipulates or distorts, or is likely to manipulate or distort, the economic decision making or behaviour of a consumer).

5. Is the requirement that detriment or likely detriment be 'material' appropriate?

NLA agrees that material detriment is an appropriate test. However, it is important to remember that what is a material detriment will vary between consumers, that is a small loss may still be material to a consumer on a lower income. Further, a small loss may be material when considering how it erodes trust and confidence in the relevant sector, and a small loss may be material where there is a pattern of conduct; and many consumers are impacted in a small way. As such, the regulation should provide clear guidance on this point.

It is also noted that the current drafting does result in different definitions of "detriment" between the unfair trading practices (UTP) definition, namely "material detriment", and definition of "detriment" in the unfair contract terms (UCT) provisions, which is "significant financial or non-financial detriment". It is arguably preferable for consumers and business to have some consistency and certainty between these provisions about the definition of "detriment" as both deal with "unfairness" and consumer harm. An alternative could be removing the word "material" and "significant", respectively, leaving the UTP and UCT provisions to read more broadly by referring only to "detriment".

6. Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed?

NLA is of the view that the grey list is appropriate, while noting the importance of recognising and acknowledging that the grey list is not exhaustive. A possible further element could be "the use of sales tactics which unduly pressure, obstruct or undermine a consumer in making an economic decision." This is similar to the online design element but captures in person and phone sales tactics that can be experienced in door-to-door sales and car sales examples.

NLA notes that the list of conduct included in the proposed grey list should also include examples of conduct that does meet the test of unfair trading practices, rather than just examples of conduct which "may" meet the test "depending on the circumstances". This may provide greater clarity for

consumers and business. In addition, the grey list should be included in the legislation itself, not the regulations, to ensure that it is given prominence and transparency for both consumers and businesses.

7. What would be the likely benefits to consumers associated with introducing the proposed general prohibition into the ACL? Where possible, please provide quantitative information.

It might save time and cost to consumers and services in the consumer protection sector if the prohibition leads to an improvement in industry conduct, reduces consumer harm; and the earlier resolution of complaints relating to unfair conduct.

8. Would there be compliance costs for businesses if the proposed general prohibition is introduced into the ACL? Would small businesses be disproportionately impacted noting that ACL reforms apply economy wide? Where possible, please provide quantitative information.

NLA is of the view that the compliance costs from the introduction of this provision is not likely to be significant, and they will not disproportionately affect small business. The costs will be no greater than the introduction of unfair contract terms, which has not had a particularly significant effect on businesses. Any compliance costs should not be passed along to the consumer as they are likely to be offset by benefits from increased consumer trust and confidence in the market.

9. What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices?

NLA recommends that the ACCC develop guidance material for small business.

10. What is the maximum civil penalty a court should be able to impose for a breach of the proposed general prohibition?

NLA recommends that maximum penalties should be large enough to impose an effective deterrent on businesses from engaging in this conduct.

11. Should civil penalties commence when a general prohibition commences, or following a transition period? If you support a phased approach, is a two-year transition period adequate to give businesses confidence around the operation of the law before penalties apply?

NLA supports a similar transition period to that which occurred for unfair contract terms which gave the ACCC the opportunity to work with businesses to improve their practices.

Focus questions – dark patterns

14. Are there specific types of dark patterns that cause particular consumer harm?

The OECD list of dark patterns in Appendix B is appropriate. All types of dark patterns cause significant consumer harm.

15. Are there particular sectors, applications, or channels (e.g. e-commerce software and platforms) where dark patterns are prevalent?

NLA is of the view that dark patterns are most prevalent in e-commerce and their platforms.

16. What are the likely costs to businesses, and benefits to consumers, of addressing dark patterns through an unfair trading practices prohibition?

NLA does not have a view on the likely cost to business but would note that the benefit to consumers is that they are not placed in a position to purchase, or encouraged into purchasing, products that provide no benefit to them. As noted above in relation to compliance costs for businesses of the proposed general prohibition, regulation should ensure that businesses do not pass on any costs of compliance to consumers.

Focus questions – subscription related practices

17. How can the ACL be amended to introduce specific prohibitions to address unfair subscription-related practices? What is your preferred reform option, or combination of options, and why?

NLA supports the introduction of a combination of Options 3 and 4. While LACs have had limited experience in specific casework involving subscription-related practices, in general the most prevalent problems occur due to consumers being unaware that they were automatically entered into a paying contract when the free trial ends and consumers finding it also impossible to successfully cancel a subscription.

18. Do you consider that the proposed specific prohibition should apply to all businesses that offer products or services using a recurring payment model or should certain businesses/sectors be exempt? For example, sectors already subject to relevant industry specific regulation (for example, telecommunications).

NLA recommends that all businesses should be covered, including telecommunication, as it is important that there is consistency across all industries. A consistent approach to regulation is easier to understand, comply with and monitor for consumers, businesses and regulators.

22. If you support Option 4 (removing barriers to cancelling a subscription), what obligations should be imposed on businesses to make cancellation processes more straightforward for customers?

NLA recommends that a subscription should be able to be cancelled by:

- (a) Sending a text;
- (b) Sending an email; and/or
- (c) Leaving a message on the company's phone line.

The regulation should specify that a consumer does not need a reason to cancel.

23. What are the anticipated costs to business, if any, and benefits to consumers and small businesses, of each option? In your response, please indicate if you are, or represent, a business that offers goods or services by subscription. Please provide any views on the most efficient, or least burdensome, approach to addressing problematic subscription practices.

The benefits to consumers would be significant in that they would be given more autonomy and control over how they managed subscriptions. It would also reduce the detrimental effect that many subscriptions currently have on some consumers' financial circumstances.

24. Do you agree civil penalties should commence at the same time as the proposed new prohibitions take effect, or should civil penalties commence following a period of compliance (and what would be an appropriate transition period)? What is the maximum civil penalty a court should be able to impose for a breach of a specific prohibition?

NLA supports a transition period similar to that which occurred for the introduction of unfair contract terms.

Focus questions – drip pricing practices, dynamic pricing, online account requirements

25. What unfair drip pricing practices causing consumer harm do you consider are not adequately covered by the existing ACL provisions?

NLA supports the expanded definition adopted in the UK which requires the disclosure of the total price of the product upfront and if that price cannot be calculated businesses should be required to disclose how that price will be calculated.

26. What reforms to the ACL may be required to address any unfair drip pricing practices? For example, should businesses be specifically required to disclose 'per transaction' fees up-front before consumers enter a purchasing process? What other reform options should be considered?

NLA supports the upfront disclosure of per transaction fees.

27. What reforms to the ACL are required to protect against dynamic pricing where businesses increase the price of the goods or services during the course of the purchasing process? Should the ACL be amended to specifically prohibit this practice?

While LACs do not have any casework experience involving dynamic pricing, NLA supports consumer protections being implemented to ensure consumers are not unfairly affected by this practice.

29. Do you consider reform to the ACL is necessary to address consumer harms associated with businesses requiring account creation for online purchases? If so, is requiring a retailer to provide a 'guest' check-out option appropriate to address the consumer harm? Are there other options that should be considered?

NLA is of the view that requiring businesses to have a guest check out option is the most appropriate approach.

30. Should any prohibitions relating to dynamic pricing and online account requirements also apply to protect small businesses in their dealing with other businesses?

Yes, small businesses should be protected in their dealings with other businesses.

31. What are the likely costs to business, and benefits to consumers, of introducing prohibitions to address these practices?

Consumers will benefit from transparent sales practices.

Focus questions – barriers to accessing customer support

32. Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address consumer harm arising from a business's failure to provide a direct point of contact or access to customer support? If not, should there be a specific prohibition and how could this be designed?

NLA is of the view that a general prohibition should adequately address this issue, noting that in LACs experience, businesses can make it very difficult to access customer support either by requiring all correspondence be via email, not having a complaints section or not having enough staff to adequately answer the phone for consumer queries.

33. Should any such prohibition also apply to protect small businesses in their dealings with other businesses?

Yes, small businesses should be protected in their dealings with other businesses.

34. What are the likely costs to business, and benefits to consumers, of introducing prohibitions to address these practices?

Benefits to consumers include being able to have their complaints heard and seek appropriate help from the company when they need it.

Focus questions – Application to business-to-business dealings

35. Do you have views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings?

NLA recommends that the general prohibition should apply to all transactions at the same time. As noted above in the response to Q3, the general prohibition should capture unfair conduct that causes harm even if the consumer does not end up entering into the contract or transacting with the business.