SHOPPING CENTRE COUNCIL OF AUSTRALIA

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Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions

The Shopping Centre Council of Australia (SCCA) welcomes the opportunity to submit in response to the Consultation Paper and provide feedback on the design elements of general and specific prohibitions on unfair trading practices. This submission complements our 29 November 2023 submission in response to the Consultation RIS.

Summary

- Fundamentally our position and perspective remain unchanged:
  - The adoption of a general prohibition would create significant uncertainty and regulatory risk for business and higher costs for consumers that is unwarranted and unnecessary when there is no economy wide problem.
  - The problems cited throughout the consultation primarily arise from the *Digital Platforms Inquiry*; they are technology-focussed, involving online platforms.
  - Either the status quo should be maintained, or a solution advanced to deal with the problem in a targeted and measured way, i.e. Government's proposed new digital competition regime.[1]
- Noting the above and that the proposed specific prohibitions would appear to address the only problems that have otherwise been identified, our position is that only these specific prohibitions ought to enacted (albeit they should be better refined to ensure that they only cover the areas they are intended to address and do not have unintended overreach).
- In terms of the proposal being advanced and consulted on for a general prohibition we acknowledge that the proposal (in part) heeds and reflects some of the concerns previously raised by the SCCA (and variously shared by other affected stakeholders), for instance:
  - The Consultation Paper acknowledges that the aim for the general prohibition is for it to "*be principles-based, addressing unfair trading practices that cause consumer harm but cannot be addressed by the ACL's current provisions*".
  - The Consultation Paper further recognises a need to "*provide sufficient certainty as to its* [a general prohibition] *application while avoiding regulatory overreach or unintended consequences*".
  - The proposed general prohibition effectively seeks to extend the misleading and deceptive conduct (ACL) provisions and to an extent the existing common law of undue influence, in lieu of a more vague, uncertain, and retrospective 'unfairness' test.
  - The proposal is for proportionate/graduated compliance and enforcement action.
  - It is proposed that the general prohibition apply to business-to-consumer transactions only in the first instance.
  - Consideration is being given to the delayed application of a penalties framework (akin to unfair contract terms changes).
- We also observe that the drafting of a general prohibition principally appears directed to fast paced, smaller online transactions (where the user interface is controlled by the supplier and the consumer may be 'duped' into making a purchase on terms they might not otherwise have entered into) and less so to our sector, which has prescribed and comprehensive disclosure obligations under retail lease legislation and a mature and transparent approach to transactions with small business tenants (as consumers).
- We further note that the Consultation Paper reorientates the focus of general and specific prohibitions away from consumer data protection and sharing, which are more appropriately addressed through prospective amendments to the *Privacy Act 1988*.
- All of these things are positive developments in comparison to the unfair trading practices proposal that was the subject of our 29 November 2023 submission. That said we remain concerned that the proposed general prohibition,

which is proposed to apply across all industries, fails to draw a sufficiently clear and certain boundary between illegitimate advertising and marketing conduct that "*unreasonably distorts or manipulates the economic decision-making or behaviour of a consumer*" and the legitimate promotion of products and service through conduct that "reasonably" distorts or manipulates the economic decision-making or behaviour of a consumer.

- Our initial reaction is that this dividing line will almost invariably fall to be determined by reference to the existing test as to whether the proposed conduct is misleading, deceptive, unconscionable, or say mere puffery. In these circumstances the proposed new general prohibition will be merely duplicative of the existing provisions and should not be introduced.
- To the extent that the proposed general prohibition is intended to cover manipulative and exploitative design practices that undermine consumer choice and autonomy and impact upon a consumer's ability to make or willing to make informed choices in their own best interests (but which are not necessarily misleading and deceptive), this needs to be made clear – whether through the proposed grey list or otherwise in the words of general prohibition (or both) as examined in greater detail below.
- Certainly it is our expectation that well informed and duly executed consensual contracts and transactions with say tenants should not be affected by proposed unfair trading practice prohibitions and this should be made clear by the proposed legislation.

Recommendations

The SCCA recommends:

1. **Government should not introduce a general prohibition** as it has failed to articulate how and why the ACL and other laws are insufficient, including where its rationale is simplistically and misleadingly restated in the Consultation Paper and that (still) no specific examples of an economy wide need are cited.
2. **Government should introduce specific prohibitions only**, noting that these pertain to those technology-focussed, online transactions identified by the *Digital Platforms Inquiry* and are in part addressed by the proposed new digital competition regime.

If Government does proceed to introduce a general prohibition, the SCCA recommends:

3. **The general prohibition should make clear what is impermissible** ("unreasonable") conduct that distorts or manipulates, or is likely to distort or manipulate, the economic decision-making or behaviour of a consumer by indicating that:
   a. the "reasonableness" of the conduct is to be determined having regard to whether the conduct, in the circumstances of the transaction, undermines consumer choice, autonomy or a consumer's ability to make or be willing to make informed choices in their own best interests or results in terms being included in any agreement which are not typically likely to have been appreciated nor understood by the consumer;
   b. "reasonableness" is also to be determined have regard to whether the conduct involves some exploitation of a vulnerability that represents a substantial departure from that which is generally acceptable commercial behaviour; and
   c. a more descriptive grey list of conduct is prima facie "unreasonable".
4. **The general prohibition should apply to business-to-consumer transactions only**. While a graduated application is proposed, it should not follow that business-to-business will be captured as a matter of course.

If a general prohibition is intended to apply to business-to-business transactions (from inception or in time), the SCCA recommends:

5. **A separate consultation process should be conducted**, which clearly delineates and considers the identified needs of consumers from small businesses. While the Consultation Paper references the European Union's (EU) Unfair Commercial Practices Directive 2005/29/EC (UCPD), it does not acknowledge that this does not extend to business-to-business transactions, which should be instructive.
6. **Government must consider and reflect the user experience of regulated entities**. The prospective burden of vague, uncertain regulation cannot be dismissed as a mere an inconvenience, which is why more detailed guidance on unreasonable behaviour would be required, in line with **Recommendation 3**.
7. **Government should introduce exclusions or safe harbours for prescribed industries that operate within existing regulatory regimes and parameters**, consistent with Government's approach to unfair contract terms.
8. **Compliance and enforcement should be proportionate and graduated**, including a range of measures, with civil pecuniary penalties applied (after a four-year transition period) as measure of last resort.

General prohibition

Response to Consultation Paper

Unfortunately, neither the initial Consultation RIS nor the current Consultation Paper have provided any evidence based examples of problematic behaviour, particularly in business-to-business dealings, that cannot already be dealt with through existing provisions of the ACL or other legislation, and that therefore would justify the introduction of a general prohibition, let alone applying it to business-to-business dealings.

It remains unclear why or in what instances a general prohibition should or would affect the typical business conduct and activity in our sector, should it apply to business-to-business dealings. In practice, a general prohibition that regulates ill-defined behaviour that can only be determined ex post would create business and compliance risk. It is fundamentally unreasonable to prohibit behaviours that aren't clearly defined in legislation or guidance material while attaching significant penalties to those behaviour.

Waiting for case law to develop would provide no relief to industry, as such case law may take many years to develop, given the limited examples of problematic economy-wide practices that have so far been proffered by Treasury.

We urge Government to be mindful of creating a heightened sense of risk and uncertainty and listen to the experience and feedback of parties that would be regulated. Any new regulation requires the introduction of new training, practices and in-house legal guidance, all of which come at a cost to businesses and consumers and should not be dismissed by Government.

We also note that the Consultation Paper suggested that the concept of 'unfair' already exists in the ACL for the purpose of the unfair contract terms provisions. However, the meaning of 'unfair' under section 24 of the ACL, combined with the examples of unfair terms listed in section 25, relates to an imbalance in rights under a contract. To assess whether a dealing is 'fair' is far more straightforward when comparing the rights and obligations of parties under a contract, as opposed to subjective assessments about the 'fairness' of a transaction for a product or service.

Provisions and amendments

Have a "grey list" list of conduct which is more descriptive of what is prima facie "unreasonable"

The SCCA submits that the proposed general prohibition would be clearer and provide greater certainty as to what is not permissible ("unreasonable") conduct if it was more descriptive in its grey list of conduct which is prima facie "unreasonable" conduct.

By way of example, from what we have read a key target of the proposed general prohibition is fast paced, smaller value, online transactions where the user interface is controlled by the supplier, where the consumer may be overwhelmed by "disclosures" relative to the purchase price of the good or service involved, and where the consumer may be time pressured into making a purchase on terms they might not otherwise have entered into (had it made commercial sense for them to spend more time looking into the transaction) – in contrast to transactions for which the negotiations took place over a substantial period of time and involved professional advisers and significant disclosure such as led to a well-informed consensual contract being entered into.

Exclusions or safe harbours

As the SCCA has submitted previously, if a general prohibition is introduced, consideration should be given to introducing specific exclusions or safe harbours which exempt prescribed industries that are mature and already heavily and satisfactorily regulated. Such an exclusion or safe harbour would prevent against the overregulation of industry.

Sections 26(1)(c)-(e) and 28 of the ACL establish a precedent in this respect, providing for exemptions if a contract is permitted by a law of the Commonwealth or of a State or Territory (e.g. a demolition clause, as permitted by retail leasing but might otherwise be deemed 'unfair') and for particular industries and contracts (e.g. marine salvage or towage and in respect of certain contracts connected with financial markets).

If a general prohibition is ultimately pursued, and does apply to business-to-business, consideration should be given to similar such exemptions. Exempting conduct that is permitted under another Commonwealth, State, or Territory law from falling within a general prohibition would provide some degree of certainty for business and would help to eliminate vexatious and disingenuous litigation claims.

Further, we submit that any general prohibition should contain exemptions (or at least explicit recognition) that industries and parties that demonstrate and promote a culture of compliance, and adhere to industry norms, will not be subject to penalties.

'Unreasonableness' over a 'legitimate interest' test

The SCCA supports the use of an 'unreasonableness' element rather than the introduction of a 'legitimate interest' test on the basis that the proposed concept of 'unreasonableness' would have regard to the regular practices of a sector or industry.

In contrast, a 'legitimate interest' test would place the onus on a business to justify that it should obtain a benefit. Such an onus is incongruous with a competitive marketplace, in which businesses are encouraged to reap value from their products and services, grow their customer base, and operate as efficiently as possible. By requiring a business to prove that an activity is in its 'legitimate interest', there is a significant risk that the general prohibition will descend into an ideological battle that is primarily focused on and suspicious of business profit.

It is important to understand that while the concept of 'legitimate interest' is included in section 24 of the ACL in the context of unfair contract terms, it is included within the definition of 'unfair' specifically in relation to contract rights. Given a contract will most likely be specific to the provision of a particular product or service, determining a 'legitimate interest' in the context of a contract allows for a nexus to exist between the subject of the contract and the 'legitimate interest' of a party – i.e. does the term protect the party from "*risks inherent in the contract*".[2] The scope of legitimate interest for practices other than contracting may be far wider, and therefore risks greater subjectivity as it is assessed.

'Professional diligence'

We agree with the position outlined in the Consultation Paper that the 'professional diligence' limb that is present in the UCPD is not necessary to include in the proposed general prohibition. Given the 'unreasonable' element of the general prohibition will allow for consideration of the common practice of relevant professions, transactions, business types or sectors, the inclusion of a 'professional diligence' limb would be merely duplicative.

'Material detriment'

The SCCA agrees with including a 'material detriment' element in the general prohibition, should the general prohibition proceed. However, we would urge for the explanatory memorandum and other guidance and interpretation materials to provide a more restrictive interpretation of the scope of non-financial detriment, particularly in cases whether the detriment is considered likely, rather than actual.

Allowing for action to be taken when actual material detriment has not occurred but is considered likely to occur in cases where the detriment is personal in nature, such as emotional detriment and inconvenience (as flagged in the Consultation Paper), may result in highly speculative action. Any guidance and interpretation material should make clear that any action on the 'likely' impact of a practice must meet a very high bar and have a sufficient evidence base, particularly when the detriment is personal in nature and therefore highly subjective.

Application to business-to-business dealings

We support the proposal to not extend the general prohibition to business-to-business dealings in the first instance. However, we urge Treasury to explicitly rule out such an extension altogether, rather than the staged approach discussed in the Consultation Paper.

As we discuss above, there is a close link between the proposed general prohibition and the UCPD. Given this close link, it is noteworthy that the Consultation Paper omits to explain that the UCPD explicitly applies only to business-to-consumer dealings, per Article 3(1), with 'consumer' defined as being a natural person acting in a non-business or professional capacity.[3]

While it is possible for EU Member States to prohibit unfair commercial practices in a business-to-business context through their domestic laws, only a limited number of Member States have done so. Those that have extended prohibitions have varied in respect of applying all or some aspects of the UCPD to business-to-business dealings, with some states, such as France and Belgium, primarily applying only the specific prohibitions included in the UCPD's blacklist.[4]

Furthermore, the European Commission considered the suggestion that the UCPD be uniformly extended to business-to-business transactions, and did not recommend such an extension to occur, noting that the practices that advocates of the extension were seemingly concerned about were already prohibited by other laws.[5]

It would be a perplexing decision, therefore, should there be even a staged extension of the proposed general prohibition to business-to-business dealings, without undertaking further consultation to assess whether any evidence exists to justify an extension.

As detailed in our submission to the Consultation RIS, businesses, whether large or small, are in a position to protect their own interests, including through undertaking appropriate due diligence and risk assessments, or obtaining external specialist and legal advice. These practices work in concert with existing and extensive government regulation that provides protection to small businesses on occasions when there may be unequal bargaining power.

Specific prohibitions

The SCCA notes that the specific prohibitions put forward in the Consultation Paper primarily relate to those technology-focussed, online transactions identified by the *Digital Platforms Inquiry*. The SCCA is of the view that Government should introduce these specific prohibitions only as they are a targeted response to address the specific unfair trading practices of digital platform operators.

Definitions should be explicit and targeted

Treasury should ensure that specific prohibitions are clearly defined and targeted. For instance, a prohibition on *subscription-related practices* should not extend to or duplicate state/territory-based retail leasing legislation. Similarly, *drip pricing practices* and *dynamic pricing* should have no bearing on leasing deliberations or the transaction of shopping centres, which is akin to an auction process (i.e. prices are set by parties and will change throughout in a pro-competitive setting).

Accordingly, consideration should be given to explicit legislative drafting and applying the specific prohibitions to targeted services or industries.

Remedies for a breach of a general prohibition

No civil pecuniary penalties initially

The SCCA agrees with the proposition put forward in the Consultation Paper, which is that ACL regulators' approach to any penalties framework should resemble that taken with the introduction of the unfair contract terms regime, which involved no civil pecuniary penalties in the first instance.

Attaching significant penalties to a general prohibition that provides only limited guidance as to the behaviours that would result in a breach would be akin to imposing speeding fines without clear speed limits.

In this instance, if there was non-compliance with the unfair contract terms regime, the non-compliant term would be rendered void, with the remainder of the contract still in force (but no penalties were applied). This provided considerable protection to consumers and small businesses without the imposition of significant penalties on companies that were in breach (often unintentionally).

A lengthy transition period is appropriate

The Consultation Paper is correct to recognise that a similar such approach "*would recognise that action may be required by businesses to ensure their systems and processes comply with a new law, particularly where there has been little or no judicial consideration of how the law will operate in practice*".

A four-year transition period would be appropriate, noting that the proposed two-years would barely provide an opportunity for businesses to understand how the new law is operating and for only limited instances of judicial consideration of matters to provide any guidance to businesses.

Remedies should be proportionate and graduated

The SCCA submits that ACL regulators should have access to and apply a range of compliance and enforcement measures in a proportionate and graduated way.

This is why we have previously sought Treasury consideration of the US model, where breach of section 5 of the *Federal Trade Commission Act* does not automatically result in penalties being applied, rather companies are required to provide an undertaking that they will change their behaviour. If they do not change their behaviour, then a penalty will be imposed on the company for breach.

Such an approach would also reflect and recognise that the proposed general prohibition is inherently ambiguous and that, despite prospective improvements and clarity, compliance will be inherently problematic, which creates regulatory risk and uncertainty for businesses.

Civil pecuniary penalties should be comparatively low and a 'last resort'

We disagree with the proposition advanced by some stakeholders that "*penalties… should be in line with the current maximum penalties for breaching existing consumer protection provisions* [and] *sufficiently high to deter contraventions (particularly by large businesses)*".

As the Consultation Paper notes, penalties associated with the unfair contract terms regime and unconscionable conduct can extend to $50 million, 3 times the value derived from a contravention, or 30 per cent of a company's adjusted turnover, which is prospectively very severe. Conversely, penalties cannot be imposed in respect of misleading and deceptive conduct, reflecting that such conduct can occur innocently. The misleading and deceptive conduct prohibition is analogous with determinations about 'fairness', which should also be reflected in the scope and application of any civil pecuniary penalties.

The SCCA submits that civil pecuniary penalties pertaining to a general prohibition should be prescribed in the ACL and far less than the maximum penalties listed above, and not left to the whim of the ACCC or a subjective determination made within the existing range. Further, they should only be applied if education, undertakings, and/or other measured have been exhausted, i.e. for egregious and willing breaches, where a business would or should have appreciated in advance that its proposed conduct would or would likely be susceptible to such punishment, and where guidance or feedback from ACL regulators exists.

Separately, if a loss is incurred by a consumer that can be measured, and before civil pecuniary penalties are considered, restitution (in addition to expenses) may be more appropriate.

Follow up

The SCCA would be pleased to discuss our feedback further with the Treasury.

[1] Australian Government, *Proposal paper – A new digital competition regime*, December 2024.
[2] Jeannie Paterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Grounds for Review of Standard Form Consumer Contracts* (2009), 33(3), Melbourne University Law Review 934.
[3] *Directive 2005/29/EC,* European Union, art 2(a).
[4] European Commission Staff Working Document, *Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices,* 2016.
[5] European Commission, *First Report on the application of Directive 2005/29/EC*, 2013.