



**Telecommunications  
Industry  
Ombudsman**

TIO submission to the Treasury  
consultation on proposed  
general and specific  
prohibitions on unfair trading  
practices

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# Table of Contents

Introduction .....	3
1    General prohibition .....	3
1.1 The proposed elements of the general prohibition could cause some difficulties in interpretation and application.....	3
1.2 A 'grey list' of UTP will provide useful guidance .....	4
1.3 Dark patterns should be captured by the general prohibition .....	4
2    Specific prohibitions .....	4
2.1 Subscription-related practices.....	4
2.2 Barriers to accessing customer support.....	7
3    Unfair trading practices prohibitions should be extended to small businesses .....	7

## Introduction

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Thank you for the opportunity to provide feedback on the Treasury's consultation on the design of the proposed general and specific prohibitions on unfair trading practices (**UTP**).

As the industry ombudsman scheme for the telecommunications industry, we are uniquely placed to provide insights on complaints about phone and internet products, including complaints about unfair trading practices by telco providers.

We support the introduction of both general and specific prohibitions on UTP. This submission offers feedback on the proposed elements of the general prohibition, and on the specific prohibitions on subscription-related practices and barriers to accessing customer support.

## 1 General prohibition

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We welcome the introduction of a general prohibition that would capture UTP that are not already captured by the proposed specific prohibitions. It is important that the general prohibition is drafted in such a way as to remain flexible and broad enough to keep up with new and emerging unfair practices.

### 1.1 The proposed elements of the general prohibition could cause some difficulties in interpretation and application

The requirement that the practice be "unreasonable" could be open to interpretation and arguably any conduct that "distorts or manipulates" is unreasonable. However, as there may be some legitimate practices that the general prohibition might capture (e.g. legitimate advertising) it is important that the prohibition is drafted in a way that does not inadvertently capture ordinary commercial conduct.

An alternative approach, as proposed in the consultation, could be anything that "is not reasonably necessary to protect the business's legitimate interests." Another alternative could be a prohibition on anything an ordinary consumer would not reasonably expect in their dealings with the business.

The requirement that the detriment be "material" is also broad and may be different for each consumer, especially those who have a vulnerability. For example, while detriment caused by an UTP may be low for most consumers, the impact on consumers experiencing financial hardship would be more severe.

In addition, while it is desirable that the general prohibition be broad, detriment not being limited to financial loss is very broad and it could be difficult to practically apply, particularly when considering emotional detriment or inconvenience. Further clarity in the form of guidance notes could be provided, in the ACL or another instrument, on the practical application of this element.

A potential gap in the general prohibition is that it does not appear to capture conduct that occurs after the consumer has already made a purchasing decision. We see in the complaints received by our office that some telco providers may make unilateral changes to a contract (such as price increases or changes to plan inclusions) after the consumer has already signed up to a plan. While

many plans now allow a consumer to exit the contract without penalty if they are dissatisfied with the unilateral changes to their telco contract, sometimes service plans are linked to a device repayment plan, which will incur charges if the consumer cancels their plan early. While the consumer's ability to make a decision was not distorted at the time of entering the contract, they may be left stuck in a plan that no longer suits their needs.

## 1.2 A 'grey list' of UTP will provide useful guidance

We support the inclusion of a non-exhaustive grey list of UTP that would be captured by the general prohibition in the ACL. The inclusion of a grey list would provide useful guidance to businesses and consumers alike, although it is important that it be clear that the list is not exhaustive.

Potentially unfair trading practices that we see in the telco industry which Treasury may consider including in the grey list are:

- the use of linked credit and equipment contracts where the length of both contract terms does not match (see part 3 below for more details on this practice)
- unilateral contract variations relating to price and inclusions.

## 1.3 Dark patterns should be captured by the general prohibition

We support the inclusion of 'dark patterns' in the general prohibition. Our complaints reveal that some telco providers do engage with the use of 'dark patterns' on their website by making it difficult for consumers to find information about low cost plans and how to sign up to them, while simultaneously promoting their high cost plans.

We have also seen some providers refer consumers to their app, however, their app contains less information than their website on a web browser does, which can make it hard for consumers to find information and make informed choices.

# 2 Specific prohibitions

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We support the inclusion of specific prohibitions to capture UTP that are not already prohibited by another provision of the ACL. Specific prohibitions of known unfair trading practices will fill a gap in the ACL and increase consumer protections. Specific prohibitions will remove any ambiguity over whether these practices are prohibited by the general prohibition or any other prohibition in the ACL.

## 2.1 Subscription-related practices

We support the introduction of a specific prohibition against unfair subscription-related practices, which we are increasingly seeing in the telco industry. Telco subscription style products can include prepaid and postpaid plans, technical support services, early device upgrade option plans, and directory listings.

All four options proposed by Treasury address different issues and would all help prevent consumer harm. In particular, we support a combination of options 2, 3, and 4.

### **Option 2 – Notification requirement**

We receive complaints where consumers have told us they were not aware that a telco subscription product they had was going to be renewed before it occurred. For some telco products, the contract term can be up to one year, which is a long recommitment for an unwanted product.

The types of information a business could be required to include in a notification include:

- the minimum subscription renewal term
- the minimum total cost for renewing the subscription
- how the consumer can cancel their subscription
- any costs involved with cancelling the subscription.

### **Option 3 – Opt-in requirement**

This may be an effective measure against unwanted subscription renewals as it means a consumer will be required to consider at the time of renewing whether this is a product that still meets their needs.

### **Option 4 – Removing barriers to cancelling a subscription**

We have received complaints from consumers who told us that they have had trouble cancelling a subscription. In some cases, consumers experienced long delays because their telco:

- was uncontactable
- would not accept their cancellation request unless the cancellation was done in a specific way or required a minimum notice period
- repeatedly transferred them to their retention department instead of actioning their cancellation request
- did not cancel their service even though they had requested that their service be cancelled
- refused to cancel their service.

Consumers told us that when they could not cancel their subscription, their subscription rolled over into a new month, which meant they had to pay for another month (or more) for a service they no longer wanted. Some consumers have also complained that when they cancelled their service, they did not receive a pro rata refund for the unused portion of their service.

### **Lucas Autorepairs\* cannot cancel its business directory listing subscription**

After Lucas Autorepairs ceased operating, it tried to cancel its business directory listing subscription, which it paid for through its telco provider. However, every time it contacted its telco provider to cancel the directory listing and to get a refund, it was told to contact the directory listing company directly to cancel. When Lucas Autorepairs tried to cancel through

the directory listing company, it was told to contact the telco provider. In the meantime, Lucas Autorepairs continued to receive a new bill each month.

When the subscription was due to expire at the end of the financial year, Lucas Autorepairs was told the directory listing would be cancelled, however, because the subscription operated on an opt out auto renewal basis, the subscription renewed automatically.

*\* Names of all parties have been changed.*

To make the cancellation process more straightforward for consumers, businesses could be required to:

- action the cancellation request within a minimum timeframe
- limit or prohibit customer retention practices
- have an easy to find, clear and accessible cancellation process on the business' website
- limit or prohibit mandatory notice periods for cancellation.

### **2.1.1 Specific prohibitions against unfair subscription-related practices in the ACL should apply to all businesses offering relevant products and services, including telcos**

The consultation paper raises the issue of whether the proposed specific prohibition on subscription-related practices should apply to all businesses that offer products or services using a recurring payment model or whether certain sectors, such as the telecommunications sector, should be exempt. As the consultation paper notes, the telco sector is subject to industry specific regulation, however, we strongly recommend that the telco industry should not be exempt.

We support the application of these important protections to all businesses to ensure a consistent level of consumer protections in relation to subscription-related practices across different sectors. There is no reason why telco should be exempted from these reforms, noting that telco is not currently subject to the protections against unfair subscription-related practices as proposed by Treasury.

While the telecommunications sector is subject to its own sector-specific rules, these obligations operate alongside the strong protections in the ACL. For example, telcos are subject to obligations regarding selling practices in the *Telecommunications Consumer Protections Code* (TCP Code), which is an industry code, and the ACL.

Further, the TIO's position is that essential consumer protections should be directly enforceable, and not contained in industry codes. That is, essential protections should be determined by government and regulators, with strong compliance tools available to ensure compliance and trust and confidence in the sector. Under the current telco regulatory framework, there are challenges in enforcing industry codes, such as the key piece of consumer protection, the TCP Code, which is currently undergoing review. An initial breach of the TCP Code by a telco will receive a direction to comply from the Australian Communications and Media Authority and will only be subject to a penalty if that direction to comply is then breached.

For these reasons, specific prohibitions against unfair subscription-related practices in the ACL should apply to the telco sector.

## 2.2 Barriers to accessing customer support

We support the introduction of a specific prohibition on the failure to provide consumers with a direct contact point to access customer service. This is a common issue we have seen in complaints to our office.

We receive complaints from consumers who have faced barriers to accessing customer support. Consumers have made complaints to our office about:

- being unable to call their telco and speak to them on the phone
- being unable to contact their telco using their preferred communication method
- having to communicate with chatbots who are unable to understand or resolve their concerns
- being unable to contact their telco due to long call wait times and being transferred between departments.
- confusion about whether their telco had lodged their concern as a complaint or not
- being given unclear timeframes from their telco for resolving their complaint.

While the *Telecommunications (Consumer Complaints Handling) Standard 2018* (**Complaints Handling Standard**) requires telco providers to have a complaint handling process with minimum requirements, we still receive many complaints from consumers who have not been able to contact their provider. These complaints show that some telcos have not consistently implemented processes in line with the Complaints Handling Standard. A specific prohibition relating to accessing customer support would increase consumer protections in this space.

## 3 Unfair trading practices prohibitions should be extended to small businesses

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We support the extension of the proposed UTP prohibitions to small businesses. We receive complaints from small businesses who have experienced harm as a result of UTP.

An example of a practice we see in the complaints we receive from small businesses relates to the sale of phone and internet services linked together with an equipment contract. Consumers tell us that when signing up to a telco service, telco providers will also arrange the supply of equipment for the consumer to use with their telco services through a leasing company that the telco provider is affiliated with.

However, the service plan will be offered for a fixed period (for example, 24 months) that is of a shorter duration than the linked equipment contract (for example, 60 months). The effect is that at the end of the service contract, the consumer is left paying for equipment they cannot use. This is because most telcos will not provide services over another business' equipment (as they cannot guarantee the service will work). This means that as the consumer must renew their contract with

their telco provider to continue using the equipment, they have effectively been locked into a longer contract term than they had thought they would be when they originally entered into the contract.

Small businesses have also complained about being locked into linked service and equipment contracts that they must continue paying for or be charged a large early termination fee. Small businesses have told us they were not aware when signing up for phone and equipment contracts that they were entering two separate contracts.

### **Flora Florists\* was not aware it had signed up to a separate leasing contract**

Flora Florists is a small business that signed up to a five year phone and equipment contract with Rosie Telco. After about a month of drop outs and intermittent service, Flora Florists asked Rosie Telco if it could cancel its service. Rosie Telco couldn't fix the service, so it agreed to release Flora Florists from the contract.

However, Rosie Telco had supplied the accompanying phone equipment through a separate phone equipment leasing company. When Flora Florists tried to get a phone service through a different telco provider, no other telco provider would agree to supply its services because its services were not compatible with the equipment. When Flora Florists complained to Rosie Telco, it said it was not a party to the equipment leasing contract and Flora Florists would either have to keep paying for the phone equipment for the full five year contract duration or pay nearly \$7,000 to pay out the contract.

*\* Names of all parties have been changed.*