

Article Information

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Consultation begins on reforms to fix unfair trading practices gaps in Australian Consumer Law

The Australian Government is consulting on proposed reforms to the Australian Consumer Law to address certain unfair trading practices not presently regulated by legislation.

Background

Some unfair trading practices, also known as ‘unfair business practices’ or ‘unfair commercial practices’ currently fall outside the scope of the Australian Consumer Law (ACL), but nevertheless can result in significant consumer and small business harm.

What are the unfair trade practices gaps in Australian Consumer Law?

The Consultation Regulation Impact Statement prepared as part of the consultation process (CRIS) includes a non exhaustive list of potentially unfair trading practices. These include:

- (a) Inducing consumer consent or agreement to data collection through concealed data practices.
- (b) Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.
- (c) Omitting or obfuscating material information which distorts consumers’ expectations or understanding of the product or service being offered.
- (d) Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy.
- (e) Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the ‘choice architecture’ of products or services (digital or otherwise).
- (f) Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights.
- (g) Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into).
- (h) All or nothing ‘clickwrap’ consents that result in harmful and excessive tracking, collection and use of data, and don’t provide consumers with meaningful control of the collection and use of their data.
- (i) Providing ineffective or complex disclosures of key information when obtaining consent or agreement to enter into contracts.

In short, there are unfair trading practices that cause significant consumer harm but which:

- do not reach the legal threshold for unconscionable conduct;
- are not misleading or deceptive or likely to mislead or deceive, although they distort consumer choice by creating confusion or hiding or omitting relevant information;
- may result in financial or other detriment although they relate to matters that do not form part of a standard form contract, or actions relating to entering into terms and conditions, rather than their content;

- exist alongside a contractual relationship that is not referable to contractual rights and therefore not captured by the unfair contract terms provisions; or
- are not a specific practice currently prohibited by ACL.

The CRIS states that in addition to causing direct harm to consumers, unfair trading practices can distort competition, which relies on consumers being able to make free and informed choices about the products and services that best suit their needs.

Options for change

The CRIS presents four policy options to address the problem of unregulated unfair trading practices. These are:

- maintaining the status quo;
- amending the statutory prohibition on unconscionable conduct;
- introducing a general prohibition on unfair trading practices; and
- introducing a combination of general and specific prohibitions on unfair trading practices.

Option 1: maintaining the status quo

This option proposes no change to the existing legislative framework. The CRIS suggests this is unlikely to be the preferred outcome as “regulators would be limited in their ability to respond to unfair trading practices”.

Option 2: Amending the statutory prohibition on unconscionable conduct

Under this option, the core of the prohibition on unconscionable conduct in section 21 of ACL would be retained. However, the prohibition would be extended to capture “unfair conduct” as a factor or element that must be assessed in determining whether conduct is unconscionable in connection with the supply or acquisition of goods or services.

This policy option would seek to broaden the scope of the ACL to consider a range of misleading, harsh, oppressive or predatory conduct depending on how unfair conduct is defined.

The prohibition on unconscionable conduct could also be made prospective, so it applies to conduct that is likely to be unconscionable. This would align with the misleading or deceptive conduct protections in the ACL.

The CRIS also explores an alternative approach to add the concept of unfairness to the unconscionable conduct provision itself.

The advantage of the former option (which would not change section 21 of the ACL) is that it retains the body of case law which has developed on the current unconscionable conduct prohibition.

Option 3: Introducing a general prohibition on unfair trading practices

This option would create a new “general” prohibition on unfair trading practices which would apply to businesses across all sectors as a separate protection from the existing provisions of the ACL. No specific definition has been proposed and if this option is to be progressed, any future definition would be determined through the policy development process.

The CRIS states that the intention of any proposal to introduce a general prohibition on unfair trading practices would be to ensure it adapts to technological and commercial changes in the market place.

The CRIS acknowledges that the success of this option would be dependant on how the prohibition is framed. If poorly framed, this option could create uncertainty for both business and consumers, and even have an adverse effect on innovation, competition and efficiency. The CRIS also notes that businesses would incur compliance and training costs in order to ensure practices are in line with this principles-based prohibition.

Option 4: Introducing a combination of general and specific prohibitions on unfair trading practices

The most comprehensive option, option 4, would combine the general principles-based prohibition against unfair trading provided in option 3 together with an additional list of specific prohibited practices. These provisions would complement existing protections under the ACL, such as the prohibitions against unconscionable conduct and misleading and deceptive conduct.

This regulatory approach is currently used in jurisdictions, such as Singapore, the European Union and the United Kingdom for business to consumer transactions.

Under this option, prohibitions would be more specific including clear and defined instances of unfair practices that are not covered by any existing provisions of the ACL.

Consumers and small businesses would be protected against the list of prohibited practices but would also have protection against unidentified or emerging unfair trading practices from the broader principles-based prohibition. Breaches of a combined general and specific prohibition would likely attract civil penalties.

Option 4 would have the highest regulatory impact of all the options presented in the CRIS. However, this option arguably would also provide the highest level of protection for consumers and small businesses from unfair trading practices.

Next steps on closing gaps on regulation of unfair trading practices

There are clear gaps on how unfair trading practices are currently regulated in Australia and the CRIS provides a preliminary impact analysis of the four policy options being considered. The CRIS seeks evidence on the nature of unfair trading practices in Australia and the extent that consumers and small business can be harmed from potential gaps in Australian Consumer Law.

Interested parties are invited to comment on this consultation paper until 29 November 2023. Information on how to make a submission can be found [here](#).

Please do not hesitate to contact us if we can assist you in making a submission.

After the consultation process, a Decision Regulatory Impact Statement (**DRIS**) will be formulated that will be used to identify a preferred regulatory response. It is anticipated that the DRIS will be established in 2024. Following the DRIS, a Bill to amend the ACL will be prepared and publicly consulted on before being introduced into the Commonwealth Parliament.