



QUAY INSIGHTS

September 2023

Australian Government commences consultation on unfair trading practices prohibition

On 31 August 2023, the Australian Government commenced consultation on proposed amendments to the Competition and Consumer Act 2010 (Cth) (**CCA**) to address unfair trading practices. The Australian Competition & Consumer Commission (**ACCC**) has long called for these reforms and has welcomed the Government’s proposals, arguing that there is a gap in the law that an unfair trading practices regime would address. If the Government progresses a new law, close consideration should be given to its scope to ensure it is truly effective and that its application is clear to ensure businesses and consumers are provided with certainty.

1. What are “unfair trading practices”?

The Commonwealth, State and Territory consumer ministers agreed in late 2022 that the Commonwealth would undertake a public consultation process on whether the Australian Consumer Law, which forms a Schedule to the CCA, should be amended to prohibit unfair trading practices.

Following on from the agreement of the consumer ministers, at the end of August 2023 the Australian Treasury released a Consultation Regulation Impact Statement (**Consultation RIS**)¹ to kick start the consultation process.

The Consultation RIS defines unfair trading practices as commercial conduct that is not currently prohibited by Australian consumer laws but nonetheless has the potential to result in significant consumer or small business² harms. The ACCC has defined unfair trading practices at a more granular level as:³

- conduct that, while it is not unconscionable conduct for the purposes of the Australian Consumer Law, nonetheless creates harm, either for small business or consumers;

¹ Available [here](#).

² A small business is one that employs less than 100 staff or has a turnover of less than \$10 million per annum.

³ See the ACCC’s media release [here](#).

- conduct that, while it is not misleading or deceptive within the meaning of the Australian Consumer Law, creates confusion or omits relevant information with a consequential distorting impact on consumer behaviour and choices; or
- contractual provisions that, while they are not unfair contract terms (for example because the relevant contract is not a standard form contract), would be harmful to the small business or consumer counterparty if they were relied upon.

There are potential issues for legal certainty in defining concepts by means of what they do not include, and it is hoped that these initial descriptions for what is to be covered by any new prohibition are not used in any regulation that is ultimately adopted.

2. **Advocacy by the ACCC**

The ACCC first endorsed an unfair trading practices prohibition in the 2019 Final Report from its Digital Platforms Inquiry.⁴ In that Final Report, the ACCC noted global digital platforms such as Google and Facebook engage in unfair practices which are significantly detrimental to Australians but which do not fit neatly into existing categories of prohibited conduct under the Australian Consumer Law. The unfair practices highlighted by the ACCC largely related to the collection and use of consumer data, including for example:

- changing terms of use for products or services without providing reasonable notice or a meaningful right to consider the new terms;
- adopting business practices aimed at dissuading consumers from exercising their legal rights; and
- requiring broad ranging consents to be given in all or nothing “click wrap” agreements.

In the Final Report, the ACCC stated that the scope of the prohibition should be carefully developed so that it was appropriately “targeted”.⁵ The ACCC also recommended that in determining the parameters of a new prohibition consideration should be given to the regimes that apply in other jurisdictions, particularly to ensure that an overly broad definition of “unfairness” is not adopted, which would be likely to lead to regulatory uncertainty.

In the Fifth Report from the ACCC’s 5 year Digital Platform Services Inquiry, the ACCC continued to advocate for an unfair practices prohibition in the context of the harmful practices of digital platforms, which had not been addressed in the period since the Digital Platforms Inquiry was completed. In addition to the types of practices that were mentioned in the 2019 Final Report, the ACCC added the following to the list of harmful practices of digital platforms:

- not taking sufficient steps to prevent scams and similar;
- using “dark patterns” (i.e., online practices to confuse users and direct them away from taking particular action) in dealings with consumers and small businesses; and
- not providing adequate dispute resolution processes.

These practices were seen to create harms for consumers and small businesses, including financial losses and reduced control over data. The ACCC recommended that the unfair

⁴ Available [here](#).

⁵ For example, pages 26 and 37 of the Final Report.

practices regime should be economy wide and noted that this matter was under consideration by Commonwealth, State and Territory governments.

The ACCC also supported reform in its 2020 Perishable Agricultural Goods Inquiry Report.⁶

3. **Proposals put forward by Government**

In addition to **Option 1**, being the status quo (i.e., to make no change), the Consultation RIS puts forward three options:

- Expand the Australian Consumer Law unconscionable conduct prohibition to include a broader range of conduct (**Option 2**).
- Include in the Australian Consumer Law a new general prohibition on unfair trading practices (**Option 3**).
- Adopt general and specific prohibitions on unfair trading practices in the Australian Consumer Law (**Option 4**).

The Consultation RIS does not indicate a preferred option, though it would seem most likely that either Option 3 or Option 4 will be pursued.

Option 3 is an economy wide general prohibition, on similar terms to that applying in the United States, the United Kingdom (**UK**), the European Union (**EU**) and Singapore. A preferred definition of “unfair” is not suggested for Option 3, though respondents have been asked to provide their views on the scope of the conduct that should be prohibited. The Consultation RIS notes that a loosely defined concept could create uncertainty and stifle both innovation and competition while – on the other hand – a narrow definition would be likely to mean that the proposed regime would be ineffective. The current consultation process will not in any event resolve the issue, with the Consultation RIS stating that what is unfair would be defined through a subsequent policy development process.

Option 4 would incorporate Option 3 as well as a list of specific instances of prohibited conduct. Examples of conduct that would be expressly prohibited are not given. However, the Consultation RIS notes that the Option 4 approach is similar to that in the UK, EU and Singapore. Regulation in each of the EU and UK lists 31 specific practices that are considered to be unfair and Singapore’s regulation lists 27 practices. The types of practices that are specifically banned are fairly similar across the jurisdictions, including for example hidden advertisements in media, bait advertising and fake free offers.

4. **Stakeholder input**

The Australian Treasury is seeking submissions by 29 November 2023. Given that timing, and the fact that further consultation would be required on the exact scope of a regime should the Government seek to pursue reform, it would seem likely that no legislation would be introduced until mid-2024 at the earliest.

If the Government does introduce an unfair trading practices prohibition then, as the ACCC has recommended, it should be carefully drafted. If (as put forward in Option 4) it includes specific examples of prohibited conduct, these should be drawn from the work of the ACCC in the Digital Platforms Inquiry and the 5 year Digital Platform Services Inquiry and targeted at the

⁶ Available [here](#).

unfair practices of digital platforms such as Google and Meta that the ACCC has raised through those inquiry processes.

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