

20 November 2023

Our ref: [KS:CC]

Dr James Popple
Chief Executive Officer
Law Council of Australia
Level 1, MODE3, 24 Lonsdale Street
Braddon ACT 2612

By email: [REDACTED]

Dear Dr Popple

Unfair trading practices - Consultation Regulation Impact Statement

Thank you for the opportunity to provide feedback on the Protecting consumers from unfair trading practices - Consultation Regulation Impact Statement (**the Consultation Paper**).

This response has been compiled by the QLS Competition and Consumer Law Committee, whose members have substantial expertise in this area.

Executive Summary/Key Points:

- QLS supports the insertion of a new general and specific prohibitions on unfair trading practices in the Australian Consumer Law (**ACL**) (Option 4 of the Consultation paper)
- The general prohibition should be consistent with the well-established concept of *unfair* as it applies to terms under the ACL
- QLS has recommended commensurate resourcing and funding to regulators and to courts, tribunals and legal assistance providers to ensure:
 - access to justice; and
 - regulators can respond to systemic and/or industry specific conduct and deter suppliers from breaching the ACL
- QLS also recommends a review of any reforms within 2 years of implementation to understand any barriers to achieving their policy intent and to identify any unintended impacts for stakeholders

Introduction

QLS supports reforms which seek to respond to unfair trading practices not currently captured (or insufficiently captured), by existing protections in the Australian Consumer Law (**ACL**). In

our view, reform in this area will be beneficial to consumers and small businesses who are impacted by these practices, albeit in differing ways.

We welcome the government's initiative in this regard and look forward to ongoing engagement as the reform proposals progress.

This submission outlines some of the practices which our members have suggested should be considered unfair as they are likely to result in consumer detriment, but do not currently meet the thresholds of the existing ACL protections (under statute and well established case law).

In addition to outlining some of the unfair trading practices observed by our members, our submission responds to the proposed policy options, supporting Option 4. We also propose additional recommendations to ensure that upon implementation:

- statutory rights can be enforced;
- remedies are accessible to consumers;
- suppliers are deterred from breaching the ACL.

Our response is limited to the focus questions set out below.

Key focus questions

Q2. How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?

The concept of 'unfairness' is no longer novel in terms of its application in unconscionable conduct ('unfair tactics' in s 22(1)(d) and s 22(2)(d) of the ACL) as well the statutory definition of 'unfair' provided in s 24 of the ACL in respect of the unfair contract terms (UCT) regime.

As the examples outlined in the paper recognise, the present difficulty is that even if a practice is objectively 'unfair' and causes detriment, it may not be captured by the existing ACL conduct protections, including misleading and deceptive conduct and/or unconscionable conduct.

QLS supports the introduction of a new concept, outside of the well-established and understood concept of unconscionable conduct, which is clearly directed towards harmful unfair trading practices which do not currently fall within the ACL framework. The Consultation papers outlines the limitations of the unconscionable conduct protections in this regard.

In our view, it is inequitable that a term can be considered unfair but that conduct or practices do not invoke the same prohibition.

In defining *unfair*, we consider it is appropriate to apply a similar definition of 'unfair' in respect of contractual terms to supplier conduct.

We suggest the elements of an 'unfair trading practice' could be drafted along the lines of the below:

Unfair conduct

- (1) A person must not, in trade or commerce, engage in conduct that is, in all the circumstances, **unfair**.

Meaning of unfair conduct

Unfair conduct

- (2) Conduct is *unfair* if:

- (a) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the conduct; and
- (b) it causes a detriment (whether financial or otherwise) to a party.

Examples of unfair conduct should also be included in the drafting to assist in providing legislative clarity for parties and their legal advisors.

Q3. Do you have any specific information, analysis or data that will help measure the impact of the problems identified?

Our members who advise and act on behalf of consumers and small businesses report that clients regularly suffer detriment from unfair trading practices.

The Consultation paper outlines the limitations of the existing legal framework in respect of unfair conduct and the need to implement a new protection to capture conduct that should otherwise be captured under the ACL framework. Our members' experiences in practice reflect these difficulties.

Our members have provided a number of examples which demonstrate gaps in the existing legal protections. These include:

- Buy now pay later arrangements (*We note the current paper does not consider the extension of reform to ASIC regulated financial services but this will be considered in a separate consultation in 2024)
- Motor vehicles:
 - Rent to buy car arrangements
- Digital and online services:
 - Online agreements and inability to easily understand what consumers are agreeing to
- Energy:
 - Fees being applied for service reconnection for non-monetary (unpaid service) disconnections
 - Bills generated on an estimated bill/meter read basis, consumers are unaware they can have the bill revised to reflect actual usage

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- Water:
 - Estimated water meter readings for body corporates, readings based on complex rather than individual usage
- Body corporate practices in respect of resident/owner hardship and collection of outstanding levies
- Consumer goods:
 - Structuring of lines of communication and avenues of complaint for enforcement of warranties
- Telecommunications and internet
 - Sales practices
 - Confusing contract terms which limit the ability of consumers to understand what they are agreeing to
 - Omitting information prior to consumer signing up to agreement
 - External factors that do not affect Telco/internet provider (e.g. change to NBN) being used as opportunity to change provider terms on a less favourable basis for the consumer
- Insurance
 - Health insurance being offered on basis of private care but no basis to ensure that private health care can be provided when required
- Obstacles to consumers exiting online/other subscriptions.

For example, requirements to cancel a contract (e.g. gym/fitness centres) by attending the business premises.

Suppliers should be required to notify subscribers who have not utilised the service in last 3 months and send them a link to 'unsubscribe'.

- Barriers to communicate issues and raise/pursue complaints and enforce rights generally, such as:
 - Suppliers not having an email address with which consumers can effectively communicate.
 - Suppliers who only have robotised inbound phone system.
 - Suppliers engaged in trade or commerce (as defined in ACL) not having an office in Australia at which process can be served.
 - Suppliers structuring their business with the aim of preventing or minimising the avenues of enforcement of the ACL by consumers (for instance, by using entities within the corporate group with no assets in Australia as the supplier for ACL purposes, by benefitting from the group's Australian subsidiary's corporate veil to require the consumer to enforce rights overseas or by relying on foreign laws to avoid having to comply with the ACL).

- Suppliers requiring consumers to communicate with various persons and departments within the group, repeating information already provided to the supplier.

Policy Options

Option 4 – Introduce a combination of general and specific prohibitions on unfair trading practices

QLS recommends a targeted policy approach to address unfair trading practices which are not currently covered by the existing consumer law protections.

In particular, QLS supports option 4, the introduction of a general principle-based prohibition. Examples of unfair conduct in the drafting would also be of assistance to ensure legislative clarity.

In addition to the introduction of a new general prohibition, QLS supports specific prohibitions on unfair trading practices. The specific prohibitions should target the most egregious conduct.

In our view a general principles-based prohibition coupled with specific prohibitions would achieve an appropriate balance in addressing egregious practices and be sufficiently flexible to respond to new practices as they evolve, as a result of new technologies or otherwise.

We agree that civil penalties are appropriate in respect of general and specific prohibitions although we note that penalties are not addressed in detail in the Consultation paper. Existing barriers to enforcement should also be taken into account.

Having regard to the specific prohibitions raised by other jurisdictions, as outlined in the Consultation paper, our initial views are that the following unfair trading practices might be captured as specific prohibitions:

- Ineffective or complex disclosures of key information when obtaining consent or agreements to enter into contracts whether online or otherwise
- Onerous or disproportionate non-contractual barriers for exercising consumer rights
- Exploitation of specific misfortune or circumstances
- Omitting material information which distorts consumers' expectations or understanding of the product or service being offered e.g. omitting material facts (including small print concealment)
- Accepting payment without intention to supply
- Obstructive practices which make it hard to contact the supplier to:
 - raise complaint;
 - change terms of service; or
 - cancel the service

Legal assistance funding and regulator resources

Consumers should be given the opportunity to have their cases tested and to enforce their rights in a timely and cost-effective manner.

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Whilst welcoming legislative reform, QLS highlights the need for additional legal assistance sector funding for civil matters to ensure that any avenues of redress afforded by the new protections are accessible by consumers and small businesses.

For example, QLS recently wrote to the Queensland Attorney-General and Minister for Justice with respect to funding for the Queensland Civil Administration Tribunal (**QCAT**) and noted that Legal Aid Queensland currently receives no specific funding for legal representation or to assist people with civil disputes. QLS strongly supports targeted legal assistance sector funding to support individuals and small businesses to resolve civil disputes in the Tribunal and the courts.

Regulators should also be allocated additional resources and funding to provide access to dispute resolution services and regulatory investigations to respond to systemic and/or industry-specific issues in appropriate circumstances. This is particularly important for consumers seeking to navigate larger suppliers, particularly those working across jurisdictions. Regulators should also be equipped to monitor and respond to emerging conduct which may inform subsequent additions to specific prohibitions in the legislation.

Subsequent review

To ensure that any reforms are achieving their legislative intent, we recommend a public consultation be undertaken within 2 years of implementation to ensure that any barriers to accessing redress are identified at any stage.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully

[REDACTED]
Chloé Kopilović
President