

ARA SUBMISSION

UNFAIR TRADING PRACTICES CONSULTATION

DECEMBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide feedback on Treasury's consultation paper on unfair trading practices under the Australian Consumer Law (ACL).

The ARA is the oldest, largest and most diverse national retail body, representing a \$430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between. Within our membership are some of Australia's largest franchise operators and their networks of franchisees.

While we acknowledge Treasury's intent to address manipulative and harmful practices, the ARA has significant concerns about the potential unintended consequences of the proposed general prohibition and other associated measures, particularly for small and medium-sized retailers.

EXECUTIVE SUMMARY

The ARA supports efforts to address genuinely harmful and manipulative practices but urges caution regarding the introduction of new, broad regulatory prohibitions. Retailers are already facing a combination of slow consumer spending and rising business costs. Key concerns include:

- **Novel and Undefined Concepts:** Introducing terms like "manipulation" and "distortion" adds uncertainty, as these concepts are not currently defined in the ACL. Without clear definitions, businesses will struggle to understand their compliance obligations.
- **Overlap with Existing Protections:** Many of the practices identified as problematic, such as manipulation or distortion, could already be addressed under existing ACL provisions like **deceptive conduct**. Introducing new, overlapping terms adds unnecessary complexity to the ACL framework.
- **Delays and Costs:** The ambiguity of these terms will require courts to interpret them over time, leading to delays, increased litigation costs, and economic inefficiencies. This uncertainty disproportionately impacts small businesses with limited resources.

THE ECONOMIC CONTEXT AND REGULATORY BURDEN

It is generally acknowledged that the private sector is the best source of economic growth in the long term, with Treasurer Jim Chalmers widely reported as saying that the private sector needs to "pull Australia out of its worst

economic slump since the 1990's recession.¹ Yet businesses are facing an increased regulatory burden at the very time businesses are looking to Government to eliminate red tape and support businesses in improving Australia's productivity.

- **Economic Outlook:** In October 2024, the International Monetary Fund (IMF) downgraded Australia's economic growth forecast to 1.2%, down from the 1.5% predicted in April². Consumer spending is under pressure, and businesses are navigating higher operational costs.
- **Regulatory Burden:** Businesses are already contending with a significant regulatory load, including eight current and proposed reforms to the **Competition and Consumer Act** and the **ACL**, as well as changes in workplace relations, cybersecurity, and sustainability.

The ARA encourages Treasury to carefully assess the cumulative impact of these regulatory changes and consider the potential long-term consequences of new policy in the current economic environment.

AUSTRALIAN CONSUMER LAW

The ARA believes the **ACL** already provides a robust and flexible regulatory framework for addressing unfair trading practices. Provisions addressing misleading and deceptive conduct, unconscionable conduct, and unfair contract terms are well-established and effective.

- **Overlap with Deceptive Conduct:** The consultation paper frequently references "misleading conduct," but does not fully explore the application of existing provisions for **deceptive conduct**. Practices such as manipulation or distortion may already be covered under deceptive conduct, even if they are not technically misleading. For example:
 - Manipulative practices that distort consumer decision-making may still be considered deceptive if they create a misleading impression, even without explicit misstatements.
- **Avoiding Unnecessary Expansion:** Introducing new terms like "manipulation" and "distortion" risks adding complexity and uncertainty. Instead, clarifying the scope of existing **deceptive conduct** provisions could address potential gaps while maintaining the coherence of the legal framework.
- **Future-Proofing the ACL:** By relying on existing terms like **deceptive conduct**, the ACL avoids the risk of ongoing "concept creep," where new terms are repeatedly added to cover new scenarios. This approach ensures **regulatory certainty** and **consistency** over time.

STRENGTHS OF THE CURRENT ACL FRAMEWORK

The **ACL** has shown flexibility and adaptability in addressing emerging issues without frequent legislative changes.

¹ <https://www.afr.com/policy/economy/growth-unexpectedly-slumps-to-0-8pc-despite-government-spending-surge-20241204-p5kvnn>

² <https://www.imf.org/en/Countries/AUS#>

- **Flexibility:** The principles-based approach of the ACL allows it to address new challenges without needing constant updates to the law. This ensures it remains relevant to evolving practices such as digital platforms and subscription models.
- **Adaptability:** Targeted amendments to the ACL, such as those relating to consumer guarantees and digital platforms, have effectively addressed gaps in coverage without overhauling the entire system. This demonstrates that the ACL can evolve to meet the needs of the modern economy without introducing unnecessary complexity.

We caution against introducing new measures that duplicate existing protections, create confusion, or increase compliance burdens unnecessarily. Before amending the ACL to address a perceived ‘gap’, consideration should be given more fully to:

- The extent of any gap
- Whether the unfair trading practices prohibition (**Prohibition**) best addresses that gap
- Whether the Prohibition over-indexes for any perceived gap
- Whether the gap necessitates the immediate introduction of civil pecuniary penalties
- The likelihood and effect of the Prohibition (substance and penalties) striking the wrong balance: over-regulation, uncertainty, compliance costs, and deterring investment and innovation.
- This legal uncertainty will put retail businesses at significant regulatory risk given the proposed penalties.³

The proposal contained in the Consultation Paper potentially prohibit, with the risk of significant penalties, standard and expected retail business activities. The act of selling relies on persuasion, and businesses employ a range of means to persuade customers to making decisions to purchase. In bricks and mortar retail, for example, this includes the way that businesses place and promote products in store, wayfinding, lighting, music and ambience. Online retail businesses likewise employ methods to persuade customers to make purchasing decisions. Without sufficient clarity, these standard practices could fall within ‘distorting or manipulating’ the economic decision-making of the consumer.

The introduction of a Prohibition is a substantial novel regulation that intervenes extensively in how retail businesses operate. Given the scope of the intervention proposed, the regulation needs to be clear, coherent and cohesive with the existing legal framework under the ACL.

OPPOSITION TO THE GENERAL PROHIBITION

The ARA strongly opposes the introduction of a general prohibition on unfair trading practices as currently proposed.

Key Concerns

³ The maximum penalty for a breach of the ACL is the greater of (a) \$50 million; (b) three times the benefit obtained from the conduct; or (c) 30% of the adjusted turnover during the breach period if the benefit cannot be determined.

- **Unclear Scope:** The proposed definitions of “unfairness” and “material detriment” lack clarity, making it difficult for businesses to understand their compliance obligations. This ambiguity risks capturing legitimate business practices, creating uncertainty for retailers.
- **Disproportionate Impact on Small Retailers:** Smaller retailers, with fewer resources, are particularly vulnerable to heightened compliance risks and costs associated with vague regulatory requirements.

Challenges with Adopting the European Union’s UCPD Framework

Treasury’s proposal to adopt and adapt the European Union’s Unfair Commercial Practices Directive (UCPD) is problematic for several reasons:

- The UCPD was designed for a vastly different legal and regulatory system. Its purpose was to harmonise regional consumer protection laws across the EU, addressing fragmentation that burdened businesses and reduced competition. These conditions are not relevant to Australia’s context.
- The UCPD introduces new and unfamiliar concepts that have no historical basis or body of precedent in Australian law. These concepts have neither been applied nor tested in Australia.
- Adopting the UCPD test risks introducing legal uncertainty. The lack of precedent will require Australian courts to interpret these new concepts over time, leading to long periods of ambiguity and inconsistent application.

Uncertainty and Overlap

The introduction of the general prohibition as proposed risks:

- **Regulatory Uncertainty:** The lack of clarity regarding the scope and application of these new concepts will hinder businesses’ ability to confidently assess what constitutes compliance. This uncertainty diverts resources from productive activities and increases compliance costs, particularly for small and medium-sized enterprises (SMEs).
- **Overlap with Existing ACL Protections:** The proposed prohibition overlaps with the existing unfair trading protections found in the ACL, creating unnecessary complexity. Instead of introducing new terms, the ACL should rely on its existing provisions, which already address issues like misleading, deceptive, and unconscionable conduct.

Inconsistencies with the Unfair Contract Terms Regime

The proposal introduces a new concept of “unfairness” that is distinct from the concept already established under the unfair contract terms (UCT) regime. This inconsistency creates further challenges:

- Under the UCT regime, “unfairness” is clearly defined by criteria such as:
 - **Significant imbalance** in the parties’ rights and obligations under the contract.
 - Whether the term is **reasonably necessary** to protect legitimate business interests.
 - Whether the term would cause **detriment** (financial or otherwise) if applied.
- Introducing a different concept of “unfairness” under the proposed prohibition risks creating confusion for businesses, consumers, and the courts. It would also delay the resolution of disputes and result in costly legal processes to reconcile these inconsistencies.

Impacts on Innovation and Economic Growth

The introduction of vague and novel regulatory concepts risks stifling innovation and harming Australia's economy:

- Regulatory uncertainty will impede businesses' ability to develop innovative practices or offer competitive products and services.
- Higher compliance costs and delays will discourage investment and reduce market efficiency, ultimately leading to fewer and lower-quality products for Australian consumers.

Recommendations

If Treasury proceeds with the general prohibition, it must:

1. Ensure that the regulation is **clear, coherent, and consistent** with the existing ACL framework.
2. Avoid introducing unnecessary concepts that duplicate or overlap with existing protections.
3. Provide detailed guidance to businesses to ensure practical and consistent application of any new requirements.

By taking these steps, Treasury can minimise the risks of legal uncertainty, unnecessary compliance costs, and reduced innovation while maintaining the integrity of Australia's consumer protection framework.

SMALL BUSINESS PROTECTIONS

The ARA acknowledges the importance of ensuring that small businesses are treated fairly in their interactions with larger entities. However, the proposed inclusion of small businesses under the general prohibition on unfair trading practices raises significant practical challenges that risk imposing unnecessary burdens on all businesses, including small retailers. A balanced approach is essential to protect small businesses while avoiding unintended consequences that could hinder their growth and competitiveness.

Key Concerns

- **Compliance Challenges and Costs for Small Businesses:**
 - The complexity of applying different rules for individual consumers and small businesses could place significant compliance burdens on smaller retailers, who often lack the resources of larger competitors.
 - Retailers operating physical stores or SMEs themselves may face operational difficulties in differentiating between individual consumers and small business customers, increasing administrative costs and creating inefficiencies.
- **Innovation and Competition Risks:**
 - Regulatory uncertainty may discourage small businesses from innovating or adopting new business models.
 - Including small businesses under the prohibition risks benefiting larger players who have the resources to navigate complex regulations, potentially reducing competition and innovation in the market.

- **Existing Protections for Small Businesses:**
 - Small businesses already benefit from robust protections under the Australian Consumer Law (ACL), including provisions for unfair contract terms (UCT), unconscionable conduct, and misleading or deceptive conduct.
 - These existing provisions address power imbalances in business-to-business transactions and provide clear and enforceable safeguards for small businesses.

- **Risk of Over-Regulation in a Challenging Economic Environment:**
 - Businesses are already grappling with a complex regulatory environment, including recent reforms to workplace relations, cybersecurity, and sustainability.
 - Adding further layers of regulation may disproportionately impact small businesses, which are less equipped to absorb compliance costs.

- **Difficulties in Identifying Small Businesses:**
 - Determining whether a customer qualifies as a small business adds practical challenges, especially given the limitations of tools such as the Small Business Identification Tool (SBI).
 - Inaccuracies in these systems could create uncertainty for retailers and complicate compliance.

Recommendations for a Balanced Approach

1. **Limit the Prohibition to Individual Consumers:**
 - a. Excluding small businesses from the general prohibition would simplify compliance and avoid duplication of protections that already exist under the ACL.

2. **Adopt a Two-Step Implementation Process:**
 - a. If Treasury determines that small businesses should be included, introduce protections in stages to allow businesses time to adapt.
 - b. Start by applying the prohibition to consumer transactions and extend it to small businesses only after monitoring the effectiveness of existing protections and ensuring clarity in the application of the new provisions.

3. **Focus on Strengthening Existing Protections:**
 - a. Monitor and evaluate the effectiveness of current ACL provisions, such as UCT and unconscionable conduct protections, before introducing new rules.
 - b. Ensure that any additional protections for small businesses address specific gaps without duplicating existing frameworks.

4. **Support Small Businesses with Education and Tools:**
 - a. Provide clear guidance, resources, and education to help small businesses understand and leverage existing ACL protections.
 - b. Equip retailers with the tools they need to comply with any new obligations in a practical and cost-effective manner.

The ARA supports a balanced regulatory approach that provides adequate protections for small businesses without imposing disproportionate burdens. By focusing on targeted, practical solutions, Treasury can safeguard small businesses while ensuring that all retailers—large and small—can operate effectively and competitively in a dynamic economic environment.

RISK OF REGULATORY OVERREACH

If the proposed measures are implemented, they could lead to significant challenges for the retail sector, including:

- **Compliance Complexity:** Ambiguous rules will increase legal costs and require businesses to dedicate resources to compliance, diverting focus from innovation and growth.
- **Impact on Innovation:** Unclear regulations could discourage retailers from adopting innovative sales strategies or entering new markets.
- **Burden on Small Businesses:** Small businesses will face higher costs in adapting to the new regulations, further disadvantaging them compared to larger players.

The ARA urges the government to carefully evaluate the necessity and proportionality of these measures before implementation.

RECOMMENDATIONS FOR A BALANCED APPROACH

The ARA recommends a measured and practical approach to addressing unfair trading practices, ensuring clarity and proportionality while minimising unnecessary burdens on businesses.

1. Address the Risk of an Unlevel Playing Field

- a. The proposed provisions may result in inconsistent protections for consumers depending on where they shop, creating two distinct customer experiences.
- b. Retailers require consistent and fair regulatory treatment to maintain a competitive and balanced market.

2. Clarify Key Definitions

- a. Provide detailed examples and guidance on what constitutes “unfair” conduct to ensure businesses understand their obligations.
- b. Align definitions with existing ACL principles to maintain consistency and coherence.

The Grey List:

- The grey list can provide helpful guidance on the types of conduct that may constitute unfair trading practices, as it has done for protections like unconscionable conduct and unfair contract terms.

- While narrowing the list of issues compared to the 2023 Consultation Regulation Impact Statement suggests an effort to address business concerns, its practical application remains unclear.
- Under the unfair contract terms (UCT) regime, the grey list functions as a guide, informing the general prohibition. Treasury must clarify whether this approach will apply to the proposed prohibition.

Risks of a Black List:

- Without clear guidance, there is a risk the grey list could evolve into a de facto black list of banned activities, leading to regulatory overreach.
- Retailers need clarity on how the prohibition will apply to routine operations such as sign-up flows and pricing strategies. Ambiguity will result in higher compliance costs, delays, and over-capture, ultimately increasing the burden on businesses.

Real-World Consideration:

- The general prohibition must be clear and practical to ensure retailers can confidently operate without fear of unintentionally contravening the law.

3. Focus on Specific Issues

- a. Target harmful practices such as subscription traps and dark patterns through **specific amendments**, rather than adopting a broad and undefined general prohibition.

4. Adopt Phased Implementation

- a. Introduce new measures with a **transition period**, allowing businesses time to adapt before penalties apply.

Staged Approach to Penalties:

- If penalties are introduced, they should only apply after an initial transition period during which businesses and regulators can establish a shared understanding of the new rules.
- This phased approach enables:
 - The development of guidance and case precedents.
 - Sectoral reviews to clarify compliance expectations.
 - Reduced risk of immediate and undue penalties.

Example from UCT Regime:

- The unfair contract terms (UCT) regime, introduced in 2010, initially did not impose penalties. This allowed businesses and regulators time to align their understanding of unfairness. Only in 2023 did penalties apply, providing a clear precedent for a phased approach to enforcement.

5. Support Small Retailers

- a. Provide targeted education, tools, and resources to help small retailers navigate compliance with any new provisions.
- b. Ensure that small businesses, with fewer resources, are not disproportionately burdened by regulatory changes.

6. Evaluate Existing Reforms Before Adding New Ones

- a. Allow recent ACL reforms, such as increased penalties for unfair contract terms, to take effect and be properly assessed before introducing further changes.
- b. Overlapping reforms must be given time to demonstrate their effectiveness, avoiding the risk of regulatory duplication and unnecessary complexity.

By adopting this balanced and cautious approach, Treasury can achieve its goals of enhancing consumer protections while minimising unnecessary burdens on retailers and ensuring a practical, effective regulatory framework.

CONCLUSION

The ARA supports measures to enhance consumer protections but stresses the importance of regulatory clarity, proportionality, and a targeted approach. The existing ACL framework provides strong protections and should be built upon rather than overhauled.

We urge the government to focus on practical, evidence-based solutions that address specific issues without imposing unnecessary burdens on businesses.

Thank you again for the opportunity to comment on Treasury's consultation paper on unfair trading practices under the Australian Consumer Law (ACL). The ARA looks forward to continuing its collaboration with Treasury to develop policies that promote fair trading while supporting the growth and innovation of Australia's retail sector. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.