

15 February 2019

By email: platforminquiry@accc.gov.au

Digital Platforms Inquiry
Australian Competition & Consumer Commission
Level 17, 2 Lonsdale Street
MELBOURNE VIC 3000

Dear Madam/Sir

Digital Platforms Inquiry—Preliminary Report

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment on the Australian Competition & Consumer Commission's (the **Commission**) preliminary report of the Digital Platforms Inquiry (the **preliminary report**).

Consumer Action supports the recommendations in the preliminary report, but focuses this submission on two of the areas identified for further analysis and assessment:

- A prohibition against unfair practices
- Opt-in for targeted advertising

We strongly support these proposals and urge the Commission to make concrete recommendations in relation to them in its final report. Our further views are outlined below.

Prohibition against unfair practices

A prohibition against unfair practices will complement the other general obligations in the Australian Consumer Law (**ACL**), particularly the prohibitions against misleading and deception conduct, unconscionable conduct and unfair contract terms.

While the existing laws are strong, there are clearly instances of conduct which is harmful to consumers that are not caught by consumer laws. For example:

- The prohibition on misleading and deceptive conduct does not fully address harm caused by misleading omissions.



Cases such as *Australian Competition & Consumer v AGL South Australia Pty Ltd*¹ demonstrate that misleading omissions are not caught unless there is a “reasonable expectation of disclosure”. In this case, the energy provider AGL had signed certain residential customers up to energy plans in 2012. In mid-2013, the rates for these customers were increased, but the customers were informed that there was no change in the discount they would continue to receive under their energy plan. This representation was found to be not misleading, and there was no obligation on AGL to inform its customers that the underlying rates had increased.

- The prohibition on unconscionable conduct is a very high bar, and jurisprudence is not consistent meaning that this protection is difficult for regulators to apply.

Cases such as *Australian Competition & Consumer Commission v Medibank Private Ltd*² demonstrate that conduct that is harsh or unfair for consumers can be insufficient to establish statutory unconscionable conduct. In this case, the private health insurer Medibank failed to notify its members about a decision to limit benefits for certain services, despite previously representing across a number of its communication and marketing materials that it would provide such benefits.

Another recent decision of the Full Federal Court overturned an initial finding of unconscionable conduct in relation the provision of credit known as “book up” which targeted Indigenous consumers in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) in remote South Australia. The scheme involved the operator of a general store withdrawing significant amounts of money from his customer’s accounts for current and future purchases, depriving them of the independent means of obtaining the necessities of life and creating a dependence upon the store. While this decision is under appeal to the High Court, this case demonstrates that the prohibition may not work to protect a particularly vulnerable cohort of consumers.

Furthermore, the late Professor Bob Baxt has written that the courts “do not appear willing to adopt a coordinated national approach on how the remedy of unconscionable conduct should be interpreted”.³ Professor Baxt notes that the state and federal superior courts have taken a different approaches to the role of “moral obloquy” in determining unconscionable conduct, with the former appearing to require this concept for the prohibition to be made out.⁴ While some justices of the federal courts have found that moral obloquy should have less relevance (rather pointing to the standards of ‘business conscience’ reflecting societal values and norms)⁵, Justice Gaegler of the High Court also appears to have relied on the necessity for establishing moral obloquy.⁶ The problem with this formulation is that it sets a very high bar, meaning the law does not adequately respond to what should be considered unlawful conduct.

¹ [2014] FCA 1369

² [2018] FCAFC 235

³ Baxt, B ‘Competition and Consumer Law: Continuing Furore over Moral Obloquy and Unconscionability’ (2017) 91 *Australian Law Journal* 809.

⁴ *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; *Director of Consumer Affairs (Vic) v Scully* [2013] VSCA 292.

⁵ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90; *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75.

⁶ *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28.



- The prohibition on unfair contract terms relates specifically to the terms of a regulated contract, and the prohibition doesn't deal with other harmful practices beyond the contract terms.

This could include unfair marketing or information provision (that does not amount to misleading conduct), as well as aggressive practices like using a customer's personal information in ways that the consumer does not understand or expect to influence product or service design or pricing.

As noted by the preliminary report, Australia's general consumer law appears to have fallen behind the standard of international jurisdictions by failing to impose a prohibition on unfair practices. Comparable jurisdictions adopt general and specific protections in relation to unfair trading practices. Unlike the prohibition on unconscionable conduct which focuses on the conduct of traders, these provisions focus on the effect of such conduct on consumers.

For example, section 5 of the *Fair Trade Commission Act* (US) stipulates that an act or practice is unfair if it is likely to cause substantial consumer injury, the injury is not reasonably avoidable by consumers, and the injury is not outweighed by benefits to consumers or competition. Similarly, the EU and UK laws focus on conduct that 'materially distorts' the economic behaviour of the 'average consumer' or 'significantly impairs the average consumer's freedom of choice or conduct'.⁷ Rather than focusing on whether the conduct offends conscience, such analysis can bring in consideration of consumers' behavioural biases that might be exploited by traders. Such an approach responds to more modern understandings of consumer protection, and how behavioural biases can operate to limit the ability of consumers to protect their own interests.⁸

A prohibition on unfair trade practices could assist deal with many of the concerns outlined in the preliminary report, including the way in which disclosures are provided by digital platforms, the use of personal information and/or data by digital platforms and the approach to consumer consents and information control. The current general provisions in the ACL are not well-adapted to deal with, for example, the inability to 'opt-out' of certain types of data practices or the use of online or location tracking and targeted advertising that is unclear to the consumer.

The same is true of complex services markets more generally, for example, private health insurance or energy offers that have complex pricing structures that the average consumer is incapable of fully understanding. Many essential service providers are today using customer information and previous conduct to determine pricing in a way that disadvantages them. For example, across insurance,⁹ mortgages¹⁰ and energy,¹¹ 'loyal' customers are being charged higher prices than others, despite not costing as much to provide the service. A prohibition against unfair trade practices could make it unlawful for traders

⁷ European Commission, *Directive 2005/29/EC on Unfair Commercial Practices*, [2005] OJ L 149/22 <http://ec.europa.eu/consumers/consumer_rights/unfairtrade/unfair-practices/index_en.htm>. Implemented in the UK through the *Consumer Protection from Unfair Trading Regulations 2008*

⁸ See, eg, Anne-Francoise Lefevre and Michael Chapman, *Behavioural economics and financial consumer protection*, OECD working paper, March 2017, available at: https://www.oecd-ilibrary.org/economics/behavioural-economics-and-financial-consumer-protection_oc8685b2-en.

⁹ Emergency Services Levy Monitor, *Pricing differences between new and existing customers*, 2018, available at: https://www.esinsurancemonitor.nsw.gov.au/sites/default/files/DiscussionPaper_Pricing_New%26Renewals_FINAL.pdf

¹⁰ ACCC, *Residential mortgage market inquiry*, December 2018, available at: <https://www.accc.gov.au/focus-areas/inquiries/residential-mortgage-products-price-inquiry/final-report>.

¹¹ ACCC, *Residential electricity supply and prices inquiry*, July 2018, available at: <https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry/final-report>.



to design pricing strategies that significantly disadvantage certain groups of customers, including more vulnerable groups. In this way, such a prohibition can be pro-competitive by promoting competitive outcomes across the whole market, rather than just for some customers.

A prohibition on unfair trade practices may help also align business practices with community expectations. If it was framed as a general provision that required traders to be upfront, clear and intelligible in their information provision, business practices might better meet such expectations. The recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was asked to consider not only where conduct had breached certain laws but where 'conduct had fallen short of the kind of behaviour the community expects of financial services entities but is also entitled to expect of them'.¹² Furthermore, the Final Report articulated six underlying principles which reflect expected norms of conduct. One of these is 'act fairly'¹³. The Commissioner noted that these norms are 'reflected in existing law, but the reflection is piecemeal'¹⁴. Adopting an economy wide prohibition on unfair trade practices would address this criticism.

Finally, it should be noted that some regulated sectors do have fairness obligations imposed on the regulated population. For example, financial service providers (including credit providers) are required to provide services "efficiently, honestly and *fairly*" (emphasis added). This does not appear to be the case in all regulated sectors and, as demonstrated by this inquiry, there are increasingly powerful digital platforms and similar businesses that are not specifically regulated. Adopting an economy-wide prohibition will ensure that regulators are able to respond to problematic practices in these new businesses, without having to wait for the development of a specific regulatory regime.

Attached to this submission is article published in the *Alternative Law Journal* which sets out further our views about an unfair trading prohibition, the benefits of such a prohibition, and how it might be structured in the Australian context.¹⁵

Opt-in for targeted advertising

We also support the preliminary report's suggestion of a prohibition on collecting, using or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in support.

Consumer Action has published a number of reports on target marketing and the risks of consumer detriment:

- Published jointly with Deakin University, the report, *Profiling for profit: a report on targeting marketing and profiling practices in the credit industry*,¹⁶ explains that many businesses make

¹² Royal Commission into Misconduct in the Banking, Superannuation & Financial Services Industry, Final report, February 2018, page 1.

¹³ As above, page 8

¹⁴ As above, page 9

¹⁵ Gerard Brody and Katherine Temple, 'Unfair but not illegal: Are Australia's consumer protection alws allowing predatory businesses to flourish?' (2016) 41:3 *Alternative Law Journal* 161.

¹⁶ Harrison, Paul; Ti Gray, Charles and Consumer Action Law Centre (2012) *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry*, Deakin University and Consumer Action Law Centre,



significant investments to purchase or develop customer relationship management systems. These systems enable businesses to better access consumers' personal information and utilise complex systems to predict an individual's behaviour. The report recognised that given businesses are adopting highly sophisticated marketing strategies, measures should be adopted to ensure consumers were not unfairly exploited.

- The 2018 report, *Dirty leads: consumer protection in online lead generation*²⁷, examines the growth of lead generation, and its relationship with evasive techniques designed to entice people to share their personal information. The report also considers the use of deliberately vague consent as well as digital trading platforms which enables leads to be sold between lead sellers and buyers. The report finds that in other jurisdictions, lead generation has been associated with scams and other fraudulent activity costing people millions of dollars in losses.

These reports identify particular practices which enable the collation of personal information to support target marketing, including pre-checked boxes; marketing consents hidden in terms and conditions of unrelated online activities; and unreasonably broad consents to marketing over unlimited periods.

Given the extent of such practices online, we consider that a legislative change requiring clear opt-in to the use of personal information for targeted advertising purposes is necessary. Not only would it prevent obtuse practices described above, it would improve the confidence of consumers engaging in commerce online.

Other recommendations

We also support the proposed amendments to the Privacy Act (preliminary recommendation 8). Other preliminary recommendations that we strongly support include:

- Preliminary recommendation 10 – introduce a statutory tort of serious invasion in personal privacy
- Preliminary recommendation 11 – impose sanctions on the use of unfair contract terms to increase deterrence

Please contact us on 03 9670 5088 or at info@consumeraction.org.au if you would like to discuss this submission further.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

²⁷ Elissa Freeman and Consumer Action Law Centre, *Dirty leads: consumer protection in online lead generation*, March 2018, available at <https://consumeraction.org.au/wp-content/uploads/2018/03/Dirty-Leads-Consumer-Action-Law-Centre-March-2018.pdf>.

