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 is 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.

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1 [2014] FCA 1369
2 [2018] FCAFC 235
• 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

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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

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13 As above, page 8
14 As above, page 9
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*17, 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@conusmeraction.org.au if you would like to discuss this submission further.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**

Gerard Brody
Chief Executive Officer

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UNFAIR BUT NOT ILLEGAL
Are Australia’s consumer protection laws allowing predatory businesses to flourish?

GERARD BRODY and KATHERINE TEMPLE

Predatory businesses that systematically take advantage of vulnerable consumers are far too common. While most commerce in Australia is conducted fairly and in a way that benefits consumers, there are still many businesses that take advantage of the poorest and most vulnerable in our community.

There are a range of possible legislative responses to predatory business behaviour. Governments can introduce ‘bright line’ rules that regulate specific business practices, such as payday loans or door-to-door sales. However, general protections that are standards-based are important as well — the most relevant being the prohibitions against misleading and deceptive, and unconscionable conduct, in various consumer laws. Standards-based rules help to fill the gaps left by bright line rules, which often struggle to keep pace with emerging predatory business models.

These core consumer protections have enabled effective enforcement action against some very sharp business practices. However, some unfair business models continue to flourish. This article examines some of the common unfair business models in today’s marketplace and the role of our existing consumer laws. In particular, the article considers the core prohibition designed to protect vulnerable consumers — the prohibition against unconscionable conduct. The article argues that this prohibition, based on equitable principles around conscience and morality, is outdated in today’s modern services-driven economy. A new prohibition on unfair trading, drawing on similar laws in the European Union (‘EU’) and the United States (‘US’), may be more effective at tackling these business models.

Predatory business models
In each of the models discussed below, the businesses use unfair tactics to target consumers with unsuitable products or confusing contracts. Generally consumers end up with a product that is unsuitable for their needs or which they can’t afford.

Credit repair
Credit repair companies (‘CRCs’) charge very high upfront fees, sometimes thousands of dollars, to ‘repair’ customers’ credit histories. People who contact CRCs may not understand Australia’s credit reporting system and are often experiencing acute financial stress. This means that they are vulnerable to high-pressure sales techniques and unrealistic promises.

The promise at the centre of this business model is that CRCs will remove barriers to accessing credit, which many consumers hope will relieve financial pressure. Many Australians believe, wrongly, that CRCs can remove legitimate listings from their credit files. Capitalising on this lack of understanding, often CRCs fail to tell their clients that, in some cases, they can amend incorrect listings on their own credit reports simply by contacting their creditors directly. Instead, CRCs charge high fees for services provided free of charge by industry ombudsmen, financial counselling services and community legal centres. CRCs are also reluctant to publicise their fees and often impose large additional charges for late payment, cancellation or other ‘administrative’ services.

For-profit debt negotiation
For-profit debt negotiators or debt settlement companies promise to settle a consumer’s debt for a fraction of what they owe. The idea is simple: debt settlement companies offer to negotiate down the outstanding debt (usually from credit cards or personal loans) owed to a more manageable amount so that the consumer can become debt free. Unfortunately debt settlement carries significant risks that may result in consumers becoming even worse off.

Debt settlement is an inherently risky venture: often the advice is for consumers to default on their debt, which can result in fees, increased interest rates, and sometimes even legal action by creditors. Even after assuming all of this risk, consumers are offered no guarantees. In fact, some creditors refuse to negotiate with these businesses at all. Even if a settlement is reached, a consumer unable to keep up with the new settlement arrangement risks falling back into default.

These businesses regularly target their marketing efforts at those who are heavily in debt and thus vulnerable to accepting their promises. For example, these businesses purchase lists of judgment debtors or trial court lists with details of bankruptcy and home repossession. Consumers on these lists can find themselves inundated with marketing paraphernalia and promises to ‘solve’ their debt stress.

Car napping
Many Australians have little understanding about their rights and obligations when involved in collisions, and they can be vulnerable to traps orchestrated by towers, repairers and debt collection lawyers. At accident scenes, drivers who are not-at-fault may be approached and offered a towing service by tow-truck drivers. They
5. Many of the early cases concerning what could be described as unconscionable conduct focused on ‘catching bargains’, or deals struck between moneylenders and expectant heirs at usurious rates of interest. For an account of the development of the law of unconscionable conduct generally see [W] Carter, Elizabeth Peden and CJ Tolhurst, Contract Law in Australia (LexisNexis, 5th ed. 2007) 517–9.
8. Blomley v Ryan (1956) 99 CLR 362 at 415, per Kitto J.
10. These provisions are replicated in the ASIC Act in relation to financial services.

The limitations of unconscionable conduct provisions

What are the prohibitions against unconscionable conduct?
The primary standards-based rules to protect vulnerable consumers are the prohibitions against unconscionable conduct. The law of unconscionable conduct has its roots in the doctrines of the courts of equity, developed over the course of several centuries, to do what justice required in cases where the strict application of the law would be unduly harsh. In Australia, the two key cases of Blomley v Ryan in 1956 and Commercial Bank of Australia Ltd v Amadio in 1983 set the tone of the judge-made law on unconscionable conduct, which may be characterised as addressing a situation where one party to a transaction is at a special disadvantage in dealing with the other, and the other party then ‘unconscientiously takes advantage of the opportunity thus placed in his hands’.

Prohibitions against unconscionable conduct became part of the statutory consumer protection regime in 1986, and were later introduced into a range of other legislation including the Australian Securities & Investments Commission Act 2001 (Cth) (‘ASIC Act’). The relevant provisions were initially introduced into the Trade Practices Act 1974 (repealed), but are now part of the Australian Consumer Law (‘ACL’). The ACL has two substantive provisions relating to unconscionable conduct. The first prohibits unconscionable conduct ‘within the meaning of the unwritten law from time to time’. The courts have not settled on what constitutes such conduct, but it is generally understood to refer to the situations described in Blomley and Amadio.

The second prohibition, often referred to as ‘statutory unconscionable conduct’, is a broader concept. For example, the prohibition now states:

- it is not limited by the unwritten law relating to unconscionable conduct; and
- it is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
- it is not limited to conduct relating to the formation of a contract, and consideration may be given to the terms of the contract and the manner in which and the extent to which the contract is carried out.

The ACL also sets out a list of factors to which the court may have regard when considering whether there has been statutory unconscionable conduct, including the relative bargaining positions of the parties, and whether the consumer was under influence or pressure. This is not an exhaustive list. This provision, however, does not have a settled legal meaning.

Unconscionable conduct involves a high threshold of misconduct

The prohibition imposes a high threshold before conduct will be considered ‘unconscionable’. Conduct that is simply unfair will not be sufficient.

This high threshold makes it difficult for regulators to take action against traders that test the boundaries. In a submission to a 2013 Senate Inquiry, the Australian Securities and Investments Commission (‘ASIC’) stated:

The courts have set a high bar for establishing unconscionability, particularly for commercial transactions. Whether a specific transaction is unconscionable depends on the individual facts and circumstances of the case. A general power imbalance between parties or a contract that favours one party more than the other is not sufficient to support a claim of unconscionable conduct.

Further, the unconscionable conduct provisions do not actually prohibit unfair trading. The Federal Court recently stated that ‘conduct which is unfair or unreasonable is not for those reasons alone unconscionable.’ The prohibition imposes a...
The term ‘unfair’ [rather than ‘unconscionability’ and ‘moral obloquy’] makes much more sense to consumers and traders, and would allow them to make at least a general assessment of the likely lawfulness of conduct themselves.

high threshold before conduct will be considered ‘unconscionable’.

Uncertainty of meaning

Various federal and state judiciaries have wrestled with the statutory concept of ‘unconscionable conduct’ and have arrived at different interpretations. The High Court is yet to consider the statutory prohibition in any depth, meaning confusion is likely to persist in the lower courts for some time yet.

In Attorney General (NSW) v World Best Holdings Ltd, Chief Justice Spigelman found that ‘moral obloquy’ needed to be found in order for conduct to be ‘unconscionable’. ‘Moral obloquy’ might be defined as disgraceful immoral conduct, such that deserves public condemnation.

In Australian Competition and Consumer Commission v Lux Distributors Pty Ltd, the Full Federal Court diminished the importance of the concept of moral obloquy. While noting that moral obloquy or moral tainting might be relevant, the Court ruled that the court should be concerned with ‘conduct against conscience by reference to the norms of society that is in question.’ This approach has been followed in other Federal Court decisions, such as Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd and Paciocco v Australian and New Zealand Banking Group Ltd. However, the Victorian Supreme Court of Appeal decision of Director of Consumer Affairs (Vic) v Scully (No 3) (“the Scully decision”) reverted to the narrower and restrictive interpretation by requiring moral obloquy once again. This approach has been followed by subsequent Victorian Supreme Court cases, including DPN Solutions Pty Ltd v Tridant Pty Ltd and Sgargetta v National Australia Bank Ltd.

It seems that two differing lines of authority are developing around the meaning of unconscionable conduct in the Federal Court and Victorian Supreme Court, again demonstrating the difficulty of applying this imprecise concept. In fact, the Full Federal Court has acknowledged that it is futile to attempt to define the concept of unconscionable conduct, saying:

any agonised search for definition, for distilled epiphanies or for short hands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules.

Some judges appear to believe that the statutory prohibition ‘could result in the transformation of commercial relationships in a manner which … was not the intention of the legislation.’ This concern appears to have unnecessarily limited the application of the prohibition against unconscionable conduct in some courts to those cases that involve ‘moral obloquy’. This sentiment appears to be shared by the High Court, with the Court in Kakavas v Crown Melbourne Limited toying with the idea that moral obloquy was relevant in evaluating unconscionability, although not deciding the matter.

Difficulties in enforcement

If a regulator chooses to proceed with an unconscionable conduct case, it will face evidentiary challenges. Victims are often vulnerable and disadvantaged consumers, and raise particular issues for enforcement activity. They are often less willing to complain, more easily intimidated, less likely to have retained documentary records and less likely to perform well as witnesses in court proceedings where among other things they can be readily confused under skilled cross examination. As such, regulators may face barriers when taking on cases affecting vulnerable and disadvantaged consumers that significantly rely on individual consumer testimony. In the regulators’ defence, courts and the rules of evidence are not generally open to approaches that may ameliorate the impact on vulnerable consumers.

Community understanding

Perhaps most importantly, however, is the complexity of the phrase ‘unconscionable conduct’ itself. Ask an average business owner or consumer what the phrase ‘unconscionable conduct’ means and you are likely to get a blank stare in response. Business people deciding whether to pursue a particular marketing strategy should not have to delve into case law to discover whether that strategy will operate within the limits of the law. Nor should a consumer have to consider the interplay between equity and statute law when determining whether they have a remedy against a dodgy trader. ‘Unconscionable’ is not commonly understood, and makes it difficult for businesses and consumers alike to recognise when conduct may be ‘unconscionable’.

Developments abroad

For many years, there has been discussion in Australia of the possibility of extending the prohibition on...
unconscionable conduct to a prohibition on unfair trading. Both the US and the EU have prohibitions outlawing unfair trade practices.

**United States**

Section 5 of the *Federal Trade Commission Act* prohibits unfair or deceptive acts or practices in or affecting commerce. Under this provision, 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.

This provision has been interpreted in an economic way, considering whether the costs to consumers of particular acts or practices are outweighed by countervailing benefits to consumers or competition. Unlike the Australian prohibition on unconscionable conduct which is based on moral standards of conscience, this prohibition might be viewed as a type of cost-benefit analysis. Indeed, the *Federal Trade Commission* (FTC) has stated that it will not consider non-economic factors, such as whether the practice violates public morals, in deciding whether to prosecute conduct as an unfair method of competition.

This provision has been used by the FTC in relation to practices that are arguably not unconscionable. For example, a company that markets home security video cameras settled an unfair practices claim initiated by the FTC, after it was found that the cameras had faulty software that left them open to online viewing such that they were not ‘secure’. Such a provision might also be used in relation to debt negotiation or car-napping, described above. For example, these practices might not only harm individual consumers, but may cause harm to other industry participants, such as banks or insurers. They are unlikely to deliver countervailing benefits to consumers or competition.

**Europe**

One feature of the comprehensive scheme on consumer protection in the European Union is the Unfair Commercial Practices Directive (‘the EU Directive’). The EU Directive takes a three-tiered approach which consists of a general prohibition of unfair commercial practices, prohibitions against practices that are misleading (whether by act or omission) or aggressive, and 31 specific practices that are prohibited in all circumstances. A business will contravene the first tier, the general prohibition of unfair commercial practices, if it is contrary to the requirements of professional diligence, and it materially distorts (or is likely to materially distort) the economic behaviour of the average customer to whom it is addressed. Economic behaviour will be ‘materially distorted’ if, for example, the average consumer would buy a product they would not otherwise have bought.

The second tier prohibition against misleading acts/omissions and aggressive practices focuses on whether the business’ conduct has caused the average consumer to make decisions they wouldn’t otherwise have made. In relation to aggressive practices, there is also consideration of the impact the business’ conduct has on the average consumer’s ‘freedom of choice’ concerning the product.

**An unfair trading provision for Australia**

Drawing on the international approaches, there are three ways in which Australia’s existing prohibition could be enhanced. First, being more specific about aggressive market practices; secondly, extending to misleading omissions; and thirdly, becoming prospective.

The first enhancement might involve defining aggressive market practices — not as in specific conduct or practices, but in terms of the effect of such practices on consumer decision-making. This picks up on the EU Directive’s focus on conduct that ‘materi ally distorts’ the economic behaviour of the ‘average consumer’ or ‘significantly impairs the average consumer’s freedom of choice or conduct’. 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. For example, tactics used by some in-home salespeople that make it more likely that a consumer will sign up may be caught. Framed in this way, the prohibition is more likely to be pro-competitive, as it promotes consumer choice.

The second enhancement relates to misleading omissions. Australia’s existing prohibition on misleading or deceptive conduct (or conduct that is likely to mislead or deceive) does extend to misleading omissions. However, cases such as *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* show that misleading omissions will not be caught unless there is a ‘reasonable expectation for disclosure’. This The EU Directive is broader, covering conduct by a trader that ‘hides or provides [material information] in an unclear, unintelligible, ambiguous or untimely manner’. This approach would require traders to bring much more clarity to their marketing and business practices than the current Australian provisions.

The third enhancement would be to make the prohibition prospective. Currently, the prohibition on unconscionable conduct applies to past conduct. This contrasts with the EU Directive where the prohibition includes conduct that ‘is likely to’ significantly impair the average consumer’s freedom of choice or conduct concerning the product or ‘is likely to’ result in the average consumer making a different transaction decision. This approach aligns with the prohibition on conduct that is ‘likely to’ mislead or deceive. Such an approach may mean that a regulator does not need to prove that the conduct occurred and harmed a consumer. It may also mean that the regulator does not need to rely on vulnerable witnesses. Instead, a broader range of evidence could be considered, including survey evidence or evidence from experts about consumer decision-making.
An unfair trading prohibition also provides a lifeline to regulators. … Regulators may be more proactive, with powers to intervene before significant harm has occurred, rather than engage in late-stage intervention strategies.

The benefits of an unfair trading prohibition

The benefits of introducing a general unfair practices provision extend beyond simply providing better protections to consumers. There are also economic and social benefits for the broader community.

The Productivity Commission has suggested that allowing market misconduct to occur without redress can be anti-competitive in that it gives legally non-compliant traders an advantage over those that do comply.39 Allowing consumers and ‘fair’ businesses to absorb the cost of the practices of unfair traders is inefficient and does not promote productivity. In addition, unfair practices have a detrimental impact on consumer confidence, which affects the business community more broadly. An unfair trading prohibition would arguably increase competition and consumer confidence, to the benefit of all ‘fair’ traders.

An unfair trading prohibition also provides a lifeline to regulators. Such a provision would enable regulators to prosecute traders based on their business models, rather than focus on individual incidents of past misconduct. Regulators may be more proactive, with powers to intervene before significant harm has occurred, rather than engage in late-stage intervention strategies.

Any standard for unfair trading should be linked to the distortion of economic behaviour, which is more certain than the morally-rooted concepts of ‘unconscionability’ and ‘moral obloquy’. The term ‘unfair’ makes much more sense to consumers and traders, and would allow them to make at least a general assessment of the likely lawfulness of conduct themselves. This could have clear compliance benefits.

Conclusion

Unfair business models will continue to thrive until we seal the gaps in our consumer protection laws. While existing prohibitions against unconscionable and misleading conduct have served the community well, further reform is needed to stamp out unfair practices. The government will be reviewing the Australian Consumer Law in 2016, and must consider whether it is time for a new standard that demands businesses treat consumers fairly. But a general prohibition against unfair practices is not just important for consumers. Robust protections for consumers would level the playing field between those who seek to do the right thing by consumers and those who don’t. The introduction of an unfair trading prohibition would be a win for consumers, ‘fair’ businesses, and the economy.

GERARD BRODY and KATHERINE TEMPLE are CEO and Senior Policy Officer, respectively, with the Consumer Action Law Centre.

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