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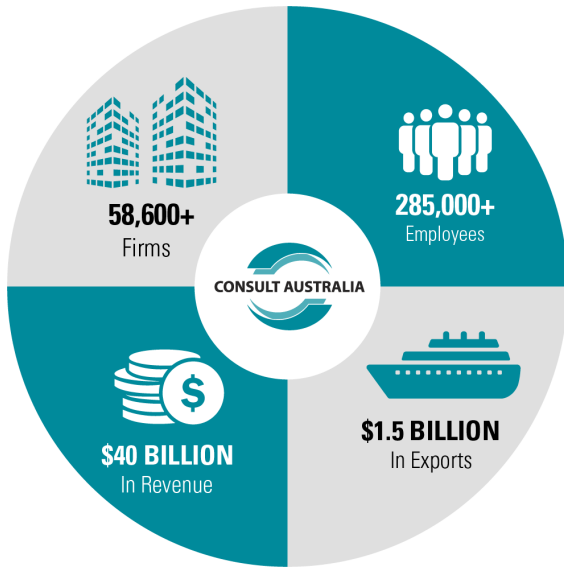
Unfair trading practices – Design of proposed general and specific prohibitions

SUBMISSION TO TREASURY

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ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering, and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



A full membership list is available on the Consult Australia [website](#).

Executive summary

Consult Australia welcomes the opportunity to contribute to the consultation by Treasury on the design of the proposed general and specific prohibitions relevant to unfair trading practices in the Australian Consumer Law (ACL). While we previously welcomed the opportunity to address the current limitations of the unfair contract term protections in the ACL, Consult Australia does not support the prohibitions released by Treasury. The proposed prohibitions are too broad and unclear, imposing an unnecessary burden on businesses. Further, there is no protection for small businesses of the type that we sought in our [2023 submission](#).

In our previous submission, we noted case studies from our members of business-to-business behaviour that could be addressed by suitably drafted prohibitions on unfair trading practices. Unfortunately, the proposed drafting is likely to inflame rather than temper the unnecessarily combative behaviours that our members experience when contracting with much bigger corporate entities to provide engineering, design, and advisory consultancy services. We also do not see any strong need, in our industry at least, for the consumer protections proposed.

In this submission, Consult Australia sets out our concern with both the general prohibition and the specific prohibitions. We demonstrate how, with the Australian construction sector being plagued by disputation, the drafting would only fuel unfair disputation. It seems by the examples provided in the consultation paper that there are very discreet issues that Treasury is trying to deal with but is using the overarching ACL rather than more specific targeted interventions on specific sectors (such as online sellers). Consult Australia is concerned because the broad application of the ACL will capture all our members and their services, from sole traders to global firms.

Consult Australia recommends that the Treasury does **not proceed** with the proposed prohibitions of unfair business practices.

Consult Australia always approaches consultation with a solutions mindset. Therefore, we would be pleased to meet with the consultation team to discuss further our perspective.

General prohibition

Designing a general prohibition that has broad application but is also sufficiently certain was always going to be a difficult task. Unfortunately, Consult Australia does not think that the proposed general provision meets those requirements, but rather the provision is vague and ill-defined.

The consultation paper proposed that a business's conduct would be prohibited where it:

- unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and
- causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.

There seem to be almost no bounds to the prohibition, making it very difficult for a business, of any size, to comply with. Arguably the 'detriment' could capture

inconvenience or other forms of harm, which we hold is too broad to be captured. Further, given the experience of disputation in the construction industry, Consult Australia foresees major businesses using this broad provision against consulting design, advisory and engineering businesses, as we see with the misleading and deceptive conduct provisions of the ACL. We cannot see how this general prohibition would work against existing combative behaviours.

Consult Australia therefore recommends that the Treasury does not proceed with the proposed general prohibition.

If Treasury does proceed with the general prohibition, it is recommended that:

- the provision is redesigned to be more certain and defined
- the 'detriment' captured by the prohibition be limited to prescribed and quantifiable financial damages.

The grey list

Consult Australia understands that the purpose of the grey list is to provide some guidance to businesses on the type of practices captured by the general prohibition, without limiting the application of the general prohibition. Consult Australia does not believe that the grey list succeeds in doing that job.

The grey list is too open-ended, too vague and seemingly can apply to any conduct – even though very specific examples are drawn out in the consultation paper. Of particular concern to Consult Australia are the first two items:

- the omission of material information
- the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner than overwhelms, or is likely to overwhelm a consumer.

Consult Australia members provide technical consultancy services where it could be debatable about what information is 'material' or not. For example, detailed calculations and compliance information would likely be material to a technical consultant but not to a homeowner customer. Further, if such information was provided to the customer, it could very well be unclear, unintelligible or ambiguous to the customer and likely overwhelm them.

It will be very difficult for any business to determine the right balance between not omitting material information but also not overwhelming the customer with information. We see this as being too subjective for inclusion in the ACL.

Consult Australia therefore recommends that the Treasury does not proceed with the proposed grey list.

If Treasury does process with the grey list, it is recommended that:

- the grey list be applied to only dedicated and prescribed sectors – rather than all businesses.

Specific prohibitions

None of the specific prohibitions seem to be particularly relevant to Consult Australia members. However, to provide industry certainty, Consult Australia recommends that the

prohibitions should only apply to prescribed specific sectors to target the problems identified by Treasury.

Answers to focus questions

Focus questions – general prohibition

1. Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified? *No, the general prohibition is not sufficiently clear. Please see above.*
2. Do the proposed elements for a general prohibition accurately reflect the gaps in the ACL that an unfair trading practices intervention could address? *No, see Consult Australia's 2023 submission.*
3. Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections? *Yes, there is no protection for small businesses of the type that we sought in our 2023 submission.*
4. Should the proposed prohibition only apply where the conduct is unreasonable (that is, where it unreasonably manipulates or distorts, or is likely to unreasonably manipulate or distort, the economic decision making or behaviour of a consumer)? Or would an alternative approach of only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests provide a better level of protection for consumers? *Consult Australia's view is that 'unreasonable' may still be too broad. We would not support the alternative approach of capturing conduct 'where it is not reasonably necessary to protect the business's legitimate interests' as we believe that would be a difficult test to manage.*
5. Is the requirement that detriment or likely detriment be 'material' appropriate? *If the prohibition is pursued, the detriment must be at least material and should be limited to only financial detriment.*
6. Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed? *The grey list does not provide adequate guidance, and in many respects will cause more confusion for businesses. See above where we give an example of a technical consultant and the objectivity of trying to determine what level of information to give to meet the proposed prohibitions.*
7. What would be the likely benefits to consumers associated with introducing the proposed general prohibition into the ACL? Where possible, please provide quantitative information. *Consult Australia cannot see significant benefits to consumers based on the current proposal. Benefits might be better defined if the prohibitions were explicitly limited to applying to prescribed sectors where the problems identified by Treasury are prevalent in Australia.*
8. Would there be compliance costs for businesses if the proposed general prohibition is introduced into the ACL? Would small businesses be disproportionately impacted noting that ACL reforms apply economy wide? Where possible, please provide quantitative information. *There would be significant costs on businesses to attempt to comply with the general prohibition. It will be difficult for businesses to develop internal procedures because the prohibition is too broad and vague. Small businesses will suffer the same problems but be impacted even more where they don't have an*

in-house legal or compliance team. It is recommended therefore that any prohibition should only attract to prescribed and specific sectors rather than all businesses that are subject to the ACL.

9. What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices? *See above – guidance material would be more likely to be successful if the prohibition applied only to prescribed and specific sectors.*
10. What is the maximum civil penalty a court should be able to impose for a breach of the proposed general prohibition? *No comment.*
11. Should civil penalties commence when a general prohibition commences, or following a transition period? If you support a phased approach, is a two-year transition period adequate to give businesses confidence around the operation of the law before penalties apply? *No comment.*
12. Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address the use of dark patterns that cause consumer detriment? If not, how should dark patterns be addressed? *Dark patterns do not seem to be relevant to our industry.*
13. Where unfair trading practices have been prohibited overseas, what lessons can be used to inform Australia's approach? *It is recommended that Treasury look closer at how overseas regulations work to regulate specific sectors, as there might be a better way to resolve the problems identified in the paper than using the broad application of the ACL.*

Focus questions – dark patterns

[Not relevant to Consult Australia]

Focus questions – subscription related practices

[Not relevant to Consult Australia]

Focus questions – drip pricing practices, dynamic pricing, online account requirements

[Not relevant to Consult Australia]

Focus questions – barriers to accessing customer support

[Not relevant to Consult Australia]

Focus questions – Application to business-to-business dealings

35. Do you have views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings? *Consult Australia is of the view that if the proposed prohibitions were introduced for business-to-business dealings, there could be misuse of the provisions as we have seen with misleading and deceptive conduct.*

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Thanks to our Industry Champions

For their outstanding leadership and engagement on behalf of the industry.



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