Submission

Make unfair illegal in financial services.

Submission on Treasury's Consultation Regulatory Impact Statement, *Protecting consumers from unfair trade* practices.

Focus topic: the proposed carve-out for financial services.

November 2023

Super Consumers Australia

Contents

Background.

The Consultation Regulatory Impact Statement (RIS), *Protecting consumers from unfair trade practices,* considers the need for an economy-wide prohibition on unfair trade practices to be added to the Australian Consumer Law. However, it carves out financial services (regulated by the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act)) from its consideration and suggests a separate regulation impact assessment process which will be advanced in 2024.

This submission responds to the proposed carve-out and recommends that Treasury should implement Option D of the Consultation RIS, which is to adopt both broad and specific prohibitions on unfair trade practices, and extend this to financial services alongside other areas of trade and commerce. This is because:

- separating the policy-making processes risks delaying and even not proceeding with the separate regulation impact assessment process;
- a carve-out from an unfair trade practices law for financial services would create market distortions and the opportunity for regulatory arbitrage;
- existing laws and standards that apply to financial services do not ensure that consumers are adequately protected from unfair trade practices, that is, there are gaps and inadequacies in the financial services consumer protection framework.

Applying the unfair trade practices prohibition to financial services would also deliver substantial benefits to consumers and the broader marketplace, and better align fairness standards, including with the jurisdiction of the Australian Financial Complaints Authority. This reform would particularly benefit First Nations consumers and consumers experiencing vulnerability, given the history of financial service providers targeting people in these groups with unfair trading practices.

The submission supports and builds on the joint consumer group submission to the Consultation RIS, and is structured as follows:

1. Background to the development of the Australian Consumer Law (ACL) and its alignment with the consumer protection provision in the ASIC Act.
2. Risks associated with delaying, or potentially not proceeding with, applying a prohibition of unfair trade practices to financial services.
3. Risks associated with distorting the marketplace or incentivising regulatory arbitrage.
4. The limits of existing broad-based financial services consumer protections and standards, including:
    - The obligation to provide services efficiently, honestly, and fairly; and
    - Design and distribution obligations; and
    - The ban on unsolicited selling of financial products
5. The limits of specific consumer protections which apply to particular financial products and services, including:
    - Best interests duties in advice, mortgage broking, and superannuation; and
    - Particular rules that apply to insurance, including the duty of utmost good faith.
6. The broader benefits of applying unfair trade practices to financial services, particularly to better align legislative standards with principles that apply in external dispute resolution and industry codes.

Ultimately, the submission recommends Option 4 in the Consultation RIS, and applying the definition referred to in the joint consumer group submission, as providing the greatest net benefit to the

community. This will deliver the greatest certainty to both consumers and industry by adopting a general prohibition together with a 'blacklist' of specified prohibitions.

SUMMARY OF RECOMMENDATIONS

Recommendation 1:
The Australian, state and territory governments maintain the alignment between the ACL and the ASIC Act in relation to economy-wide consumer protections.

Recommendation 2:
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the risks and costs of misalignment and delays incurred by separate ACL and ASIC Act reform processes.

Recommendation 3:
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costs that accrue from regulatory arbitrage and the distortion of business choices should the prohibition not apply to financial services.

Recommendation 4
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costs that accrue from existing gaps in general financial services consumer protections.

Recommendation 5
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costly gaps in protections that apply to specific financial products and services.

Recommendation 6
When extending the prohibition on unfair trade practices to insurance, amend section 15 of the *Insurance Contracts Act* so that there are no limitations to its application.

Recommendation 7
In considering the regulatory impact of on unfair trade practices to financial services, Treasury should recognise the specific benefits and efficiencies associated with aligning broad-based regulatory standards with the fairness standard that is already applied by the Australian Financial Complaints Authority.

Recommendation 8
In considering the regulatory impact of a on unfair trade practices, Treasury should recognise the benefits associated with providing for a consistency of standard across industry codes when it comes to fairness.

Recommendation 9:
An unfair trading practices prohibition should adopt the model proposed in Option 4 of the Consultation RIS, incorporating a general prohibition together with a 'blacklist' of specified unfair trade practices.

Recommendation 10:
The 'blacklist' of unfair trade practices should be specified and managed by ASIC, and subject to public consultation.

1. The Australian Consumer Law, the ASIC Act and financial services consumer protections.

When the ACL was first implemented in 2010, it was on the basis that its provisions be reflected in the ASIC Act for financial services. In the Second Reading Speech enacting the ACL, the Minister stated that the Bill "amends the consumer protection provisions of the ASIC Act to maintain consistency with the Australian Consumer Law concerning consumer protection for financial services."[1] The approach was designed to deliver on a policy objective of a 'seamless national economy', reducing regulatory complexity for business.

This approach was initially adopted following the Wallis Financial System Inquiry, which recommended that the Australian Securities and Investments Commission (ASIC) be responsible for the enforcement of economy-wide consumer protection laws to financial services. The Wallis Inquiry recommended that equivalent consumer protection provisions should exist across both the (then) Trade Practices Act and the legislation establishing ASIC, noting that this ensured 'consistent and efficient administration' of consumer protection laws.[2]

The benefit of this approach was confirmed in several subsequent reviews. First, the 2014 Murray Financial System Inquiry considered that ASIC should retain responsibility for consumer protections equivalent to that in the ACL, noting the value of an 'integrated consumer regulator for financial services'.[3] Similarly, when the ACL was reviewed in 2017, its Final Report found that "a key strength of the ACL is its generic nature, applying across all sectors of the economy. This includes the conduct of financial service providers (through mirrored protections in the *ASIC Act*)".[4]

Reforms to the ACL over the period of its enactment have been reflected in the ASIC Act. For example:

- Reforms to the unconscionable conduct provision in 2011;[5]
- Enhancing the power of regulators to use investigative powers to better assess whether a consumer contract term may be unfair in 2018;[6]
- The extension of unconscionable conduct provisions to listed public companies in 2018;[7] and
- The increase to the threshold for the definition of 'consumer' to $100,000 for the purposes of consumer contracts in the unfair contract term provisions in 2021.[8]

The historical policy intent, as confirmed by the above timeline, is that there should be alignment between the ACL and ASIC Act. We urge re-commitment to this principle.

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[1] Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, Second Reading Speech, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.
[2] Wallis Financial Systems Inquiry, 1996, page 17 and recommendation 3, https://treasury.gov.au/publication/p1996-fsi-fr.
[3] Murray Financial Systems Inquiry, 2014, page 235, https://treasury.gov.au/publication/c2014-fsi-final-report
[4] CAANZ, Final Report, Review of the ACL, page 72, https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review.
[5] *Competition and Consumer Legislation Amendment Act 2011.*
[6] *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018,* schedule 7
[7] *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018,* schedule 2
[8] Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020

Recommendation 1:
The Australian, state and territory governments maintain the alignment between the ACL and the ASIC Act in relation to economy-wide consumer protections.

2. Potential delays and misalignment in consumer protections.

As outlined in the joint consumer submission to the Consultation RIS, there are risks with carving out financial services from the proposed reforms. These include a likely delay in expanding the reforms to financial services. This delay would undoubtedly result in a costly misalignment between the basic consumer protection standards applying to financial services compared to other areas of economic activity.

While the Consultation RIS suggests a further regulatory assessment process will occur in 2024 relating to financial services, we expect this commitment will be delayed in practice. Our experience over recent years is that there have been significant delays with consumer law reform processes, despite there being commitment from Ministers to progress them.

Previous inquiries have recommended alignment between economy-wide protections in the ACL and financial services protections in the ASIC Act for a reason. Misalignment creates costly loopholes, complexity in enforcement, and confusion for consumers and industry alike. Furthermore, it appears that divorcing the reform process for the ASIC Act from the ACL may breach the Intergovernmental Agreement on the Australian Consumer Law.[9] Clause 3.1.3 of that agreement states that the consumer protection provisions of the ASIC Act should be 'consistent with the ACL'. To proceed with an unfair trade practices provision for the ACL without also applying it to the ASIC Act means that there will be an inconsistency.

Recent reforms to penalties for breaches of the ACL are an example of why misalignment should be prevented from the get-go.[10] Now, an energy company, telecommunication provider or retailer can be penalised up to five times more than a bank or insurer for contravention of the same law as mirrored in the ASIC Act. This hardly meets community expectations, nor is it good policy. While the Federal Government indicated that there would be further public consultation to address this inconsistency, it is now more than twelve months since this commitment was made.[11] Consumers are still waiting.

Another example of misalignment involves the prohibition on unfair contract terms, and the delay in applying this law to insurance contracts. The national unfair contract term regime first applied in 2010, however it was not extended to insurance contracts until after this was recommended by the

[9] Intergovernmental Agreement on the Australian Consumer Law, 2 July 2009, clause 3.1.3, https://federation.gov.au/about/agreements/intergovernmental-agreement-australian-consumer-law.
[10] The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* increased penalties for corporations breaching the ACL from $10m to $50m, but did not apply this to the equivalent provisions of the *ASIC Act.*
[11] The Hon Dr Andrew Leigh MP and The Hon Stephen Jones MP, More competition and better prices, 28 September 2022, https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/more-competition-and-better-prices.

Hayne Royal Commission.[12] Even after this recommendation was made, the insurance industry raised concerns that reform "would harm rather than improve consumer outcomes".[13] The extension came into effect in April 2021, leaving insurance consumers unprotected for more than 10 years.

These examples suggest that any further reform process may be delayed, even substantially so, particularly given the likelihood of powerful lobbying by vested interests in the financial sector.

Misalignment in protections is particularly relevant where financial and non-financial products and services are bundled together. For example, it is common that a purchase of a vehicle is bundled with a credit contract. While the contractual arrangements may be separate, the transaction is interdependent and, from the consumer's perspective, the arrangements are seamless. Recent research has found that around 30 percent of people finance a car purchase through a credit arrangement, and this type of bundling is likely to grow due to cost-of-living pressures.[14] Many other products and services such as white goods, electronics and new energy technology are also bought with credit arrangements, either tied or untied.

Should car dealers or other retailers be required to comply with an unfair trade practices prohibition, but not the lender, there will be a consumer protection loophole that could cost consumers dearly. This loophole will create confusing and inconsistent standards and may even limit the ability of consumers to make complaints and regulators to act. A lender will be able to hide behind the unfair conduct of a dealer or retailer, and limit access to a remedy, because they are also not required to meet the unfair trade practices standard.

Recommendation 2:
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the risks and costs of misalignment and delays incurred by separate ACL and ASIC Act reform processes.

3. Incentivising regulatory arbitrage.

Excluding financial services from an unfair trading prohibition creates misalignment between consumer protections frameworks. This misalignment encourages regulatory arbitrage, which distorts business choices and activities. Regulatory arbitrage is when a business adjusts its activities to take advantage of a more favourable jurisdiction or avoid a less favourable one.

Experience shows that some businesses will design their contracts and arrangements to effectively fit within certain legislative or regulatory definitions, to evade specific requirements.[15] An unfair trading prohibition applying to all business activity other than financial services will create an

[12] Financial Services Royal Commission, Final Report, recommendation 4.7.
[13] Insurance Council of Australia, Submission, Extending unfair contract terms to insurance, 28 August 2019.
[14] CPRC, 2023, Detours and roadblocks: The consumer experience with faulty cars in Victoria, https://cprc.org.au/detours-and-roadblocks/, p16.
[15] See, e.g., Ali et al, 'Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm', 2013, *Australian Business Law Review,* vol 41, No 5 pp-240-269.

incentive for enterprising or opportunistic businesses to escape the new requirement by setting up shop in the financial services industry. This can create an environment where consumers are unclear of their rights and what they should expect of business conduct.

An example of regulatory arbitrage can be seen in unregulated financial or credit products and services. By unregulated, we mean providers that are not required to obtain an Australian Credit Licence or an Australian Financial Services Licence. The current regulatory regime for credit and financial services is very complex, and it results in uneven licensing coverage. For example, there are a variety of credit products that do not require a licence; these include 'buy now pay later' and other types of fringe lending schemes.[16] There are also types of businesses such as those covered by the box below.

Unlicensed or poorly oversighted financial services – some examples

Wage advance: Wage advance products, also called Pay on Demand, are becoming more prevalent, with financial counsellors also raising concerns about their use. Wage advance is a harmful financial product that takes advantage of people in financial hardship. Wage advance allows consumers to take out a loan for a proportion of their next pay (for example, up to a third). A common business model is to charge 5% of the amount advanced. The loan is repaid over subsequent pay cycles. Wage advance is closer to a payday loan, but it operates by exploiting gaps in the law. Therefore, it is not regulated by the Credit Code and may not be licensed. In some instances, these wage advance products are promoted directly through employee HR apps used to manage pay, entitlements and leave.

Alternative real estate products: There have been various complex real estate investments that are akin to a financial service but are unregulated. One example is the Sterling Group of companies, which was marketed as a long-term, secure residential lease of up to 40 years, enabling retirees and seniors to release cash for the purpose of living a more comfortable retirement. Tenants were also required to pay a lump sum into an investment product, becoming an investor in another Sterling Entity. Tenants-investors were told that the returns from their invested capital would be sufficient to enable each tenant to pay all of the rent due. Ultimately, the Sterling investments failed, and the arrangements providing for payment of rent based on investment returns, ceased. This left tenant-investors in a very vulnerable and difficult position. While aspects of the investment scheme were licensed, there was inconsistent requirements across different aspects of the business model, aiding complexity and contributing to barriers in accessing remedies.

Dealer-issued extended warranties
Firms that offer extended motor vehicle (and other) warranties are generally considered financial products because they are facilities by which customers manage financial risks.[17] These products may also amount to an insurance contract in some circumstances, for example, where they are issued by a third party and not the manufacturer directly. However, some firms structure their products to be 'dealer-issued', that is, the product is issued by the dealer or retailer, while the product is administered by the warranty firm. Administration includes all aspects of customer service including managing and overseeing claims. It appears that one purpose of structuring the product in this way is to take advantage of the 'incidental product' exemption[18], which applies

[16] There are various other types of providers that don't have a licence, such as providers that lend for rental bonds or provide loans against the security of rental income.
[17] Section 763A and section 763C of the Corporations Act and section 12BAA(1) and (5) of the ASIC Act.
[18] Section 763E of the Corporations Act.

where the product is incidental to the issuer's primary purpose and not the main purpose. The benefit of the exemption is there is no requirement to be licensed.

Early access to superannuation
Some firms seek to 'assist' consumers access their superannuation early and charge a substantial fee or a percentage of the amount released.[19] There are limited circumstances upon which early access to superannuation can be granted, including compassionate or hardship grounds. People in these circumstances should be able to access superannuation on their own or with the help of a financial counsellor. However, some firms, including those operating in the financial services marketplace, seek to charge for this service regardless of whether the hardship claim is successful. It is unlikely that they need to be licensed.

Consumer advocates have previously argued that legislative loopholes and complexity enable regulatory arbitrage.[20] Should financial services receive a carve-out from the unfair trading prohibition, there will be an even greater incentive for businesses to position themselves as unregulated financial services providers, to avoid the prohibition that would apply to other sectors. Unregulated financial service providers have demonstrated to cause immeasurable consumer harm over the past decade;[21] and they will be precisely the businesses that benefit from the carve out of unfair trade practices for financial services. This seems a very odd and unintended result of this reform.

Recommendation 3:
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costs that accrue from regulatory arbitrage and the distortion of business choices should the prohibition not apply to financial services.

4. Limits of broad-based financial services consumer protections and standards.

4.1 The 'efficient, honest, and fair' duty.

Licensed credit and financial services providers are required to meet a general obligation to 'do all things necessary to ensure that financial services/credit activities covered/authorised by the licence are provided/engaged in efficiently, honestly, and fairly'.[22] This obligation or norm applies broadly to banks, other authorised deposit taking institutions, insurers, investment firms, superannuation funds, and credit providers.

[19] See, eg, https://www.mysupercare.com.au/our-services/

[20] See, e.g., Joint Consumer Submission, *ALRC Report 137 Inquiry into Financial Services Legislation,* response to Interim Report A, November 2022.

[21] Financial Counselling Australia 2021, It's Credit, It's Causing Harm and It Needs Better Safeguards: What Financial Counsellors Say About Buy Now Pay Later, https://www.financialcounsellingaustralia.org.au/docs/its-credit-its-causing-harm-and-it-needs-better-safeguards-what-financial-counsellors-say-about-buy-now-pay-later/

[22] Section 912A(1), *Corporations Act 2001* (Cth); section 47(1)(a), *National Consumer Credit Protection Act 2009* (Cth).

This 'free-floating norm or duty' is intended to apply in an infinite variety of circumstances, including business models, sales techniques, marketing, risk management, and communications with customers.[23] However, recent case law suggests that this obligation is limited in its scope and is difficult to enforce. In substance, this duty is fundamentally different from a proposed prohibition focused on unfair trade practices.

As outlined in the joint consumer submission to the Consultation RIS, a particular benefit of a prohibition on unfair trade practices will be its focus on promoting business practices that enable consumer autonomy, choice, and access. The definition proposed by the joint consumer submission includes as unfair conduct or practices that:

- unreasonably distort or undermine the autonomy and economic choices of consumers;
- take unreasonable advantage of consumers' lack of understanding, consumers' ability to protect their own interests, or consumers' reasonable reliance on the trader;
- omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information; or
- unreasonably inhibit access to or enjoyment of goods or services already purchased.

This definition is squarely aimed at promoting a business norm that enables consumer autonomy and choices to be respected, and for consumers to be able to access goods or services (including customer service) without unreasonable barriers. In other words, it is aimed at promoting good consumer outcomes, to the benefit of the whole community and the economy more broadly.

The duty to provide services 'efficiently, honestly, and fairly', by contrast, seems to be more focused on the processes and systems that licensees should have in place, rather than customer outcomes produced by their business practices. It has been interpreted in a variety of ways which differ from the policy intent, for example:

For example, the provision has been described in recent case law as 'a forward-looking obligation'. In *ASIC v Commonwealth Bank of Australia,*[24] Downes J stated that the obligation is concerned with 'the taking of steps to achieve compliance with the statutory norm **before** any specific instance of non-compliance has arisen'.

In that case, the court determined that the bank's failure to apply fee waivers to account holders who were entitled to them did not of itself demonstrate a breach of the obligation. The court's interpretation suggests that the 'efficient, honest and fair' duty relates to the processes a licensee has put in place, not the actual conduct or decision the licensee has undertaken.

Previous decisions have largely interpreted the obligation as a composite one, rather than considering it imposes three standalone norms relating to efficiency, honesty, and fairness.

Perhaps the most significant appellate discussion of this provision was the Full Federal Court case of *ASIC v Westpac Securities Administration Ltd.*[25] In that decision, Allsop CJ described the provision as

[23] Leif Gamertsfelder, 'Efficiently, honestly and fairly: A norm that applies in an infinite variety of circumstances' (2021) 50 *Australian Bar Review* 345.
[24] [2022] FCA 1422 at [156].
[25] [2019] FCAFC 187.

follows: 'the rule in the section is directed to a social and commercial norm, expressed as an abstraction'.[26] This suggests that it operates together as one norm.

In the earlier decision of *Story v National Companies and Securities Commission,* Young J said that the provision requires a licensee to go about their duties 'efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty'.[27] This might suggest that the norms need to be traded off against each other, potentially dulling the consumer benefits associated with a fairness norm. In response to this, the Australian Law Reform Commission has made proposals to separately articulate each of the individual terms, however this has not passed into law.[28]

Furthermore, recent case law has also suggested that fairness, in the context of the duty to provide services efficiently, honestly, and fairly, requires an equal assessment of the interests of both parties, rather than an emphasis on the interests of consumers, or whether the conduct or practices undermines consumer autonomy and decision-making.

In *ASIC v AGM Markets Pty Ltd (in liq) (No 3)*,[29] Beach J stated: "Fairness is to be judged having regard to the interests of both parties. Other statutory provisions may be designed to tilt the scales, but not s 912A(1)(a) and the statutory composite norm it enshrines. Disproportionate emphasis should not be given to what is the third part of a composite phrase in a manner which creates unsatisfactory asymmetry in favour of those with whom the licensee deals. This section is not a back door into an 'act in the [best] interests of' obligation."

The courts' interpretation of the 'efficiently, honestly and fairly' duty imposes quite a different standard to that which we might expect from a prohibition on unfair trade practices. The courts' focus appears to be on balancing the legitimate interests of the firm compared to the interests of consumers. As outlined in the joint consumer submission to the Consultation RIS, we consider that a prohibition on unfair trade practices should focus on the impact of business conduct or practices on the consumer – the existing 'efficiently, honestly, and fairly' duty cannot.

A further limitation of the 'efficiently, honestly, and fairly' duty is that it applies to 'financial services covered by the licence' and 'credit activities authorised by the licence'. This means that business practices that are outside the scope or are not authorised by the licence may not be covered by the duty.

There are examples of business conduct and practices, particularly among complex business arrangements that are common in financial services, that fall outside what is authorised by a licence. An example is where licensees' authorised representatives—for example, credit representatives – can be authorised to engage in credit activities pursuant to section 64 of the *National Consumer Credit Protection Act 2009.* While licensees are intended to be responsible the conduct of representatives[30], this will be unlikely to be the case where they are not also considered an agent

[26] At [173].
[27] *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661.
[28] Australian Law Reform Commission, Report 137, Financial Services Legislation, Interim Report A, Proposal A20, page 510, November 2021, https://www.alrc.gov.au/publication/fsl-report-137/.
[29] [2020] FCA 208.
[30] See Division 4, Part 2-3.

under law. This is because, under agency law, an agent can be separately liable from a principal. For example:

- an agent can be personally liable in circumstances in which it does not disclose either the name or existence of the principal to the contracting party.[31]
- an agent can be personally liable to a third party where the third party suffers loss or damage as a result of a wrongful act committed by an agent.[32]

In these circumstances, the agent's conduct may not be 'activities authorised by the licence', and thus they may not be covered by the duty to provide services 'efficiently, honestly and fairly'.

For these reasons, we consider that the duty to deliver services efficiently, honestly, and fairly would not deliver the same standard as a prohibition on unfair trade practices, and therefore the prohibition should be extended to financial services.

4.2 Design and distribution obligations.

Design and distribution obligations (DDOs), which apply to all issuers of financial and credit products, are intended to help consumers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products. They do this by:[33]

- requiring product issuers to design financial products that are likely to be consistent with the objectives, financial situation and needs of the consumers for whom they are intended (issuers are required to prepare a 'target market determination' which sets out the target market for a product);
- requiring product issuers and distributors to take 'reasonable steps' that are likely to result in financial products reaching consumers in the target market defined by the issuer; and
- requiring issuers to monitor consumer outcomes and review products to ensure that consumers are receiving products that are likely to be consistent with their likely objectives, financial situations, and needs.

While the regime does require a focus on product governance arrangements, it does not establish any individual consumer right or standard to specific transactions. Further, the DDOs do not require product issuers to undertake a product suitability test or assess someone's personal circumstances at the point-of-sale. It also does little to address barriers that could prevent someone from accessing or enjoying services already purchased, for example, customer communications, customer service, and complaints systems. Given this, the regime does not replace the need for an unfair trading prohibition.

ASIC has used the DDOs since it was empowered to do so, which has improved firms' focus on product governance arrangements. In response, firms generally make sure their documentation is compliant with the scheme, particularly their target market determinations. However, it is unclear whether the DDO scheme has resulted in firms remedying unfair business practices that have

[31] *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* (2006) 236 ALR 115 ; [2006] FCA 1324 at [103]–[106] per Kiefel J.

[32] For example, refer to *Sibley v Grosvenor* (1916) 21 CLR 469 ; [1916] VLR 307; (1916) 22 ALR 113, where an agent was held personally liable in the case of a misrepresentation and fraud

[33] Part 7.8A, Corporations Act 2001.

affected customers. This is perhaps not that surprising—the regime was intended to be preventative by encouraging good standards of governance at a product level, it was not designed to address unfair business practices per se. The following examples show that initial regulatory focus has been on the adequacy of product documentation.

Product design and distribution enforcement

Clearview Life Assurance: In July 2023, ASIC issued two interim stop orders relating to income protection products because it considered there were deficiencies in the target market determinations. Within a few days, Clearview updated its target market determination and ASIC's orders were lifted.[34]

Storehouse Residential Trust: In September 2023, ASIC issued an interim stop order on Storehouse Residential Trust, a registered managed fund promoted by K2 Asset Management Ltd (K2). ASIC considered that the target market determination defined the target market too broadly, did not properly consider the risks and features of the fund, and contained inconsistent information. Following the interim stop order, K2 made amendments to the determination, and the interim order was lifted.[35]

Spaceship Super: In June 2023, ASIC interim stop orders in relation to Spaceship Super and other managed funds due to deficiencies in target market determinations. ASIC considered that the target market in the TMD for the Spaceship Super product was defined too broadly and had not properly considered the risks of the product options. In the days following, the target market determination was updated, and the stop order was lifted.[36]

Humm: ASIC made an interim stop order on 25 May 2023 preventing Humm BNPL Pty Ltd from issuing its buy now pay later (BNPL) product because of deficiencies in its target market determination. The order was revoked by ASIC on 26 May 2023 following immediate corrective action by Humm to address the design and distribution obligation deficiencies identified by ASIC.[37]

[34] ASIC, Media Release, ASIC issues first tsop order for a life insurance product, 18 July 2023, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-192mr-asic-issues-first-stop-order-for-a-life-insurance-product/#:%7E:text=ASIC%20made%20the%20interim%20stop,objectives%2C%20financial%20situation%20or%20needs.

[35] ASIC, Media Release, ASIC halts offer of Storehouse Residential Trust, 1 September 203, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-241mr-asic-halts-offer-of-storehouse-residential-trust#!page=2

[36] ASIC, Media Release, ASIC halts offer of Spaceship Super and Spaceship Voyager Funds, 2 July 2023, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-140mr-asic-halts-offer-of-spaceship-super-and-spaceship-voyager-funds/

[37] ASIC, Media Release, ASIC issued interim stop order on Humm following buy now pay later review, 2 July 2023, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-142mr-asic-issued-interim-stop-order-on-humm-following-buy-now-pay-later-review/

4.3 Ban on unsolicited selling of products.

The Corporations Act includes a broad prohibition on offering financial products for issue or sale to a retail client if the offer is made during, or because of, an unsolicited contact. The provision is limited in that it does not apply to credit products, nor does it apply to financial services.[38]

This prohibition is intended to provide consumers with a degree of control over their decisions to purchase financial products—it allows them to determine how they want to be contacted and the kinds of products they are offered. 'Unsolicited contact' is contact by telephone, face-to-face, or any other real-time interaction in a discussion or conversation to which the consumer did not consent.

While this is a vital prohibition, it does not effectively respond to the full extent of market practices today that undermine consumer autonomy or distort consumer choice. For example, a recent investigation by Super Consumers Australia found that businesses are taking advantage of the financial services carve-out from anti-hawking rules.[39]

Unfair practices can be far more nuanced and use design tricks or other tactics that impede consumer's ability to make choices that meet their needs and objectives. Another concerning example of unsolicited marketing that contributed to consumer harm involved the funeral plan provider, Aboriginal Community Benefits Fund (also known as Youpla). ACBF engaged in extensive unsolicited marketing of its funeral plans in Aboriginal and Torres Strait Islander communities, including at homes, workplaces, and community events. In 2004, ASIC brought proceedings against ACBF alleging breaches of anti-hawking (unsolicited marketing) rules.[40]

However, ACBF's unfair business practices were much broader than unsolicited sales. It was able to change its product offering slightly to avoid the prohibition, but more importantly relied on a range of other unfair market practices to distort the choices of First Nations consumers. Chief among these was its failure to be upfront and clear about the fact that the firm was not owned or managed by Aboriginal persons or the fact that the products did not have Aboriginal community approval.

In 2020, ASIC launched court action against ACBF alleging implied representations made by it in marketing material and point of sale documentation were false. The alleged representations included that ACBF Funeral Plans was owned or managed by an Aboriginal person or persons and that the ACBF Plan had Aboriginal community approval. However, in September 2023, the Federal Court held that ACBF did not engage in such misleading representations.[41] ASIC has appealed this judgment.[42]

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[38] There are specific rules that apply to unsolicited credit, i.e. the prohibition on sending unsolicited credit or debit cards in the ASIC Act (section 12DL), the prohibition on making unsolicited offers or invitations to enter into a small amount credit contract and consumer leases (section 133CF and 179VA of NCCPA), and third-party vendor introducers cannot make unsolicited contact unless they have a credit licence (regulation 23(4), NCCP Regulations)

[39] Super Consumers Australia 2023, Why Cold Calling Must Stop, https://www.choice.com.au/money/financial-planning-and-investing/superannuation/articles/why-cold-calling-must-stop

[40] *ASIC v Aboriginal Community Benefits Fund Pty Ltd* [200] FCA 178.

[41] *ASIC v ACBF Funeral Plans Pty Ltd* [2023] FCA 1041.

[42] ASIC, Media Release, ASIC appeals Federal Court findings relating to representations made by ACBF Funeral Plans, 4 October 2023, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-267mr-asic-appeals-federal-court-findings-relating-to-representations-made-by-acbf-funeral-plans/

The joint consumer submission to the Consultation RIS proposes that one limb of the definition of unfair (for the purposes of the unfair trading prohibition) includes conduct or practices that 'omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information'. This limb would address gaps in anti-hawking rules, and those caused by court interpretations applied to misleading and deceptive conduct. If an unfair trading prohibition had applied, this definition would have required ACBF to be more upfront and proactively inform its customers the truth about its business. It would have been a clear breach to rely on the type of marketing that ACBF employed, as it used First Nations language, colours, and logos without being upfront and clear about the nature and ownership of the business.

Recommendation 4
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costs that accrue from existing gaps in general financial services consumer protections.

5. Limits of specific protections applying to particular financial products and services.

5.1 Best interests duties in advice and broking.

Both financial advisers and mortgage brokers have an obligation to act in the best interests of their client.[43] This is a very important protection designed to safeguard the interests of consumers who rely on a professional adviser. Broadly, the requirement means that advisers and brokers should determine and assess the best interests of consumers, and present recommendations in line with those interests. The protection addresses a range of risks and potential harms, including those arising from conflicts of interest, the risk of inaccurate or non-comprehensive advice, and the risk of unsuitable advice.

While it is a vital consumer protection, it comes with several limitations and gaps, underscoring the need for an economy-wide unfair trade practices provision.

First, in relation to financial services licensees, the best interest duty applies to the provision of 'personal advice'. Financial products can be sold without personal advice, whereby the financial services licensee markets products without tailoring the information to the specific circumstances of the consumer. This is very common across banking, insurance (including life insurance), and superannuation. In these circumstances, the licensee is not required to consider the best interests of consumers.

Second, in relation to credit, the obligation applies only in relation to mortgage broking or advice. It does not apply to financial brokers more broadly, including brokers who arrange personal loans, car finance, or small business loans.

These gaps mean that the obligation cannot ensure that financial services licensees do not engage in unfair practices. Some examples of potential unfair practices involving advisers and brokers include:

[43] Section 961B, Corporations Act; sections 158LA and 158LE, NCCPA.

- Several insurance brokers call consumers unexpectedly after they make an inquiry via an online quote process, without having made this expectation clear on their website—this can subvert consumer choices by subjecting them to pressure;
- Brokers which outsource lead generation to third parties who engage in targeted advertising online, collect consumer information, and pass it on to a licensed adviser.

5.2 Best financial interests in superannuation and related covenants.

The best financial interest duty applies to superannuation trustees.[44] It places an onus on entities to ensure, and demonstrate, that all decisions are consistent with the best financial interests of their members. Decisions must be supported by strong analysis and evidence, as there is a reverse onus of proof that assumes trustees have breached the duty unless they have evidence to demonstrate otherwise.

The best financial interests duty applies along with other superannuation covenants, including to act honestly; to exercise a prudent degree of care; skill and diligence; to address conflicts of interest; as well to formulate and regularly review investment, insurance and retirement income strategies.

These covenants apply at the entity, system, or management level, and do not give rise to individual consumer rights. For example, the best financial interests duty is owed to the membership of the superannuation fund as a whole rather than to an individual. This can mean that harms or unfair practices affecting a cohort of fund members—for example, casual workers who may be negatively impacted by particular insurance arrangements—cannot be properly addressed by the covenants.

This conflict between duties owed to all members collectively and the community expectation to treat individual members fairly plays out in relation to customer service. Arguably, superannuation funds have, in an effort to save money for members collectively, not invested sufficiently in customer service and complaints systems (including in relation to insurance claims handling). In 2022-23, complaints about delays in handling insured benefit claims in superannuation soared by 136 percent.[45] AFCA also reports account administration complaints have increased over 30 percent last year, with complaints involving delays with rollovers and withdrawals, failures to consolidate duplicate errors, and errors implementing investment switches. These failures have led the Minister for Financial Services to call on superannuation funds to improve customer service.[46] Unfortunately, the existing covenants and standards applying to superannuation funds have not provided incentives to ensure good customer service at an individual level.

Poor customer service and complaints systems can particularly disadvantage consumers experiencing vulnerability. Complex and inaccessible interfaces pose challenges for people with disability, limited tech literacy, or those with English as an additional language; automated responses and rigid scripts fail to provide the personalised support needed by many vulnerable customers; while reliance on digital technologies excludes those facing the digital divide, such as those on low incomes, people in regional and remote areas, and some elderly people. Furthermore, delays and

[44] Section 52A(c), Superannuation Industry (Supervision) Act 1993.
[45] AFCA Annual Review 2022-23, https://www.afca.org.au/annual-review-superannuation-complaints
[46] The Hon Stephen Jones MP, Address to the AFR Super and Wealth Summit 2023, 31 October 2023, https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-afr-super-and-wealth-summit-2023

long wait times and inefficiencies can disproportionately affect those with limited resources or health issues. It is clearly unfair if customer service systems lack the flexibility, efficiency, and empathy required to effectively support and accommodate the needs of diverse populations and people experiencing vulnerability.

Another aspect of customer service where unfair practices have emerged relates to the communications super funds which failed the performance test were required to send members. An analysis of communications by Super Consumers Australia[47] demonstrated that some funds obfuscated the primary message intended by the communication. Some funds included unnecessary information in the letters to confuse members and distract from the test failure, while some discredited the performance test methodology, and others referred to other irrelevant awards or rankings their product had received. This is unfair because it effectively manipulates the primary message that is intended by the legislative communication requirements.

Beyond customer service, these covenants do not easily apply to third parties in the superannuation ecosystem, limiting their impact. This can mean unfair practices continue to affect consumers in relation to their superannuation, but this cannot easily be dealt with by the regulators. For example, employee management firm MYOB has been found to use dark patterns, choice architecture, and fine print to steer people towards advertised funds.[48] These advertised funds included Slate Super, a high-fee fund owned by MYOB via subsidiaries.[49] A Super Consumers Australia investigation found that users of MYOB's onboarding software, Flare HR, were pointed towards prominent and colourful options to pick one of three "featured funds", with options to stick with their current fund below. The unfair practice in this instance was deployed by the employee onboarding third parties, rather than the superannuation fund themselves.

Should an economy-wide unfair trading prohibition apply to financial services broadly, this will help address unfair practices by third parties and aligned entities that may not be providing financial services directly. This will rebuild consumers' trust and confidence in the finance sector, by reducing the opportunity for gaps in the consumer protection framework.

5.3 Utmost good faith in insurance

Both insurers and their customers owe each other a duty of utmost good faith in all their dealings with each other—for example, they cannot rely on a term in an insurance contract if to do so would be to fail to act with the utmost good faith.[50] This is an implied term in every insurance contract and sets an important consumer protection standard.

However, close analysis confirms that the duty of utmost good faith is about candour, not community expectations about fairness. There is no statutory definition of the duty, but courts have

[47] Super Consumers Australia, Are our funds being honest? A fact check on underperforming super fund communications, https://www.superconsumers.com.au/are-our-funds-being-honest-a-fact-check-on-underperforming-super-fund-communications

[48] Super Consumers Australia 2023, MYOB's new HR platform is funnelling people into a high-fee super fund, https://www.choice.com.au/money/financial-planning-and-investing/superannuation/articles/myob-flare-hr-and-supe

[49] APRA 2023, Choice heatmap August 2023, https://www.apra.gov.au/sites/default/files/2023-04/Choice%20Heatmap.xlsx

[50] Section 14, Insurance Contracts Act.

held that the duty requires the person buying the policy to make full disclosures, and the insurer to comply with commercial standards of decency.[51] It does not require one party to prefer the interests of the another party to its own interests,[52] and a lack of honesty is not necessarily a breach of a prerequisite to a breach of the duty.[53]

Furthermore, a report by Consumer Action Law Centre in 2018 found that external dispute resolution provider the Financial Ombudsman Service had rarely invoked the duty of utmost good faith to find in favour of consumers, while the vast majority of cases involving the duty (83%) involved an insurer arguing a breach of the duty by the customer due to fraud, being misleading or untruthful, non-disclosure or not co-operating. This analysis confirms the limitations of the provision in providing consumer protection, let alone promoting standards of fairness.[54]

Since April 2021, unfair contract term laws have been extended to insurance. This reform recognises the imbalance of power between consumers and insurers, and the risks that arise for consumers in the contractual bargain where they have no ability to negotiate standard-form insurance policies. While this was an important reform, it does not adequately deal with unfair practices beyond the terms of the contract.[55]

Examples of unfair practices in relation to insurance include:

- Price walking—this involves insurers increasing prices for existing customers at renewal compared to new customers for the same risk.
- Monthly pricing higher than annual prices—insurance firms can charge higher amounts for customers who pay their premiums monthly, instead of yearly.
- Denying cover for non-disclosure when the matter not being disclosed is unrelated to the risk insured; consumer advocates have raised this issue in the context of insurance application forms that require disclosure of bankruptcy or insolvency.
- Increasing annual insurance premiums substantially without explaining why, meaning the consumer is unable to take steps to mitigate the price increase.

For the prohibition on unfair trade practices to apply to insurance, consequent reform will be required to insurance legislation. This is because section 15 of the *Insurance Contracts Act 1984* (Cth) provides that a contract of insurance is not capable of being made subject of relief 'on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable'. When the prohibition on unfair contract terms was extended to insurance, amendments were made to section 15; such amendments would need to be extended in relation to unfair trade practices. It seems odd and inconsistent for licensed insurance firms to be required to 'provide services efficiently, honestly, and fairly' but for insurance contracts to be limited by section 15.

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[51] *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] 235 CLR 1

[52] *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd* (2009) 240 CLR 391.

[53] *Gutteridge v Cth* [1993] QSC 199

[54] Consumer Action Law Centre, Denied: Levelling the playing field to make insurance fair, https://consumeraction.org.au/denied-levelling-the-playing-field-to-make-insurance-fair/, page 8.

[55] UCTs still do not apply to group insurance through super, because the contract is between the trustee and the insurer rather than the consumer and the insurer. This is a further example of a misalignment referred to in section 2 above.

Recommendation 5
In considering the regulatory impact of an unfair trading prohibition, Treasury should consider the costly gaps in protections that apply to specific financial products and services.

Recommendation 6
When extending the prohibition on unfair trade practices to insurance, amend section 15 of the *Insurance Contracts Act* so that there are no limitations to its application.

6. Further benefits extending an unfair trading prohibition to financial services

6.1 Fairness and external dispute resolution

A major benefit of extending an unfair trading prohibition to financial services is that it will support alignment with standards that apply in external dispute resolution.

The rules of the Australian Financial Complaints Authority (AFCA) provides that when determining a complaint, AFCA must consider what is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, good industry practice, and previous relevant determinations.[56] For superannuation complaints, AFCA must affirm a decision or conduct of a super fund trustee or other decision maker if AFCA is satisfied that the decision was fair and reasonable.

AFCA has developed a fairness jurisdiction framework to help understand, explain, interpret, and apply AFCA's rules and fairness jurisdiction.[57] The framework incorporates fairness tests, including fair dealing, fair service, fair treatment, and fair remediation.

Fairness at AFCA

Fair dealing: ensuring that one party does not take unfair advantage of another:
- in the nature of the bargain struck;
- in the circumstances of entering that financial arrangement.

Fair treatment: ensuring that one party is not treated inequitably or in a way that is adverse to their interests.

Fair service: delivering quality, professional financial products and services in a manner that:
- is fit for purpose;
- meets a consumer's legitimate interests and reasonable expectations.

Fair remediation: A prompt and proportionate response when things go wrong.

[56] AFCA Rules, A.14.2

[57] AFCA, Fairness Jurisdiction Project, https://www.afca.org.au/news/latest-news/afca-publishes-fairness-jurisdiction-project-outcomes-report

This framework aligns with the definition of unfairness put forward by the joint consumer submission to the Consultation RIS. In particular,

- 'Fair dealing' aligns with limb 2 of the proposed definition, being taking unreasonable advantage of consumers' lack of understanding or inability to protect their own interests, or consumers' reasonable reliance on the trader—both adopt the concept of taking unfair advantage;
- 'Fair treatment' aligns with limb 1 of the proposed definition, being unreasonably distorting or undermining the autonomy or treatment and economic choices of consumers—both adopt ensuring consumers are able to make choices in their own interests;
- 'Fair treatment' aligns with limb 4 of the proposed definition, being 'unreasonably inhibiting access to or enjoyment of goods or services—both go to ensure access to customer support without unreasonable barriers.

Should the prohibition on unfair trade practices apply to financial services, this will thus improve alignment with the disputes regime applying to financial services. It will also improve firm understanding of fairness and what behaviour is required by providing for a clear legislative standard. Moreover, it is likely to improve consumer outcomes by applying that fairness standard broadly and proactively, not just in a responsive way during external dispute resolution where problems have already occurred.

Recommendation 7
In considering the regulatory impact of an unfair trading prohibition to financial services, Treasury should recognise the specific benefits and efficiencies associated with aligning broad-based regulatory standards with the fairness standard that is already applied by the Australian Financial Complaints Authority.

6.2 Fairness and industry codes

Beyond external dispute resolution, the prohibition on unfair trade practices is also likely to support the regime for industry codes. Many industry codes of practice in the finance sector already reference fairness, for example:

- Clause 10 of the Banking Code of Practices states that signatories will engage with customers in a fair, reasonable and ethical manner;
- Clause 21 of the General Insurance Code of practice says that signatories, and distributors and service suppliers, will be honest, efficient, fair, transparent and timely in dealings with customers;
- Clause 5 of the Insurance Brokers Code of Practice provides signatories will discharge their duties diligently, competently, fairly and with honesty and integrity.
- Various clauses of the Customer Owned Banking Code of Practice promise fairness, including in relation to sales, fair terms and conditions, fair resolution of complaints, fair and reasonable fees and charges, and fairness where a customer is experiencing difficulty.[58]
- Clause 1.6 of the Life Insurance Code of Practice applies fairness as a key principle and promise.
- Clause 9 of the Buy Now Pay Later Code of Practice promises that signatories will be fair, honest, and ethical.

[58] See clauses 5, 10, 31, 126.

- Clause 3 of the Online Small Business Lenders Code of Practice says that signatories will act fairly, honestly, be ethical and treat customers reasonably.

It is thus clear that fairness is a standard that the financial services sector supports, as articulated in its various codes of practice. Applying a legislative prohibition on unfair trade practices is likely to support these industry promises by providing a consistent definition of unfairness across all industry sub-sectors. This will improve business understanding about the norm of conduct expected, and consequently be likely to improve standards of conduct and practices. Industry codes can then better articulate how that particular sector will meet the standard, considering the particular circumstances and practices of that industry. This may, overtime, contribute to improvement in the standards of consumer protection delivered by industry codes.

Recommendation 8
In considering the regulatory impact of an unfair trading prohibition, Treasury should recognise the benefits associated with providing for a consistency of standard across industry codes when it comes to fairness.

7. Preferred option when applying to financial services.

Consistent with the approach to non-financial services, consumer advocates consider that Option 4 as proposed by the Consultation RIS should similarly apply to financial services. Option 4 proposes a combination of general and specific prohibitions on unfair trading practices and should be preferred as the policy option with the greatest net benefit.

The general prohibition would ensure protection from the widest range of both current and emerging unfair trade practices. The inclusion of specific prohibitions would also create public benefits through clearly capturing unfair practices that are widespread today through a 'blacklist'.

7.1 General prohibition can capture emerging and 'innovative' business models.

A robust general prohibition would have a particular benefit in addressing unfairness in 'innovative' or unusual business models that might not be well adapted to existing consumer protections.

One example of an unusual business model in the finance sector that has been found by the High Court not to be unconscionable is 'book up'.[59] The book-up informal credit scheme, in the context of the *ASIC v Kobelt* decision but elsewhere too, involved a shopkeeper allowing First Nations customers to purchase goods and second-hand vehicles on credit by providing their debit cards, PINs, and details of their income. The shopkeeper used these details to withdraw the whole of the customers' money from their bank account on the day they were paid. Around half of withdrawn money was used to pay down debt, while the balance was to be used as credit for items or cash advances at the store. The credit charges were not disclosed but were high.

[59] *ASIC v Kobelt* [2019 HCA 18.

The arrangement may be said to be unfair because it unreasonably distorts or undermines the autonomy and choices of the consumers who use it. The arrangement in practice tied the customers to the store and impeded their ability to shop elsewhere.

7.2 ASIC should be empowered to specify a 'blacklist' of unfair practices in financial services.

The joint consumer submission proposed that the regulator should be empowered to set the specific list of unfair practices.

For financial products and services, the regulator should be ASIC. This is because ASIC holds specialist expertise and knowledge regarding the financial sector, and it is closer to market participants and consumers. ASIC also has well-developed consultation arrangements that could inform the development of the blacklist.

ASIC already has powers to make orders on a temporary basis where a financial product or credit product has resulted, will result or is likely to result in significant consumer detriment.[60] ASIC can also make various orders relieving or modifying regulatory obligations. Providing ASIC with the power to develop a blacklist of specified unfair trading practices is thus aligned with existing ASIC powers.

7.3 Why alternative options will not produce a net public benefit.

The other options proposed by the Consultation RIS are unlikely to produce the same net public benefit:

- Option 1, which proposes the status quo, may set the green light for unfair practices. As outlined by the joint consumer submission to the Consultation RIS, it is likely to embed existing costs of unfair trade practices on consumers, competitive processes, the economy, and society more broadly.
- Option 2, which proposes retaining the core prohibition of 'unconscionable' conduct rather than 'unfair' conduct also risks being costly. As outlined by the joint consumer submission to the Consultation RIS, previous legislative efforts to broaden the scope of unconscionable conduct have failed and it is likely that the courts would continue to read down the provision. This approach would also miss the opportunity to garner benefits associated with aligning fairness across the financial services sector, including with standards already applied during external dispute resolution.
- Option 3, which would apply a general prohibition on unfair trade practices but not include a blacklist of specified unfair trade practices, would likely be more costly compared to Option 4. This is because it would risk business uncertainty over the meaning of fair-trading practices, which can be partially avoided if there is a clear blacklist. The financial services sector has a history of seeking prescription when the legislature imposes broad outcomes-based regulation. It is likely to be costly to industry, regulators, and government if there is a general standard without also the certainty provided by a blacklist.

[60] See Part 7.9A Corporations Act, Part 6-7A of NCCPA.

Recommendation 9:
An unfair trading practices prohibition should adopt the model proposed in Option 4 of the Consultation RIS, incorporating a general prohibition together with a 'blacklist' of specified unfair trade practices.

Recommendation 10:
The 'blacklist' of unfair trade practices should be specified and managed by ASIC, and subject to public consultation.

8. Concluding remarks

Financial services should be included in the current policy assessment process relating to an economy-wide prohibition on unfair trading.

This submission has outlined several reasons why this is necessary:

- **Risk of delay**: Keeping financial services separate from the broader policy-making process might delay or even halt the regulation impact assessment process promised for 2024.
- **Market distortions**: Exempting financial services from this law could create market distortions and opportunities for regulatory arbitrage.
- **Inadequate current protections**: Current laws and standards in financial services don't fully protect consumers from unfair trade practices, indicating gaps in the consumer protection framework.

Applying the prohibition to financial services would benefit consumers and align standards, especially benefiting First Nations people who have historically been disproportionately affected by unfair trading practices by financial services providers. It would also assist industry by describing a clearly articulated norm, thereby improving business understanding and recognition of fairness and promoting consistency across all aspects of business-customer relations.