

Unfair Trading- General Unfair Trading Prohibition

1. Introduction

- 1.1 Consumer Affairs Australia and New Zealand (“**CAANZ**”) is considering whether a general prohibition on unfair trading should be incorporated into the *Australian Consumer Law* (“**ACL**”). It has been suggested that a prohibition of this nature should be enacted to target systematic and pervasive conduct in the market, rather than emphasising individual conduct. The Consumer Action Law Centre (“**CALC**”) has submitted that such a provision could help protect vulnerable consumers.

2. Disadvantages to a general unfair trading prohibition

- 2.1 It has been suggested by some stakeholders that the concept of “fairness”, as set out in the EU’s Unfair Commercial Practices Directive (“**EU Directive**”), should be used as a basis for a general prohibition on “unfair trading” in the ACL. We consider that this notion of “fairness” is inappropriate for Australia. “Fairness” is derived from the decisions of the European Union Court of Justice applying principles of European law, which applies different principles to those applied in common law jurisdictions, like Australia. It is an unfamiliar concept under Australian law and will cause confusion and uncertainty for Australian businesses.
- 2.2 The Business Council of Australia has submitted that a general prohibition of this type could increase the regulatory burden on businesses and lead to higher compliance costs. Regulation of this nature (and the consequential uncertainties) is likely to stifle investment and commercial innovation. This is likely to ultimately deliver inferior outcomes for Australian consumers. WorldVentures Marketing Pty Ltd (“**WV**”) supports this submission.
- 2.3 Any general prohibition would result in duplication with prohibitions already included under current law. The Interim Report has stated that there is likely to be a substantial overlap between a general unfair trading prohibition, taken from an international model, and current Australian law. A general unfair trading prohibition would be redundant and needlessly complicate the Australian legal framework.

3. There is no evidence of a gap in the current law that would justify an economy wide approach.

- 3.1 The Interim Report noted that, if a new general prohibition on unfair trading were to be introduced into the ACL, it would need to be considered carefully and backed by evidence that there is a gap in the current law which needs to be addressed and that an “economy-wide” approach would be appropriate.
- 3.2 Stakeholders have referred to the EU Directive which has been implemented in the UK and contains a three-tiered approach:
- first tier – general prohibition against unfair commercial practices;
 - second tier – prohibitions against misleading and aggressive practices; and

- third tier – a blacklist of circumstances which are prohibited eg stating a product is only available for a limited time.

(a) The first tier

The CALC has argued that Australia has a gap in its existing law when compared to the EU Directive. As evidence for this argument, the CALC has submitted that Australia does not have an equivalent provision to the first tier general prohibition of unfair commercial practices in the EU Directive.

The concept of statutory unconscionable conduct in section 21 of the ACL is similar to the notion of ‘unfair commercial practice’ in the EU. Conduct which could fall under a general prohibition modelled on the EU Directive appears to already be covered by section 21 and related provisions.

(b) The second tier

The Comparative Analysis of Overseas Consumer Policy Frameworks Report prepared by the Queensland University of Technology (“**QUT Report**”) found that the UK regulator has relied upon the second tier prohibitions, rather than the first tier general prohibition, when applying the EU Directive.¹ This raises legitimate concerns about the value of a prohibition modelled on the first tier prohibition in Australia.

The QUT Report considered that there could potentially be a significant overlap between section 18 of the ACL and the second-tier prohibition on unfairness in the EU Directive. Any behaviour which would be captured by the second-tier prohibition is likely to be covered by section 18.

(c) The third tier

Some stakeholders have commented that the ACL already prohibits conduct appearing on the “blacklist” in the third tier of the EU Directive. For example, establishing, operating or promoting a pyramid scheme is blacklisted under the third tier of the EU Directive. This is prohibited expressly in Australia by section 44 of the ACL, which makes it an offence to participate in, establish or promote a pyramid scheme.

Several types of conduct specified on the blacklist, which involve misleading or deceptive behaviour, (for example, “deceptive advertising” and “misleading order forms”), are likely to be covered generally under section 18 of the ACL. Misleading and deceptive representations are also likely to be covered by section 29 of the ACL. There appears to be no reason to add a general prohibition to the existing prohibitions in the ACL. It would merely cause unnecessary duplication without offering any benefit to consumers.

As the Business Council of Australia has noted, there is insufficient evidence that the ACL has failed to protect consumers which would warrant a legislative

¹ http://consumerlaw.gov.au/files/2016/05/ACL_Comparative-analysis-overseas-consumer-policy-frameworks-1.pdf

intervention. We agree. There is no necessity to add specific prohibitions to the ACL which reflect the “black-list” in the EU Directive.

- 3.3 The QUT Report examined the US approach on unfair trading and reached the conclusion that the subject matter of many of the US prohibitions is covered by comparable Australian prohibitions. For example, the QUT Report noted that section 5 of the *Federal Trade Commission Act*, which prohibits “unfair or deceptive acts or practices in or affecting commerce”, is quite similar to section 18 of the ACL, which prohibits false or misleading conduct. This is to be expected, as the Australian provision was inspired by its US counterpart.

4. **Conclusion**

- 4.1 There is no gap in the current law when it is compared to the EU Directive. A general unfair trading prohibition should not be contemplated unless there is clear evidence of a gap in the law.
- 4.2 The ACL has largely achieved its statutory aims. It promotes fair trading and consumer protection. The ACL adequately balances the interests of all stakeholder groups in its current form, apart from some elements of the existing unsolicited consumer agreements (“UCA”) provisions which are unduly restrictive on businesses.
- 4.3 The QUT Report has found that Australia offers similar levels of consumer protection to jurisdictions like the UK and the US. The QUT Report has noted that, in this context, consumer protection covers misleading conduct, unconscionable conduct, unfair terms, pyramid selling and door-to-door selling. The QUT Report’s analysis of overseas jurisdictions does not demonstrate a deficiency in Australian consumer protection law which merits any necessity for additional provisions for an economy-wide approach to unfair trading.

Unsolicited Consumer Agreements (“UCAs”)

5. **Direct Selling**

- 5.1 Direct Selling is a business model whereby products and services are sold to consumers away from fixed stores. It encompasses a range of sales scenarios, which may be solicited or unsolicited in nature.
- 5.2 This business model is conducive to using the latest technologies to constantly improve the quality of products and services that are available to consumers. It is an industry which provides flexible and valuable opportunities for thousands of Australians to earn income.
- 5.3 CAANZ has rightly recognised that a complete ban on any particular form of selling (including “direct” selling) would be an extreme regulatory intrusion. Instead, CAANZ proposes four reform options for stakeholders to consider with respect to UCAs.

Option 1 — Maintain the current balance and breadth of the provisions, noting the current gap in available data about the industry and the incidence of consumer problems.

6. The unsolicited selling provisions should not be maintained in their current state. Another approach could adopt features from the New Zealand framework.

6.1 WV considers that some of the UCA provisions are unnecessary, overly restrictive, unfair and anti-competitive. These provisions are conducive to creating risk for businesses engaged in unsolicited selling and there is insufficient evidence that they are beneficial to consumers. The Interim Report noted that there was a lack of evidence across industries and locations concerning consumer harm caused by unsolicited sales. The justification for these provisions was the alleged harm caused to certain consumers. There does not appear to be any such justification from an evidentiary basis.

(a) All stakeholders are encouraged to review the “Conclusion” section of our previous submission. WV considers the New Zealand model to be a preferable approach for two reasons. Firstly, the scope of UCAs, or “uninvited direct sales” agreements as they are known in the *Fair Trading Act 1986* (“FTA”), is much clearer. Section 36K of the FTA states that an agreement will only be an uninvited sales agreement when it is negotiated by a supplier and a consumer in the consumer’s workplace or home, or over the phone. This provides better guidance to direct selling businesses than the current Australian law, which categorises any agreement formed away from a business premises as an UCA.

(b) Secondly, the FTA does not impose restrictions on either the supply of goods and services or the making (or receipt) of payment from the consumer during the cooling-off period. This is preferable to the current restrictions in section 86 of the ACL.

6.2 The restrictions in section 86 of the ACL should be updated to address present deficiencies in the law:

(a) As noted in WV’s previous submission, section 86 of the ACL allows goods valued under \$500 to be supplied to consumers during the cooling off period. However, services valued under \$500 cannot be supplied during the same period. The restriction on the supply of services is inappropriate and discriminatory and should be removed.

(b) Broadly speaking, the restriction on accepting, or demanding, payment during the cooling off period in section 86 is unfairly cumbersome. It is also unnecessary because a supplier is required to immediately return or refund any consideration given by the consumer if a UCA is terminated within the cooling-off period. It can be detrimental to consumers as they may be unable to test the product during the cooling-off period.

6.3 WV considers that the New Zealand and United Kingdom approaches of allowing the supply of services and accepting payment during the cooling off period is a preferable approach to the current prohibition under section 86. Adopting a similar approach in Australia would strengthen the direct-selling industry and align Australia with the best practice model in comparable jurisdictions.



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Option 2 — Replace the cooling-off period with an ‘opt-in’ mechanism

7. **The cooling-off period should not be replaced with an opt-in mechanism.**
- 7.1 The Interim Report demonstrates that there is a lack of evidence across industries and locations concerning consumer harm caused by unsolicited sales. In light of this evidentiary gap, it would be inappropriate for a change to be made to the UCA regime as unfair and as restrictive as the change proposed in Option 2. This change would result in significant and uncertain costs for business. Such a measure will be anti-competitive and will obstruct innovation.
- 7.2 There is an absence of international experience (and no evidence) to demonstrate the viability or practicality of an opt-in mechanism. The QUT Report notes that US law only provides a cooling-off period of three business days. This is considerably shorter than the ten business days mandated under section 82(1) of the ACL. Similarly, the cooling-off period in New Zealand is only five days. The QUT Report has also found that all comparable jurisdictions provide for a cooling-off period.
- 7.3 The ten business day cooling-off period currently presents huge difficulties to businesses. The practice of not taking payment for such a lengthy period of time is not workable in the context of transactions concluded by any means. For example, payment card industry requirements limit the period of time for which card details may be held.

Option 3 — Introduce additional rights and protections for consumers entering into enduring service contracts

8. **Additional rights and protections should not apply to the unsolicited sale of enduring service contracts**
- 8.1 The addition of concepts such as enduring service contracts would only complicate the regime which regulates UCAs. Such a concept would unfairly discriminate against direct selling businesses which supply services for which a payment is required on a monthly basis. In the absence of evidence relating to consumer harm, such a restriction on direct selling businesses is anti-competitive and is unwarranted.
- 8.2 Moreover, it is unclear how enduring service contracts would be defined. There is no obvious way of determining the contractual term that would result in a contract being valid (rather than invalid), or how often products or services should be supplied for, in order to qualify as one of “enduring service”.

Option 4 — Enhance protections for high-risk transactions while reducing regulations for low-risk transactions

9. **There does not appear to be any merit in pursuing a risk-based approach to UCAs.**
- 9.1 Any distinction between “high-risk” and “low-risk” transactions will generate further legal uncertainty. Risk is an ambiguous concept and can only be judged when examining transactions by reference to subjective considerations. As CAANZ has stated, such an approach is likely to add complexity to the law because it involves drawing an arbitrary

distinction between different types of sales. Any risk-based approach should not be applied to Option 2 and 3.

9.2 There is no clear indication that restrictions in the current law target appropriately conduct that gives rise to the greatest risk to consumers. What is clear, however, is the practical difficulties which the current restrictions cause direct selling operators. The restrictions result in arbitrary distinctions between:

- (a) goods valued at under \$500, and
- (b) services value at under \$500,

10. **ACCC enforcement action**

10.1 The QUT Report has demonstrated that the ACCC has successfully enforced the UCA provisions in the ACL when non-compliance occurs.

10.2 In *ACCC v AGL Sales Pty Ltd*, the ACCC successfully argued that a “do not knock” sticker could qualify as a request to leave a customer’s premise as recognised in section 75(1) of the ACL. In *ACCC v Neighbourhood Energy Pty Ltd*, a company was held to be liable under section 77 of the ACL for contraventions of sections 74 (a), (b) and (c) by its dealers.

10.3 These examples demonstrate that the regulator is willing to enforce all the provisions of the ACL to protect consumers. In light of this fact, additional amendments to further restrict UCAs are unwarranted.

Pyramid Schemes

11. **Introduction**

11.1 CAANZ requested submissions in relation to “Other Issues” in the Interim Report. The third issue in the Interim Report was whether the definition of “pyramid scheme” should be broadened in line with CALC’s submission. CALC submitted that an amendment to the definition of pyramid schemes in the ACL is justified. It was argued that pyramid schemes were defined too narrowly and the definition needed to be broadened to capture multi-level marketing (MLM) business models which caused similar levels of harm. CALC submitted that MLMs which do not provide a “realistic chance of a successful return” should be classified as pyramid schemes.

12. **Whether an amendment to the ACL, or to regulators’ activities, is required or justified, and any evidence for this**

12.1 WV submits that the current definition of pyramid schemes is adequate. This definition is well-established and its elements are universally understood by all stakeholders. There has been a long history of Australian case law which has led to a clear understanding of what constitutes a pyramid scheme at law.

12.2 Section 45 of the ACL states that there must be a “participation payment” and a “recruitment payment” in order for there to be a pyramid scheme. A participation payment is where new participants are compelled to make a payment to another

participant(s). A recruitment payment is where new participants are entirely, or substantially, induced to receive a payment or benefit if they enlist new participants, rather than for selling a genuine good or service.

- 12.3 A departure from this definition and the introduction of the “realistic chance of a successful return” test in the manner proposed would lead to the inclusion of a subjective element, such as what constitutes a “successful return”. This could vary from participant to participant, as those involved can have very different motivations for engaging with MLMs. Above all, success is dependent upon a multitude of factors including time, effort, experience and skill. A combination of these factors directly contributes to the quality of the return that an individual will derive from an MLM.
- 12.4 The concept of “realistic chance” is also unhelpful. It is clear that, although the expectation of a return is realistic when a participant engages with an MLM, the reality of market conditions may make this expectation unrealistic. This approach would take a well-understood definition and replace it with an ambiguous and convoluted definition which is likely to be unworkable in practice. Both these concepts are too vague to be coherently implemented in a commercial context.
- 12.5 WV submits that MLM and network marketing are valid business models which are vital for direct selling businesses. People involved in MLMs earn income by selling, or having their downline sell, genuine products (of real value and at a reasonable price) to consumers. An amendment of the type proposed by CALC could threaten the viability of reputable, well-established businesses, and their participants (many of whom are small business owners) and restrict consumer access to popular goods and services. It would negatively affect many stakeholders who have an MLM business model.
- 12.6 In *ACCC v Lyoness Australia Pty Ltd [2015] FCA 1129*, Justice Flick decided that the Lyoness business model was not a pyramid scheme. However, His Honour described schemes such as the Lyoness scheme as “complex and elusive”. With respect to these comments, it is clear that a complex business model is not necessarily linked to the existence of a pyramid scheme.
- 12.7 A court must have regard to the following matters set out in section 46 of the ACL in determining whether participation payments under the scheme are entirely or substantially induced by the potential for new participants to have an entitlement for recruitment payments. Firstly, the court must examine whether there is a reasonable relationship between participation payments and the value of goods and services that participants have a right to supply. Secondly, the court must consider whether there is a focus in any scheme on promoting a participant’s rights to recruitment payments, instead of the participant’s entitlement to earn income through supplying valuable goods or services. Having regard to these matters is entirely adequate for determining whether a business model breaches the pyramid scheme prohibition in the ACL.
- 12.8 WV submits that no amendment to the definition of pyramid schemes in the ACL is justified. There is no evidence of harm to consumers which would warrant a broader definition and the current definition is adequate.
13. **Whether there are more effective approaches to addressing the issue.**
- 13.1 In the absence of any evidence that there is a problem with the current definition of a pyramid scheme, WV submits that there is no need to adopt an alternative approach.



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- 13.2 Some stakeholders are concerned that vulnerable people are being induced into harmful schemes. WV submits that enforcing the ACL against promoters of such schemes is the most effective way of providing redress to these people. This is supported by observations in the QUT Report that the marketing of pyramid schemes may be covered by the general consumer protection provisions of the ACL. Provisions such as sections 18, 21, 29(1) and 37 of the ACL cover a wide range of conduct including misleading and deceptive conduct, unconscionable conduct and the false or misleading representations, which may be made in connection with such schemes.
- 13.3 As stated above, an amended definition would require a decision to be made on subjective matters such as the nature of a “successful return” or a “realistic chance”. There is no guarantee that vulnerable people would be protected from misconduct once these two vague notions have been applied in practice. The current provisions of the ACL would be more effective in this regard.
- 13.4 WV considers that there is no evidence that the current definition of pyramid scheme is deficient.