



Australian Government  
The Treasury



# Protecting consumers from unfair trading practices

Consultation Regulation Impact Statement  
The Treasury

August 2023

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# Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFCA	Australian Financial Complaints Authority
APY	Anangu Pitjantjatjara Yankunytjatjara
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
ATO	Australian Taxation Office
CAANZ	Consumer Affairs Australia and New Zealand
CAF	Legislative and Governance Forum on Consumer Affairs
CASE	Consumers Association of Singapore
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CCCS	Competition and Consumer Commission of Singapore
CEDA	Committee for Economic Development of Australia
CMA	UK Competition and Markets Authority
CPFTA	<i>Consumer Protection (Fair Trading) Act 2003</i> (SG)
CPR	<i>Consumer Protection from Unfair Trading Regulations 2008</i> (UK)
CPRC	Consumer Policy Research Centre
Consultation RIS	Consultation Regulation Impact Statement
Cth	Commonwealth of Australia
DAS	ACCC Digital Advertising Services Inquiry
Decision RIS	Decision Regulation Impact Statement
EU	European Union
FCA	UK Financial Conduct Authority
FTC	US Federal Trade Commission
FTC Act	<i>Federal Trade Commission Act</i> (US)
OECD	Organisation for Economic Co-operation and Development
RIS	Regulation Impact Statement
SG	Singapore
TPA	<i>Trade Practices Act 1974</i> (Cth) (superseded by the ACL in Schedule 2 to the CCA)
UCPD	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market
UK	United Kingdom
US	United States of America



# About this Consultation Regulation Impact Statement

On 9 September 2022, the Commonwealth, State and Territory consumer ministers agreed that the Commonwealth would lead a public consultation on proposed reforms to address unfair trading practices<sup>1</sup> in the Australian Consumer Law (ACL) on behalf of the states and territories.

This Consultation Regulation Impact Statement (Consultation RIS) seeks stakeholder feedback on the policy options it canvasses, including their possible costs and benefits. This paper provides an overview of how unfair trading practices are currently regulated, identifies issues for consumers and small businesses posed by gaps in existing protections, and provides a preliminary impact analysis of the policy options being considered.

Stakeholder feedback, including submissions, comments on regulatory impacts and cost estimates, will be used to develop a Decision Regulation Impact Statement (Decision RIS). This will summarise and assess the evidence gathered, and identify a preferred regulatory response. A timeframe for publishing a Decision RIS has not yet been established but it is likely to occur during 2024.

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1 South Australian Minister for Consumer Affairs, Andrea Michaels MP, '[Cross border collaboration](#)', (Press release, 21 September 2022). See also South Australian Attorney-General's Department, '[Consumer Affairs Ministers meet in Adelaide](#)' (Press release, 21 September 2022).

# Consultation process

## Making a submission to Treasury

Interested parties are invited to comment on the options outlined in this paper. The consultation process is open until 29 November 2023 with the objective of gathering additional evidence and data on the extent of unfair trading practices and to seek views on the benefits and costs of the proposed policy options. In addition, there are a number of targeted consultation questions to consider when making a submission. There is no obligation to answer any or all of the consultation questions, and there is no limit to the length of submissions.

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

Treasury will also be hosting a number of consultation roundtables in the second half of 2023, with details to be published on the Treasury's consultation webpage in due course.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

View Treasury's [Submission Guidelines](#) for further information.

**Closing date for submissions:** 29 November 2023

## Contact information

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Enquiries	Director, Consumer Policy and Product Safety Unit by email <a href="mailto:consumerlaw@treasury.gov.au">consumerlaw@treasury.gov.au</a>

The policy options outlined in this paper have not received Australian Government approval and are not yet law. As a result, this paper is merely a guide as to how the policy options might be implemented to address the problem and improve consumer and small business protections against unfair trading practices under the ACL. We look forward to your feedback.

# Introduction

Unfair trading practices, also known as ‘unfair business practices’ or ‘unfair commercial practices’, are particular types of commercial conduct which are not covered by existing provisions of Australia’s consumer laws (such as misleading or deceptive or unconscionable conduct), but nevertheless can result in significant consumer and small business harm.

Evidence suggests that a large and growing range of commercial practices and business models fall into this category, including in the digital economy.<sup>2</sup> In 2017 Consumer Affairs Australia and New Zealand (CAANZ) presented the Australian Consumer Law (ACL) Review Final Report to Consumer Affairs Ministers, which identified significant stakeholder interest in introducing a general prohibition against unfair trading practices. Federal and State and Territory consumer ministers agreed that the issues identified by CAANZ warranted further exploration through a regulation impact assessment process, including seeking further evidence on the nature of the problem and the extent of consumer harm arising from potential gaps in the current law, and whether there is a need for government intervention.

Reform which addresses unfair trading practices could address harmful commercial practices not currently captured by existing protections in the ACL such as misleading and deceptive conduct and unconscionable conduct provisions. Effective action against oppressive, exploitative or otherwise unfair business behaviour could better protect consumers and small businesses, remove distortions to competition (where firms engaging in unfair behaviours currently gain an advantage over their rivals) and bring Australia into line with other Organisation for Economic Co-operation and Development (OECD) countries. At the same time, taking policy action to deal with unfairness, which in many respects is a subjective concept, poses a number of design and implementation challenges.

This paper confines its attention to a possible unfair trading prohibition under the ACL and does not consider the extension of reform to Australian Securities and Investments Commission (ASIC)-regulated financial services in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). This will be considered through a separate regulation impact assessment process which will be advanced in 2024.

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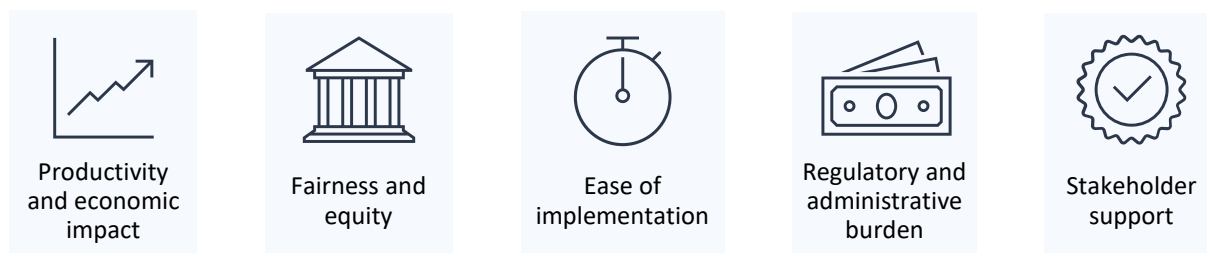
2 Consumer Policy Research Centre, [Submission to the ACCC on the Digital Platform Services Inquiry on updating consumer law for digital platform services – Discussion paper](#), (Submission, 13 April 2022), p. 3; Australian Competition and Consumer Commission, [Digital platforms services inquiry – Interim report 6: Report on social media services](#), (Report, March 2023).



The following policy options are presented for consideration:

- **Option 1:** Status quo (no change)
- **Option 2:** Amend statutory unconscionable conduct
- **Option 3:** Introduce a general prohibition on unfair trading practices
- **Option 4:** Introduce a combination of general and specific prohibitions on unfair trading practices.

This paper will broadly assess each proposed policy option from the perspective of:



In assessing the potential costs and benefits of each policy option, this paper includes indicative case examples and anecdotes. This preliminary impact analysis is provided to inform the consultation process and to help understand and assess the possible net benefit of each option. Additionally, this paper refers to commentary, research, reports and inquiries conducted by government, private sector and not-for-profit stakeholders on unfair trading practices and other related areas without expressing support for, or preference of, any particular policy recommendation or conclusion.

For the purposes of this paper, unless otherwise specified, a ‘consumer’ means an individual person, or small business which employs fewer than 100 persons or has a turnover for the last income year of less than \$10 million. Extending any potential unfair trading prohibitions to small businesses recognises that small businesses can often face the same challenges as consumers when it comes to experiences of unfair trading. This small business threshold is consistent with that in the Government’s recent reforms to unfair contract terms legislation.<sup>3</sup>

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3 See *Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth)*, Schedule 2 (Unfair contract terms), effective 9 November 2023. See also *Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth)*, s 5.

## Key focus questions

Below is a list of key focus questions to consider when reading the paper. A list of questions specific to each policy option is included in the 'Policy Options' chapter.

You are encouraged but not required to respond to the key focus questions when lodging submissions, and you may include other information you feel is relevant but does not relate to any of the questions listed below. Where possible, Treasury encourages the provision of data and evidence to support your views.

### Key focus questions

- Q1.** Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide any evidence to support your position.
- Q2.** How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?
- Q3.** Do you have any specific information, analysis or data that will help measure the impact of the problems identified?
- Q4.** Do you agree with the consultation objectives as outlined? If not, why not?
- Q5.** Are there any other consultation objectives that should be considered in addressing unfair trading practices in Australia?
- Q6.** As a consumer or small business, have you suffered detriment from unfair trading practices? Please describe your experience and quantify the impact in monetary terms, if possible.
- Q7.** Have you experienced any difficulties with challenging or disputing a potentially unfair trading practice? Please provide any relevant details.
- Q8.** What is your preferred reform option, or combination of options? What are your reasons?
- Q9.** Are there any alternative or additional reform options to those presented you think should be considered?



## Consultation objectives

Consistent with the announcement by the consumer affairs ministers in September 2022,<sup>4</sup> the objective of this paper is to inform consideration of options for addressing unfair trading practices.

The overarching objectives for this paper are to:

- Identify the policy problem that warrants consideration of reform in this area;
- Explore policy options that address perceived harmful commercial practices not currently captured by the ACL;
- Investigate policy options that could align Australia to other jurisdictions in this context; and
- Assess policy options that equip regulators with more tools to address unfair trading practices, while ensuring firms are able to compete on their merits.

This paper seeks feedback on the regulatory, financial, business and community impacts of alternative courses of action. Feedback received through public consultation will assist the Government to better assess the costs and benefits of each option.

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4 See South Australian Minister for Consumer Affairs, Andrea Michaels MP, '[Cross border collaboration](#)', (Press release, 21 September 2022). See also South Australian Attorney-General's Department, '[Consumer Affairs Ministers meet in Adelaide](#)' (Press release, 21 September 2022).

# The problem

## The emergence of unfair trading practices

Regulators, consumer groups, small business representatives and others have identified a range of business practices – sometimes referred to as ‘unfair trading practices’ – that are causing significant and growing consumer harm. Despite this, many of these practices are not currently prohibited by our consumer and competition laws.

These practices are driven in part by the growing importance of digital platform services for small businesses and consumers.

However, they are not confined to the digital economy.

The ACCC first recommended that the ACL be amended to include an unfair trading practices prohibition in its 2019 Digital Platforms Inquiry final report<sup>5</sup> and has reaffirmed its support in subsequent inquiries, including the Digital Platform Services Inquiry<sup>6</sup>, the Digital Advertising Services Inquiry<sup>7</sup> and the Perishable Agricultural Goods Inquiry<sup>8</sup> (as outlined at Appendix B). Several consumer advocacy groups including the Consumer Policy Research Centre<sup>9</sup>, the Australian Communications Action Network<sup>10</sup> and Consumer Action Law Centre<sup>11</sup> have also advocated for an unfair trading prohibition.

The below list provides some examples, highlighted through multiple inquiries, of trading practices which are potentially unfair.

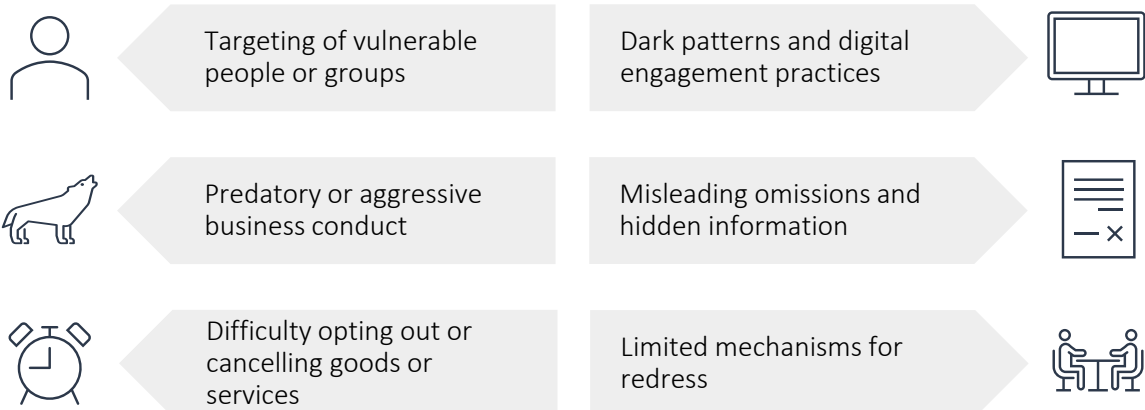
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- 5 Australian Competition and Consumer Commission, [Digital Platforms Inquiry – Final Report](#), (Report, June 2019).
  - 6 Australian Competition and Consumer Commission, [Digital platforms services inquiry – Interim report 6: Report on social media services](#), (Report, March 2023).
  - 7 Australian Competition and Consumer Commission, [Digital advertising services inquiry – final report](#), (Report, August 2021).
  - 8 Australian Competition and Consumer Commission, [Perishable agricultural goods inquiry report](#), (Report, November 2020).
  - 9 Consumer Policy Research Centre, [Unfair Trading Practices in Digital Markets: Evidence and Regulatory Gaps](#), (March 2021).
  - 10 Australian Communications Consumer Action Network, [Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#) (Submission, 1 April 2022), p. 8.
  - 11 Consumer Action Law Centre, [Submission to Australian Consumer Law Review – Issues Paper](#), (May 2016).

## Examples of potentially unfair trading practices:

- Inducing consumer consent or agreement to data collection through concealed data practices;
- Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice;
- Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered;
- Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy;
- Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise);
- Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights;
- Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into);
- All or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection and use of data, and don't provide consumers with meaningful control of the collection and use of their data; and
- Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.

## Consumer and small business harms from unfair trading practices

The business practices described above as currently falling outside the consumer protection law, which may be described as 'unfair', impact individual consumers and small businesses in different ways. Some of these business practices are illustrated in the infographic below. Immediate impacts of this conduct may include consumers incurring financial losses or obtaining unsuitable goods or services. Longer-term impacts could include consumers being reluctant to access or take advantage of new technologies, innovations or business relationships. Further evidence is sought through this consultation process on the extent of harms caused by unfair trading practices.



In addition to causing direct harms to consumers, unfair trading practices can distort competition, which relies on consumers being able to make free and informed choices about the products and services that best suit their needs. Egregious business conduct that interferes with consumer choice, such as that illustrated in the examples below, can result in consumers making decisions they would not otherwise make, to their financial detriment. These practices can also limit the ability of consumers to switch providers, harming competition.

## Experiences of consumers in the digital age

The rise in e-commerce has brought significant benefits to consumers and small businesses, and many markets, including traditional retail, travel, accommodation and financial services, have seen a growth in competition as a result of it. Evolving market trends have also altered, and continue to alter, the risks posed to consumers. Seemingly ‘free’ services or products might be provided to consumers in exchange for consumer and business data that may be sold to third parties. Digital platforms collect and use data and algorithms for multiple purposes, which may lead to personalising offers or pricing for individual consumers without their knowledge or explicit consent.<sup>12</sup> This data also facilitates targeted online advertising, which underpins many of the free services offered by digital platforms.

Research conducted by the Consumer Policy Research Centre (CPRC) found that less than 10 per cent of consumers surveyed were comfortable with the current approach to targeted advertising with tracking of online behaviour or personal characteristics without giving express permission.<sup>13</sup> In its 2019 Digital Platforms Inquiry, the ACCC observed that enhanced data collection and increased sophistication in data analysis and consumer targeting creates the potential for significant consumer harm.<sup>14</sup>

Stakeholders have also raised concerns about consumer harm resulting from online designs known as dark patterns,<sup>15</sup> which manipulate consumer choice and experience.<sup>16</sup> The CPRC found that 83 per cent of respondents had experienced one or more negative consequences because of a website or app

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12 Australian Competition and Consumer Commission, [Digital Platforms Inquiry – Final Report](#), (Report, June 2019).

13 Consumer Policy Research Centre, [Not a fair trade: Consumer views on how businesses use their data](#), (Report, March 2023).

14 Australian Competition and Consumer Commission, [Digital Platforms Inquiry – Final Report](#), (Report, June 2019), p. 26.

15 The ACCC has cautioned that dark patterns present serious concerns for regulators where products are designed in a way that are exploitative, deceptive, or undermine consumer autonomy by encouraging consumers to make decisions that they would not normally make, often through an appeal to certain psychological or behavioural biases. The ACCC defines ‘dark patterns’ as ‘[e]lements of user interfaces which have been designed to make it difficult for users to express their actual preferences, or which nudge users to take certain action that may not be in their best interests’. Similarly, the OECD defines dark patterns as ‘business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice... [that] often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways’. The relevant definitions for these concepts have been provided at Appendix C. The ACCC also notes that some ‘dark patterns’ conduct can occur offline as well, and acknowledges that existing provisions in the ACL may cover some types of dark patterns. However, many dark patterns would fall outside existing laws.

16 Consumer Policy Research Centre, [Duped by Design – Manipulative online design: Dark patterns in Australia](#), (Report, June 2022); CHOICE, [Wait, what’s in my cart? The hidden cost of website ‘dark patterns’](#), (19 August 2022); Australian Competition and Consumer Commission, [Digital platform services inquiry Interim report No. 3 – Search defaults and choice screens](#), (Report, September 2021).

using design features aimed at influencing their behaviour.<sup>17</sup> In addition, the research showed dark patterns led to one in four Australians sharing more personal information than they wanted to.<sup>18</sup>

The provision of goods and services is becoming more complex and there is an increasing reliance on intermediaries to facilitate online transactions for consumers. This can also lead to consumer transactions that increasingly encompass complex side-contracts, licence agreements and multi-party arrangements. It is important that reforms which seek to address unfair trading practices are able to address the evolving nature of technology and e-commerce in the modern economy.

## Limitations of existing protections in Australian law

The ACL currently contains 2 types of provisions to regulate business behaviour:

- Standards-based provisions, which establish principles that apply generally across circumstances and industries; and
- Specific provisions, which establish clear offences for defined behaviours.

The standards-based provisions in the ACL include prohibitions against unconscionable conduct, misleading or deceptive conduct and unfair contract terms, as outlined below. The prohibitions generally apply to both business-to-consumer and business-to-business transactions. On the other hand, specific provisions in the ACL prohibit discrete specific unfair trading practices such as pyramid schemes and bait advertising.

Australia's competition laws prohibit practices which lessen or undermine competition, including the misuse of market power. Their objective is to ensure firms are able to compete on their merits by prohibiting conduct which interferes with the competitive process. Industry codes provide rules or minimum standards for businesses in specific sectors where bargaining power imbalances exist, some of which include protections against practices which would be considered unfair.

As set out in the examples below, there may be conduct that causes significant consumer harm and:

- is not misleading or deceptive or likely to mislead or deceive, but which nevertheless distorts consumer choice (for example, because businesses obscure or omit pertinent information)
- does not reach the threshold of unconscionable conduct
- may result in financial or other detriment but relates to:
  - matters that do not form part of a standard form contract, or
  - actions relating to entering into terms and conditions, rather than their content
- exists alongside a contractual relationship but is not referable to contractual rights and therefore not captured by the unfair contract terms provisions, and/or
- is not a specific practice currently prohibited by the ACL.

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17 Consumer Policy Research Centre, [Duped by Design – Manipulative online design: Dark patterns in Australia](#), (Report, June 2022).

18 Consumer Policy Research Centre, [Duped by Design – Manipulative online design: Dark patterns in Australia](#), (Report, June 2022).

## Potential limitations of existing standards-based provisions

### Misleading or deceptive conduct

Section 18 of the ACL prohibits businesses from engaging in conduct which is misleading or deceptive or is likely to mislead or deceive. The prohibition in its current form was first introduced in 1974 in the *Trade Practices Act 1974* (Cth). It applies even if the intention was not to mislead or deceive.

Misleading or deceptive conduct is assessed against whether an 'ordinary' or 'reasonable' member of the relevant class of people to whom the conduct was directed are likely to be misled. A substantial body of case law has developed since the introduction of the prohibition, and it is now generally well understood by both consumers and business, and a well-accepted tenet of consumer laws in Australia.

Misleading omissions are not expressly covered by this provision although silence may be considered misleading when there is a reasonable expectation that a fact, if it exists, will be disclosed.<sup>19</sup>

The prohibition rarely imposes a positive duty on businesses to disclose information about their practices, even where non-disclosure causes significant consumer detriment. Accordingly, the prohibition will not always address practices that involve a business obscuring or omitting material information or using data or negative choice architecture linked to a product or service which causes consumers to make unintended or undesirable transactional decisions or hinders the exercise of their consumer rights.

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<sup>19</sup> See *ACCC v AGL South Australia* [2014] FCA 1369.



## Misleading omissions: Disclosure of information to customers

### ACCC v AGL South Australia

In *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd*,<sup>i</sup> the ACCC alleged AGL South Australia Pty Ltd (AGL SA) engaged in misleading or deceptive conduct and made false or misleading statements concerning the level of discount residential consumers would receive under AGL SA's energy plans. The Federal Court agreed. AGL SA was subsequently ordered to pay \$700,000 in penalties and to offer refunds of approximately \$780,000 to 23,000 customers for particular false or misleading discount representations, publish a corrective notice in a newspaper, and pay \$300,000 towards the ACCC's costs.<sup>ii</sup> The Federal Court held that, in 2012, AGL SA represented to residential consumers of electricity in South Australia, during inbound telephone calls to AGL SA customer service representatives and subsequently in welcome packs, that, if they entered into an energy plan, they would receive a specified discount off the energy usage charges they would otherwise pay AGL SA. Although the customers initially received this discount, in mid-2012 AGL SA increased the rates under its energy plans and sent a letter to these customers advising them of the new rates and also stating they would continue to receive their discount. However this was not the case because the rate rise meant they would no longer receive the same level of discount.<sup>iii</sup>

With respect to another rate increase in mid-2013 that was alleged to be misleading by the ACCC, the Federal Court adopted a different view. The ACCC alleged that AGL SA engaged in misleading or deceptive conduct by failing to provide certain information to these customers relevant to the rate increase. The Court considered that the customers had no reasonable expectation that such a disclosure should be made. Consequently, the Court ruled that AGL SA had not engaged in misleading and deceptive conduct in this instance. This case illustrates the legal limits to the existing prohibition on misleading and deceptive conduct.

## Unconscionable conduct

The ACL contains 2 protections from unconscionable conduct:

- equitable unconscionable conduct, a concept from the courts of equity which prohibits conduct where one party takes advantage of a special disadvantage of another;<sup>20</sup> and
- statutory unconscionable conduct, designed to address a broader range of conduct than equitable unconscionable conduct.<sup>21</sup>


Statutory unconscionable conduct under section 21 of the ACL is a general ban on conduct which is particularly harsh or oppressive. To be considered unconscionable, the conduct must be against good conscience as judged against the norms of society. There are several matters the court may consider in determining whether conduct, or a system of conduct or pattern of behaviour, is unconscionable, including:

- the use of undue influence, pressure or unfair tactics by the stronger party

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<sup>20</sup> See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

<sup>21</sup> *Competition and Consumer Act 2010* (Cth), Schedule 2 (Australian Consumer Law), s 21(4)(a).

- 
- the price or other terms on which the weaker party could have got the same or similar products or services from another business
  - whether the stronger party acted unreasonably in not informing the weaker party about key risks that the stronger party should have known the weaker party was not aware of
  - whether the parties acted in good faith.<sup>22</sup>

Section 22 of the ACL contains a list of matters or factors that a court may have regard to when determining whether conduct was unconscionable.<sup>23</sup> Generally, one factor is not itself sufficient to meet the threshold.

Statutory unconscionable conduct is limited in its ability to address unfair practices because it is not the same as unfair conduct and it requires a high threshold of misconduct to be met. As a result, there are cases where courts have determined that conduct falls short of the high threshold, even though that conduct would be considered by many as unfair and was likely to result in significant consumer detriment.

Equitable unconscionable conduct has a narrower focus than statutory unconscionable conduct. It prohibits a business from taking advantage of a consumer's special disadvantage. A special disadvantage may be age, sickness, illiteracy, lack of education, a language barrier, or some other factor or combination of factors, which seriously affects a person's ability to make a judgment as to their own best interests.

The following examples illustrate the way courts have applied the statutory unconscionable conduct law.

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<sup>22</sup> Australian Competition and Consumer Commission, [Unfair business practices](#), (n.d.).

<sup>23</sup> Australian Consumer Law, s 22.

## Limitations of unconscionable conduct: Lack of transparency about changes

### ACCC v Medibank

In June 2016, the ACCC instituted proceedings in the Federal Court against Medibank Private Limited (Medibank) alleging it contravened the ACL by engaging in misleading conduct, making false or misleading representations and engaging in unconscionable conduct.<sup>iv</sup>

The ACCC alleged that Medibank:<sup>v</sup>

- made representations that under the terms of its private health insurance policies, members would not incur any out-of-pocket expenses for ‘in-hospital diagnostic services’ including in-hospital pathology and radiology services;<sup>vi</sup> and
- had told its members and potential members that it would tell them in writing if it proposed to make any ‘detrimental changes’ to the benefits it offered, and that it failed to provide such notice when it no longer provided cover for out-of-pocket expenses in cases where diagnostic service providers charged more than the schedule fee for their in-hospital diagnostic services.

The ACCC alleged that Medibank did not provide members with any advance notice of the change in coverage for the out-of-pocket expenses, despite previously representing that it would do so, while adopting a strategy of keeping communications about this change contained and reactive. The ACCC alleged that the conduct was unconscionable because:<sup>vii</sup>

- Medibank knowingly exploited what was alleged to be a lack of understanding by members of private health insurance
- Medibank knew that its decision not to notify members would cause them harm
- not notifying members was unethical because it breached industry norms to provide consumers with current information about their entitlement to benefits.

In August 2017, the Federal Court dismissed proceedings brought by the ACCC against Medibank, where Justice O’Callaghan stated:<sup>viii</sup>

*Ultimately, that evidence, which I unhesitatingly accept, demonstrates that the decision not to communicate with members (about which the applicant complains) was a decision made in the context of the exercise by the relevant committee of its business judgment. Some may agree with it, some may disagree with it, but, in my view, there was nothing remotely unconscionable about it.*

In December 2018, the Full Federal Court dismissed an appeal by the ACCC with Justice Beach stating:<sup>ix</sup>

*I accept that some members... may have been distressed by the unexpected costs. Certainly, Medibank acted harshly. And I am also prepared to conclude that it acted unfairly. But this is not enough to establish statutory unconscionability.*

## Limitations of unconscionable conduct: Consumer guarantees

### ACCC v Mazda

In October 2019, the ACCC instituted proceedings in the Federal Court against Mazda Australia Pty Ltd (Mazda) alleging the company had engaged in unconscionable conduct and made false or misleading representations in its dealings with some consumers who bought new Mazda vehicles between 2013 and 2017.<sup>x</sup>

The ACCC alleged that these consumers began experiencing faults with their vehicles within a year or two of purchase. The faults affected the ability of the consumers to use their vehicles, and in some cases included the vehicles unexpectedly losing power and decelerating while they were being driven. The vehicles were taken to Mazda dealers for repeated repairs, including multiple engine replacements. One vehicle was off the road for 4 months within a 6 month period. It was alleged that Mazda repeatedly refused to provide a refund or a replacement at no cost to the consumers and pressured them to accept lesser offers which were made by Mazda only after multiple failures of the vehicles and repeated attempted repairs. It was also alleged that Mazda offered to refund only a portion of the car's purchase price, or offered to provide a replacement car if the consumer made a significant payment.<sup>xi</sup>

In November 2021, the Federal Court found that while Mazda's conduct could constitute 'appalling customer service'<sup>xii</sup> and a 'failure to comply with Mazda's own procedures',<sup>xiii</sup> Mazda's conduct was not unconscionable as its conduct was not 'sufficiently divergent from the community standards of acceptable business practices'.<sup>xiv</sup>

In March 2023, the Full Federal Court dismissed the ACCC's appeal against the Federal Court judgment<sup>xv</sup> that Mazda did not engage in unconscionable conduct<sup>xvi</sup> and determined the alleged conduct did not amount to unconscionable conduct because:<sup>xvii</sup>

*...the conduct of Mazda relied upon by the ACCC did not involve a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience for the reasons that we explain below.*

*In reaching that conclusion, we have necessarily had to consider the conduct of Mazda against the values that have been said to inform the standard of conscience and matters that have been stated to be part of its essential conception. In doing so, we recognise that this is not a search for easy aphorisms or alternative formulations of the language of s 21 of the ACL against which to judge the conduct of Mazda and perform the necessary evaluative judgment.*

## Limitations of unconscionable conduct: Targeting of people experiencing situational vulnerability

### Pitt v Commissioner for Consumer Affairs

The Commissioner for Consumer Affairs in South Australia brought proceedings against Mr Zane Pitt, a real estate agent, alleging Mr Pitt had engaged in statutory unconscionable conduct contrary to section 21 of the ACL. Mr Pitt undertook a business advertised as “We Buy Houses” where he sought to buy properties from people who were struggling to sell by entering into an option agreement to enable Mr Pitt to purchase the property at a fixed price sometime in the future.<sup>xviii</sup>

Mr Pitt entered into an Option Agreement with Mr Hartwig, a retired pensioner with limited education and experience in commercial or property matters, to purchase his home at any time over a 4-year period for \$200,000.<sup>xix</sup> Mr Hartwig was in financial difficulty, having spent his savings and exceeded his credit account limit, and was on a hardship program that permitted him to pay his mortgage at a reduced rate.<sup>xx</sup>

After the obtaining of a building report which identified defects in the property, Mr Hartwig agreed with Mr Pitt to lower the purchase price to \$175,000. Around this time, Mr Hartwig informed Mr Pitt that he wanted to sell as soon as possible to use the proceeds to buy into a retirement village.<sup>xxi</sup>


Mr Pitt and Mr Hartwig executed a contract for the sale of the property for a sale price of \$175,000.<sup>xxii</sup> Mr Pitt and his daughter then executed a contract for the on-sale of the property from Mr Pitt to Ms Pitt.<sup>xxiii</sup> Ms Pitt subsequently obtained approval to demolish the property and construct 2 new dwellings, which were later sold for a total of \$765,000.<sup>xxiv</sup>

The South Australian Court of Appeal accepted that at the time of entry into the contract for sale, there was a ‘marked disparity’ between Mr Hartwig and Mr Pitt in terms of their relevant knowledge and experience; Mr Hartwig was ‘in a position of vulnerability and disadvantage’ where he had ‘limited options available to him’.<sup>xxv</sup> Nevertheless, the Court of Appeal overturned the single Judge’s finding that Mr Hartwig was in a position of ‘special disadvantage’ as at the entry into the Addendum Agreement, where his vulnerability or disadvantage was such as to have seriously compromised or affected his ability to understand and safeguard his own interests.<sup>xxvi</sup> The Court of Appeal held that it had not been established that Mr Pitt’s conduct was so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that was offensive to conscience, and that he had not acted unconscionably.<sup>xxvii</sup>

## Unfair contract terms

This protection provides courts with the ability to declare contract terms in standard form consumer and small business contracts unfair and impose significant penalties. In Part 23 of the ACL, a term of a contract is unfair if it:

- causes a significant imbalance in the parties’ rights and obligations
- is not reasonably necessary to protect the legitimate interests of the supplier
- would cause significant financial or non-financial detriment to a party.



These provisions consider the fairness of terms in standard form contracts. However, they do not address unfair conduct that occurs prior to entering into contracts, or in the parties' dealings while the contract is in place, including when a business applies an otherwise fair contract term in an unfair manner. As most of the unfair practices identified in this paper are about business conduct rather than specific contract terms, the existing unfair contract term protection provisions are unlikely to address such practices as they only apply in the context of standard form contracts.

### **Limitation of Unfair Contract Terms: Conduct beyond small business contract terms**

From a small business perspective, an unfair application or interpretation of an otherwise fair contract term may result in unfair conduct. For example, a contract between a large and small business may require the small business to indemnify the large business if losses result from conduct or circumstances within the control of the small business. The large business insists that certain conduct is 'within the control' of a small business, and therefore captured by the term, even when the circumstances and conduct make that an unreasonable interpretation or application of the contract. In these circumstances, the small business's options are to acquiesce to the larger business's demands, commence costly legal proceedings or lose a key supplier or acquirer.

Another example is that a contract between a large and small business may allow the large business to unilaterally impose a price increase if the conduct is a 'carry-through' price increase beyond the larger business's control. The ACCC reports it has seen instances where the larger business invokes this clause even when the larger business could have influenced or minimised such costs and was therefore arguably not permitted to pass them on to the smaller business under the relevant contract term.

## **Potential limitations of specific protections**

Some specific trading practices are unlawful under the ACL. These protections target certain harmful business practices that distort consumers' economic behaviour through information asymmetries (where one party has more or better information than the other) or through more overt practices such as coercion or undue harassment.

Examples of existing ACL specific protections include false or misleading representations about, for example, the price of goods, availability of repair facilities, or the existence of warranties. They also include protections against bait advertising, accepting payment without intending to supply goods or services, certain practices in the unsolicited supply of goods or services, participating in or persuading someone to participate in a pyramid scheme, coercion, undue harassment or physical force in connection with the supply or possible supply of goods or services, or the payment for them. These provisions are narrowly drafted, and are not likely to capture new or emerging potentially unfair conduct that stakeholders have identified.

# Key design considerations

## Definition of unfair

Unfairness is an inherently subjective concept, thus highlighting the need for a calibrated policy response. A reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce. On the other hand, an excessively narrow approach could be ineffective, and might not capture the full range of unfair and harmful practices.

The ACL and consumer law from overseas jurisdictions provide some precedent and insight into the potential definition of unfair in the Australian context. These precedents may provide a basis for developing a definition of unfair under the options below. Stakeholder views are sought on what could be an appropriate definition of unfair in the context of an Australian unfair trading practices prohibition.

The unfair contract terms provisions under the ACL prohibit terms in consumer and small business standard form contracts for consumers and small businesses which meet a high-level statutory test. A possible unfair trading practices prohibition could draw on relevant parts of this test. For example, a practice could be considered unfair if it:

- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the conduct; and
- would cause detriment (whether financial or otherwise) to a party if it were to continue.

Prohibitions in other OECD countries feature varying definitions of unfairness, as outlined at Appendix A. These definitions could also be drawn upon to inform a definition of unfair in the Australian context.


In the United States, the *Federal Trade Commission Act* (US) defines an act or practice as unfair when it causes or is likely to cause substantial injury to consumers, cannot be reasonably avoided by consumers, and is not outweighed by countervailing benefits to consumers or to competition.

In the European Union, the *Unfair Commercial Practices Directive* (UCPD) defines a commercial practice as unfair if it is contrary to the requirements of professional diligence, and materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

In the United Kingdom, the *Consumer Protection from Unfair Trading Regulations 2008* (UK) adopts a definition of unfairness in line with the EU's directive. A commercial practice is also taken to be unfair if it is a 'misleading action', a 'misleading omission', or is 'aggressive'.

In Singapore, the *Consumer Protection (Fair Trading) Act 2013* (SG) considers an unfair practice to be where a supplier in a consumer transaction: (1) deceives or misleads; (2) makes a false claim; (3) takes advantage of a consumer if the supplier knows or ought reasonably to know the consumer is not in a position to protect their own interests or reasonably able to understand the transaction or any related matter; or (4) engages in certain specific practices, including taking advantage of a consumer by including harsh, oppressive or excessively one-sided conditions so as to be unconscionable, or exerting undue pressure/influence to enter the transaction.

These approaches vary widely in design, scope and potential effect. In the United States of America (US), the reference to the likelihood of substantial injury to consumers contrasts with the EU's focus on distortion of behaviour. While the latter standard is far broader, it could also give rise to uncertainty (over the demarcation between legitimate persuasion of customers and prohibited



distortion of their behaviour) and be more difficult to establish (as it relies on a counterfactual). Singapore's approach invokes the idea of taking advantage of consumers, which has associations with unconscionability in our and other countries' laws. And only the US's law acknowledges that unfairness, in the way defined by it, may be outweighed by broader benefits to consumers and competition.

## Process to amend the Australian Consumer Law

The ACL is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA)<sup>24</sup> and aims to protect Australian consumers and encourage fair trade and competition. The ACL is a national law administered and enforced jointly by Commonwealth, state and territory consumer protection agencies,<sup>25</sup> and the Australian Competition and Consumer Commission (ACCC).

As a law administered jointly by jurisdictions, certain processes must be followed to amend the ACL as set out in the Intergovernmental Agreement.<sup>26</sup> The ACL can only be amended with the agreement of the Commonwealth and 4 other states or territories (including at least 3 states) following a period of formal consultation. If carried, a Bill to amend the ACL is prepared and publicly consulted on prior to being introduced into the Commonwealth Parliament.

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24 [Competition and Consumer Act 2010 \(Cth\), Schedule 2 \(Australian Consumer Law\)](#).

25 Access Canberra; New South Wales Fair Trading; Northern Territory Consumer Affairs; Office of Fair Trading Queensland; South Australia Office of Consumer and Business Services; Tasmania Consumer, Building and Occupational Services; Consumer Affairs Victoria; Western Australia Consumer Protection – Department of Mines, Industry Regulation and Safety

26 Council of Australian Governments, '[Intergovernmental Agreement for the ACL](#)' (30 August 2019).



# Policy options

## Summary

To address the problem identified above, this paper discusses the following policy options:

<b>Option 1</b>	Status quo (no change)
<b>Option 2</b>	Amend statutory unconscionable conduct
<b>Option 3</b>	Introduce a general prohibition on unfair trading practices
<b>Option 4</b>	Introduce a combination of general and specific prohibitions on unfair trading practices

These policy options are expected to affect businesses (large and small), consumers and consumer law regulators, together with Commonwealth, state and territory governments. This paper does not present a preferred option, because further consultation and evidence on the likely impact of all options is required to conduct an informed evaluation of each option. The policy options presented may also be combined, depending on stakeholder feedback and the evidence gathered.

The paper evaluates the expected relative costs and benefits of the options, and how well each option might address the policy problem set out earlier in the paper. Costs and benefits are assessed as against the status quo. Noting the challenges of drawing comparisons between the different options, the initial assessments outlined below are indicative only, and reflect the qualitative discussion of options in this chapter. The views of stakeholders will inform a final Decision RIS.

## Option 1 – Status quo

### Description

This option proposes no change to the existing legislative framework. The ACL would continue to protect consumers against misleading or deceptive conduct, unconscionable conduct, unfair contract terms, and specific unfair trading practices that are prohibited by Part 3–1 of the ACL (for example, pyramid selling, bait advertising).

Regulators would continue to monitor and enforce the existing consumer protection policy framework and case law on the unconscionable conduct prohibition would continue to develop gradually. However, regulators would be limited in their ability to respond to unfair trading practices, as identified in the Problem chapter.

### Context

Under this option, consumers and small businesses can:

- seek mediation and redress from Ombudsman services in certain sectors, such as energy and water, telecommunications, financial services and small business
- ask businesses behaving poorly to change their conduct, or seek mediation or alternative dispute resolution.

Small businesses can also access dispute resolution arrangements in industry sectors with voluntary industry developed codes of conduct, or mandatory codes prescribed under legislation.

Regulatory agencies currently offer some recourse to consumers and small businesses regarding unfair trading practices. The Australian Small Business and Family Enterprise Ombudsman helps small businesses and family enterprises to resolve disputes involving other businesses or Commonwealth Government agencies and avoid costly formal legal avenues.<sup>27</sup> Similarly, state-based consumer regulators and small business commissions handle and provide support to individual complaints, provide access to commercial mediation services and can make policy representations at higher levels of government.<sup>28</sup> As the ACCC is not a complaint handling body, it rarely becomes involved in individual consumer or small business disputes. Rather the ACCC uses individual reports, and other sources of intelligence, to inform its compliance and enforcement work.<sup>29</sup>

However, these courses of action would only be available if the alleged unfair practice is covered by existing consumer laws.

### Option 1 – Preliminary Impact Analysis

Option 1 would not have any regulatory impact as the current legal framework for dealing with unlawful business conduct under the ACL would be maintained, as per the preliminary impact analysis set out below.

Continuing benefits	Continuing costs
The status quo provides certainty for consumers and businesses as existing protections under the ACL would be maintained.	Unfair trading practices not covered by existing laws would likely continue, with consumers and small businesses bearing financial and non-financial costs as a result of these practices, with no effective options for redress.

### Option 1 – Questions

Option 1 – Status quo	
1.1	Do you agree with the impact analysis of this option? Are there other issues that should be taken into account when analysing the impact of this option?
1.2	If a trading practice is found to have caused consumer harm, do you think that the courts are able to determine appropriate remedies in line with community expectations under the current legal framework? If not, why not?
1.3	Could a focus on stakeholder education help reduce the prevalence of unfair trading practices under existing consumer protections?

27 Further information available at <https://www.asbfeo.gov.au/about-us>.

28 For example, refer to the statutory power of the NSW Small Business Commission, at <https://www.smallbusiness.nsw.gov.au/what-we-do/advocacy/our-legal-powers> and the mediation services offered at <https://www.smallbusiness.nsw.gov.au/what-we-do/mediation>.

29 Further information available at <https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities>.

## Option 2 – Amend statutory unconscionable conduct

### Description

This policy option would retain the core prohibition on unconscionable conduct contained in section 21 of the ACL but would propose to extend the prohibition to capture unfair conduct within subsection 21(3) or section 22 as a factor or element that must be assessed in determining whether conduct is unconscionable in connection with the supply or acquisition of goods or services. (Currently, the courts *may* consider the factors and elements listed in section 22.)

This policy option would seek to broaden the scope of sections 21 and 22 of the ACL to consider a range of misleading, harsh, oppressive or predatory conduct depending on how unfair conduct is defined. However, this policy option intends to maintain section 20 of the ACL that is confined within the parameters of the unwritten law developed under equity.

The prohibition on unconscionable conduct could also be made prospective, so it applies to conduct that is likely to be unconscionable. This would align with the misleading or deceptive conduct protections in the ACL.

An alternative approach would be to add the concept of unfairness to the unconscionable conduct provision itself (section 21 of the ACL). The rationale for this is that ‘unfair tactics’ are already referred to in the list of factors courts should take into account in determining unconscionability, and that elevating this to something courts must consider (as opposed to may consider) may not have a material effect.

### Context

In recent case law, judges applying the current prohibition have drawn a distinction between conduct that is unconscionable and conduct that is unfair.<sup>30</sup> The intention of this option would be to clearly signal to courts that unfair conduct that falls short of the threshold for unconscionability should also be prohibited.

The first approach (which would not change section 21 of the ACL) would intend to retain the body of case law that has developed based on the current statute, which may provide ongoing and useful guidance to courts on the application of the provision and relevant factors. For example, the Full Federal Court in *ACCC v Quantum Housing Group Pty Ltd*<sup>31</sup> found it is not necessary for a respondent accused of unconscionable conduct to have taken advantage of or exploited some vulnerability, disability or disadvantage of the person or persons to whom the conduct was directed in reference to the section 21 prohibition.<sup>32</sup> However, amending section 21 of the ACL to create a deliberate and explicit delineation from the unwritten meaning of unconscionability within equity law<sup>33</sup> may be required to lower the threshold that can be applied as a departure from its traditional meaning and interpretation.

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30 See *Australian Competition and Consumer Commission v Medibank Private Limited* [2018] FCAFC 235; *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493.

31 [2021] FCAFC 40.

32 [2021] FCAFC 40 [93] (Allsop CJ, Besanko and McKerracher JJ).

33 See Australian Consumer Law, s 20.

## Option 2 – Preliminary Impact Analysis

This option is likely to have a medium regulatory impact compared to the other options proposed, as outlined in the potential benefits and costs table below. This option would provide some benefits to consumers and small businesses, and impose some compliance costs.

Potential benefits	Potential costs
Expanding the scope of statutory unconscionable conduct to capture a broader range of 'harmful conduct' or 'unfair conduct' would provide consumers and small business with greater protection against unfair trading practices.	A new body of judicial precedent on amended statutory unconscionable conduct would take time to develop and be applied across Australia, leaving consumers and small businesses exposed to unfair trading practices in the interim.
Government and regulators would have more tools to address harmful conduct not presently captured by the existing unconscionable conduct laws.	Greater compliance and transition costs on businesses beyond the status quo.
Including unfair conduct as a factor or element that must be assessed in determining whether conduct is unconscionable would provide a greater deterrence against predatory, aggressive or misleading business conduct.	Government and regulators would incur greater costs for implementation, oversight and enforcement of the amended protection compared to the status quo.
It would build on existing case law and precedent, which would provide useful guidance for the courts.	To the extent that reliance would continue to be placed on the term unconscionable, it may be difficult to capture manifestations of unfair behaviour.

## Option 2 – Questions

### Option 2 – Amend statutory unconscionable conduct

- 2.1 Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?
- 2.2 What would be the impact of pursuing this policy option for consumers and businesses?
- 2.3 Are there any consequences or risks that need to be considered when pursuing this policy option? Please provide details.
- 2.4 Would this policy option place any additional financial or administrative cost or burden on small businesses and/or consumers?
- 2.5 Do you consider amending 'unconscionable conduct' under the ACL would sufficiently deter businesses from engaging in unfair trading practices? Please provide reasons for your response.
- 2.6 What forms of unfair trading conduct could be included as additional factors in section 22?
- 2.7 Do you think that the prohibition should be made prospective, so it applies to conduct that is *likely* to be unconscionable? Why or why not?
- 2.8 Should the list of factors contained in section 22 be mandatory for courts to consider in determining whether conduct is unconscionable? In other words, should section 22 be amended so that the courts *must* have regard to the list of factors for the purposes of section 21?
- 2.9 Are there any other principles that would be useful to consider in amending statutory unconscionable conduct? Please provide details.

## Option 3 – Introduce a general prohibition on unfair trading practices

### Description

This policy option would create a new general prohibition on unfair trading practices which would apply to businesses across all sectors as a separate protection from the existing provisions of the ACL. It would be a broad and flexible principles-based prohibition which would align it with the largely principles-based nature of the ACL.

The US, the United Kingdom, the European Union and Singapore each have a general unfair trading prohibition for business-to-consumer transactions, however the US also applies a general unfair practices prohibition in the business-to-business context as well.

This paper does not propose a specific definition of unfair within this context. If this option were progressed, any future definition would be determined through the policy development process, drawing upon its use and application in international jurisdictions and the informed feedback of stakeholders through this and future consultation processes. Importantly, the meaning of unfair would require an appropriate and adaptable definition for a general prohibition against unfair trading practices.

Recent reforms to the ACL introduced penalties for businesses that include unfair contract terms in their standard form contracts with consumers and small businesses. Penalties will come into effect in November 2023.<sup>34</sup> Any reform introducing a general prohibition on unfair trading practices could align with the approach to unfair contract terms and include civil penalties for a breach.

### Context

The ACCC's 5th interim report of the Digital Platform Services Inquiry recommended an economy-wide prohibition against unfair trading practices to address certain business practices not currently covered by the ACL. The ACCC points out that while there are a range of unfair trading practices in relation to digital platform services that currently fall outside of the ACL, unfair trading practices also occur across the broader Australian economy. In a speech at the 2021 National Consumer Congress, former chair of the ACCC, Rod Sims, stated:<sup>35</sup>

*While we [the ACCC] have had some success with the unconscionable conduct provisions, the courts are showing us clearly the limitations of this provision, in part due to how it is named... [s]uffice to say here that a principles-based prohibition would allow the law to keep up with evolving unfair trading practices, particularly as technology creates new opportunities for unfair conduct.*

The intention of any proposal to introduce a general prohibition on unfair trading practices would be to ensure it adapts to technological and commercial change. It could establish an explicit norm of conduct about fair dealing and fair trading. Alternatively, it could have an explicit definition of what constitutes an unfair practice.

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<sup>34</sup> Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth).

<sup>35</sup> Australian Competition and Consumer Commission, Rod Sims, '2021 National Consumer Congress: Road to recovery address' (Speech, 22 March 2021).

## Option 3 – Preliminary Impact Analysis

Option 3 is likely to have a higher regulatory impact than option 2, as outlined in the potential benefits and costs table below. A general prohibition on unfair trading practices would provide consumers and small businesses with protection from a wide range of current and emerging unfair trading practices. At the same time, if poorly framed it could create uncertainty for both business and consumers, and even have an adverse effect on innovation, competition and efficiency. Businesses would also incur compliance and training costs in order to ensure practices are not in contravention of the principles-based prohibition.

Potential benefits	Potential costs
A general prohibition on unfair trading practices would provide a greater deterrence against predatory, aggressive or misleading business conduct. It would enable future and evolving unfair trading practices to be captured.	Businesses would incur compliance and training costs to ensure they are not engaging in unfair trading practices.
A general prohibition on unfair trading practices may better meet community expectations for protecting consumers and small businesses under the ACL.	Judicial precedent on a general prohibition may take time to develop and be consistently applied. This could create uncertainty for businesses which could have a chilling effect on competition and innovation.
Government and regulators would have more tools to more appropriately and efficiently respond to misconduct, and therefore allow for less complex and less costly regulatory intervention.	Government and regulators could incur greater costs through increased enforcement and administration actions, particularly as more conduct is captured.
A general prohibition on unfair trading practices would bring Australia in line with other international jurisdictions and prominent trading partners. (See Appendix A.)	Government and regulators would incur upfront costs in developing guidance and education measures in order to support business certainty.
A general prohibition on unfair trading may increase consumer and small business confidence.	Depending on how it is framed, a general prohibition could create uncertainty for businesses and consumers and be difficult to enforce.

## Option 3 – Questions

### Option 3 – Introduce a general prohibition on unfair trading practices

- 3.1 Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?
- 3.2 Are there any consequences or risks that need to be considered when pursuing this policy option? Please provide details.
- 3.3 Would this policy option potentially create uncertainty for business or limit competition and innovation? Would it place any additional financial or administrative cost or burden on small businesses and/or consumers?
- 3.4 Do you consider a general prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?
- 3.5 Should a general prohibition on unfair trading practices define what is considered unfair? If so, what elements should be incorporated? Should a definition of unfair be similar to the recent unfair contract terms amendment under section 24 of the ACL?
- 3.6 Should civil penalties be attached to a general prohibition on unfair trading practices? Please provide reasons for your response.
- 3.7 Are there any practices you think may be captured by a potential unfair trading prohibition, that you consider to be part of legitimate commercial behaviour and should be excluded from an unfair trading prohibition? Please provide examples.

## Option 4 – Introduce a combination of general and specific prohibitions on unfair trading practices

### Description

The combination of a general principles-based prohibition against unfair trading practices (Option 3) with the addition of a list of specific prohibited practices would be the most comprehensive and targeted policy approach. These provisions would complement existing protections under the ACL, such as the prohibitions against unconscionable conduct and misleading or deceptive conduct.

As discussed at Appendix A, this combined regulatory approach has been enforced in overseas jurisdictions such as Singapore (since 2003), the European Union (since 2005), and the United Kingdom (since 2008) for business-to-consumer transactions.

### What is a specific prohibition?

As one part of this policy option, a specific prohibition on unfair trading practices would be a list of specific instances of prohibited conduct that commonly result in consumer and/or small business harm.

This list could be updated over time as business models and strategies change. It would provide clarity for both firms and their customers on what practices are not permitted, complementing any general prohibition. The ACL already contains several specific prohibitions that, in overseas jurisdictions, are included in their list of specific prohibitions against unfair practices. For example, in the European Union, the UCPD provides a non-exhaustive list of 31 specific commercial practices which are deemed in all circumstances to be unfair under 2 main categories of ‘misleading commercial practices’ and ‘aggressive commercial practices’. This list broadly covers bait advertising, phony ‘free’ offers, manipulation of children, false claims about cures, hidden advertisements in media, pyramid schemes, false offers of prizes and gifts, phony ‘special’ advantages, false use of limited offers, and persistent unwanted offers. The UK has adopted the EU directive.<sup>36</sup>

Under this option, further specific unfair practices would be inserted into the ACL alongside a general prohibition on unfair practices. These prohibitions would be more specific, including clear and defined instances of unfair practices that are not covered by any existing provisions of the ACL.

Option 4 is comparable to the approach taken to unfair trading in the EU, the UK and Singapore.<sup>37</sup> No international jurisdiction has introduced or enforced a stand-alone specific unfair practices

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36 The UCPD was implemented into UK legislation through the *Consumer Protection from Unfair Trading Regulations 2008*. Since Brexit, the main change to the regulations is that trader liability for the misleading or aggressive practices of importers of goods is now restricted to importers into the UK rather than importers into the European Economic Area (EEA). Conway, Lorraine, ‘[Brexit: UK consumer protection law](#)’, (May 2021, Briefing Paper 9126).

37 In Singapore, the Second Schedule of the *Consumer Protection (Fair Trading) Act 2013* (SG) provides a list of 27 specific unfair practices that broadly covers specific misrepresentations about goods or services, false or misleading representations, charging prices substantially higher than estimated, misrepresentations about rights, remedies or obligations, misrepresentations about authority to negotiate final terms of agreement, undue pressure, undue influence, representations about supply that cannot be supplied, free prizes, advertorials, omitting or misleading material facts (including small print concealment), bait advertising, accepting payment without intention to supply, asserting rights to payment for unsolicited supplies, refusing to supply copies of agreement to consumers upon request, and harsh, oppressive or excessively one-sided terms and conditions so as to be unconscionable.

prohibition without also having a general unfair practices prohibition in place. More detailed information about international responses to unfair trading practices is outlined at Appendix A.

### Combined approach

This policy option gives a combined approach of the benefits of targeting specific practices, while also retaining the benefits of a more general prohibition. Consumers and small businesses would be clearly protected against the list of prohibited practices but would also have protection against unidentified or emerging unfair trading practices from the broader principles-based prohibition. Breaches of a combined general and specific prohibition would likely attract civil penalties.

The operation of this option could be similar to the structure of existing provisions in the ACL. For example, the ACL provides a broad principles-based prohibition against misleading or deceptive conduct, and it also contains a separate prohibition on making certain false or misleading representations about goods or services.

### Option 4 – Preliminary Impact Analysis

Option 4 is likely to have the highest regulatory impact of all the options presented, as outlined in the potential benefits and costs table below. This option would provide the highest level of protection to consumers and small businesses from unfair trading practices. As this option represents the most significant legislative change compared to the status quo, it may present the largest transition cost to businesses of all the options.

Potential benefits	Potential costs
Consumers and small business would be protected from the widest range of both current and emerging unfair trading practices. It would enable future and evolving unfair trading practices to be captured.	Businesses would incur compliance and training costs to ensure they are not engaging in unfair trading practices.
A combined prohibition on unfair trading practices may better meet community expectations for protecting consumers and small businesses under the ACL.	Businesses may be uncertain about what is unfair which may create an overly cautious commercial environment with potential impacts on business confidence and innovation. The use of a specific list of practices, however, could provide useful guidance to businesses and be easier to enforce.
Government and regulators would have a comprehensive range of tools to address harmful conduct not presently captured by existing laws, including new and emerging conduct.	Government and regulators could incur greater costs through increased enforcement and administration actions.
A combined prohibition on unfair trading may increase consumer and small business confidence.	Governments would incur upfront costs to developing guidance and education measures in order to support business certainty.
A combined approach would bring Australia in line with other international jurisdictions and prominent trading partners. (See Appendix A.)	



## Option 4 – Questions

### Option 4 – Introduce a general and specific prohibition on unfair trading practices

- 4.1 Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?
- 4.2 Are there any consequences or risks that need to be considered when pursuing this policy option?  
Please provide details.
- 4.3 Would this policy option place any additional financial or administrative cost or burden on small businesses and/or consumers?
- 4.4 Do you consider a specific prohibition on unfair trading practices in the form of a list or schedule of unfair conduct would be an adaptable policy option for technological change?
- 4.5 Do you consider a specific prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?
- 4.6 What types of unfair trading practices should be specifically prohibited? Should they be industry specific or economy-wide?
- 4.7 Should civil penalties be attached to a combined prohibition on unfair trading practices?  
Please provide reasons for your response.



## Next Steps

Treasury is undertaking a public consultation process in relation to the issues explored in this paper. The objective of the consultation process is to build on previous stakeholder engagement, to gather additional evidence and data on the extent of the problem and to seek views on the potential benefits and costs of the proposed policy options.

The consultation process will consist of:

- a formal written submission process
- targeted meetings with key stakeholders and interested parties.

If you are interested in meeting with Treasury to discuss the paper or your submission, please contact:

Director  
Consumer Policy and Product Safety Unit  
Market Conduct and Digital Division  
The Treasury  
Email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Written submissions to this process may reference how previous consultation submissions address particular questions posed in this paper.

Once this consultation process has concluded, a Decision RIS will be produced to discuss the results of the consultation process, the evidence that has been gathered and the preferred policy option.

Specific questions are likely to arise from this Consultation RIS which may have not been considered at the time of drafting. Treasury may undertake further targeted consultation with key stakeholders if necessary. Please note that Treasury does not intend to reply to each submission.

Both this paper and the Decision RIS will be published on the Office of Impact Analysis website.

# Appendix A – International responses to unfair trading practices

## United States – General prohibition only

In the United States, section 5 of the *Federal Trade Commission Act* (FTC Act) contains a **general prohibition** against ‘**unfair or deceptive acts or practices in or affecting commerce**’. The FTC Act defines an act or practice to be unfair when it:

- causes or is likely to cause substantial injury to consumers
- cannot be reasonably avoided by consumers
- is not outweighed by countervailing benefits to consumers or to competition.

Uniquely, the FTC Act does not focus on definitions of the ‘average consumer’, the ‘vulnerable’ consumer, or establish specific examples or categories of conduct or acts that are prohibited.

- The FTC focuses largely on the concept of ‘**substantial injury**’ to the consumer which applies to all persons engaged in commerce, including banks. In this context, ‘substantial injury’ usually involves monetary harm, but can also include, in certain circumstances, unquantifiable or non-monetary harm.
- Substantial injury can occur where an act or practice causes a small amount of harm to a large number of people, or if the injury raises a significant risk of concrete harm (not trivial or merely speculative harm). Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair.

Public policy as established by statute, regulation, judicial decision or agency determination may be considered with all other evidence in determining whether an act or practice is unfair, but not as a primary consideration. Importantly, the FTC applies to transactions that may impact business customers as well as individual customers.

## United States – Enforcement actions under the FTC framework

### Epic Games<sup>38</sup>

In March 2023, the US Federal Trade Commission (FTC) finalised an order requiring Epic Games, creator of video game Fortnite, to pay a total of US\$245 million to consumers to settle charges that the company violated section 5 of the FTC Act due to the deployment of design tricks, known as dark patterns, to induce millions of players into making unintentional purchases. The order also prohibits Epic from charging consumers through the use of dark patterns or from otherwise charging consumers without obtaining their affirmative consent. This was the FTC's largest refund amount in a gaming case, and its largest administrative order in history.

In a complaint announced in December 2022, the FTC alleged that Epic Games used dark patterns to trick users into making purchases, charged account holders without authorisation and blocked access to purchased content by locking the accounts of customers who disputed unauthorised charges with their credit card companies. The FTC also alleged Epic Games ignored more than one million user complaints and repeated employee concerns that many consumers were being wrongfully charged.

### Vonage<sup>39</sup>

In November 2022, the FTC sought a court order to require internet phone service provider Vonage to pay US\$100 million in refunds to consumers. The FTC alleged that the company used dark patterns to make it difficult for consumers to cancel and often continued to illegally charge them even after they spoke to an agent directly and requested cancellation. According to the FTC's complaint, Vonage billed their customers for services on an automatic basis every month, either by charging a credit or debit card or withdrawing money from a customer's bank account directly. Consumer accounts ranged from \$5 to around \$50 each month, while business accounts could cost up to thousands of dollars each month. In many cases, the company signed customers up using 'negative option' plans that begin with a free trial, but then required consumers to take action to avoid being charged. The FTC specifically alleged that Vonage had engaged in the elimination of cancellation options, making the cancellation process difficult, surprising customers with expensive junk fees when attempting to cancel, and continuing to charge customers even after they had cancelled their service.

### Google and iHeartMedia<sup>40</sup>

In February 2023, the FTC finalised consent orders against Google and iHeartMedia settling allegations that they produced and aired nearly 29,000 deceptive first-person endorsements by radio personalities promoting the personalities' use of and experience with Google's Pixel 4 phone in 2019 and 2020. Separate state judgements also required them to pay a total of \$9.4 million in penalties.<sup>41</sup>

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38 Federal Trade Commission, 'FTC Finalizes Order Requiring Fortnite maker Epic Games to pay \$245 Million for Tricking Users into Making Unwanted Charges' (Press Release, 14 March 2023).

39 Federal Trade Commission, 'FTC Action Against Vonage Results in \$100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service' (Press Release, 3 November 2022).

40 Federal Trade Commission, 'FTC, States Sue Google and iHeartMedia for Deceptive Ads Promoting the Pixel 4 Smartphone' (Press Release, 28 November 2022).

41 Federal Trade Commission, 'FTC Approves Final Orders against Google and iHeartMedia for Deceptive On-Air Endorsements for Google's Pixel 4 Phone' (Press Release, 19 December 2022).

## European Union – Combined general and specific prohibition

In the European Union, *Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market* (UCPD) contains a **general prohibition** against ‘**unfair commercial practices**’ if a commercial practice is:

- contrary to the requirements of professional diligence
- materially distorts or is likely to materially distort the economic behaviour of the average consumer or the average member of a group it is directed towards.

The UCPD prohibits commercial practices under 4 main categories:

1. **Misleading actions (Article 6)** – where a commercial practice contains false information, is untruthful or in any way deceives or is likely to deceive the average consumer.
2. **Misleading omissions (Article 7)** – where a commercial practice omits material information that the average consumer needs to know in order to take an informed transactional decision, and that omission causes (or is likely to cause) them to undertake a transactional decision they would not have taken otherwise.
3. **Aggressive commercial practices (Article 8)** – where a commercial practice impairs (or is likely to impair) the average consumer’s freedom of choice or conduct due to harassment, coercion, physical force, or undue influence, and causes the consumer to undertake a transactional decision that they would not have taken otherwise.
4. **Harassment, coercion and undue influence (Article 9)** – where a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, which takes into account factors such as timing, location, nature or persistence, threatening or abusive language or behaviour, exploitation of specific misfortune or circumstance, any onerous or disproportionate non-contractual barriers for exercising consumer rights, and any threat to take any action that cannot legally be taken.

Annex 1 to the UCPD contains a **specific prohibition** approach which includes a non-exhaustive list of 31 **specific practices** that broadly covers: bait advertising, phony ‘free’ offers, manipulation of children, false claims about cures, hidden advertisements in media, pyramid schemes, false offers of prizes and gifts, phony ‘special’ advantages, false use of limited offers, and persistent unwanted offers.

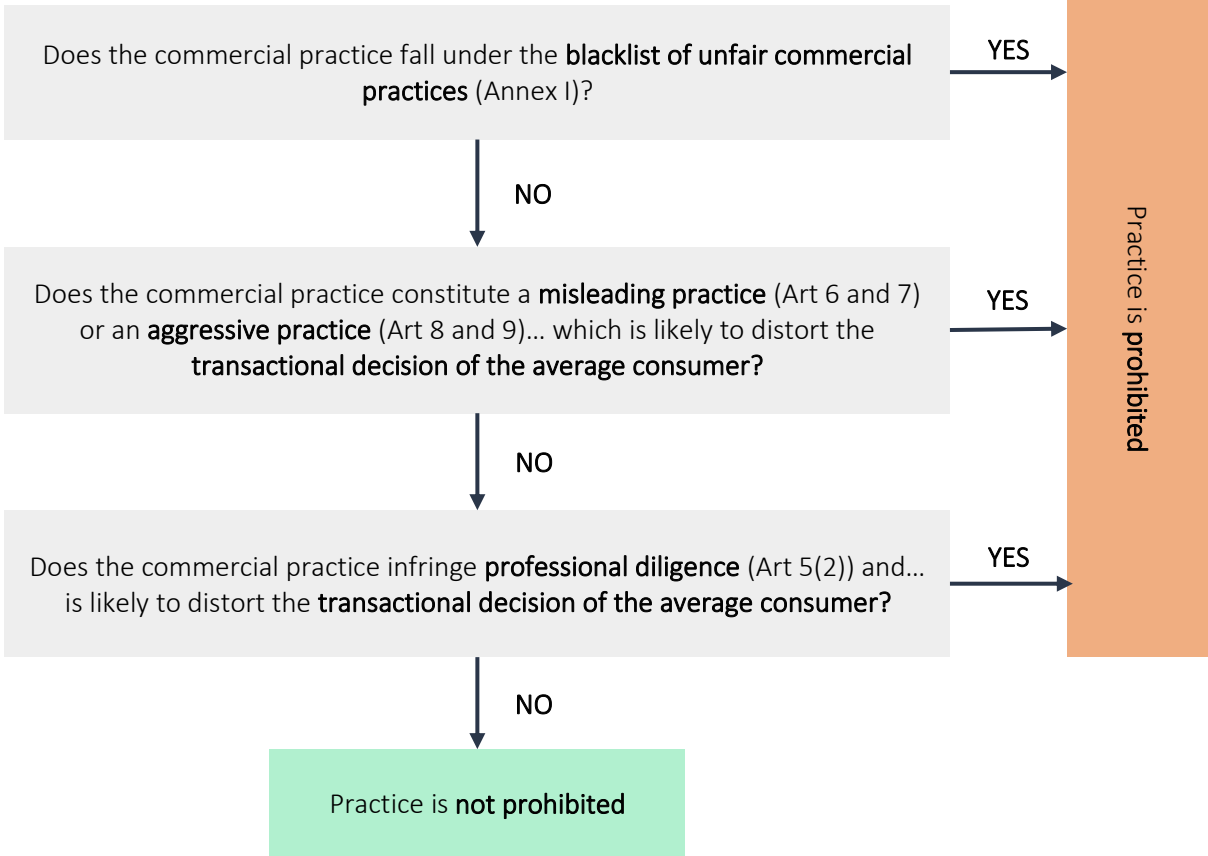
The practice of listing specific conduct in an annexure or schedule is colloquially known as a ‘blacklist’ approach. The UCPD categorises this non-exhaustive list into 2 parts being ‘**Misleading commercial practices**’ and ‘**Aggressive commercial practices**’.

In general, commercial practices which are likely to ‘materially distort the economic behaviour’ only of a clearly identifiable group of consumers who are particularly vulnerable (e.g., mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee) would be assessed from the perspective of the average member of that group. Exceptions apply to common and legitimate advertising practices, including the making of exaggerated statements or statements which are not meant to be taken literally.

A recent Omnibus Directive has amended the UCPD to also impose a positive duty to provide information in certain situations which include clearly disclosing any paid advertisement or payment for online product searches and informing consumers if online prices are based on an algorithm taking into account personal consumer behaviour.

## European Union – Flowchart of UCPD framework

This flowchart illustrates the relationship between the ‘blacklist’ of commercial practices in Annex I and the general clauses of the UCPD, namely Articles 6 to 9 and Article 5 respectively. In order to be considered unfair, and therefore prohibited under the UCPD, it is sufficient that a commercial practice fulfils only one of these tests.<sup>42</sup>



42 Official Journal of the European Union, ‘Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ (Regulatory guidance, 29 December 2021), C 526/26, p. 26.

## European Union – Enforcement actions under the UCPD framework

### Samsung Electronics Italia<sup>43</sup>

In January 2017, the Autorità Garante della Concorrenza e del Mercato, also known as the Italian Competition Authority, imposed a total fine of €3.1 million against Samsung Electronics Italia for promoting the sale of electronic products by promising prizes and bonuses to consumers in a manner which constituted misleading and aggressive commercial practices. The prizes or bonuses promised to consumers were only available if consumers registered with a website or had purchased through a particular authorised retailer. These conditions were not specified in advertisements and could be read only after registering on the website and having read the terms and conditions in full. If these steps were completed, obtaining a prize was still very difficult as consumers were repeatedly requested to provide documents. At the same time, after having bought the item linked to the promotional offer, consumers were forced to register to the Samsung People online platform and provide their personal data which were used by Samsung for marketing purposes. Additionally, consumers could not get the promised prize or bonus without giving their consent to the commercial use of their personal data which was used by Samsung for purposes not linked at all with the promotional offer of the product itself.

### Wind Tre & Vodafone Italia<sup>44</sup>

In September 2018, the Italian Competition Authority imposed fines on 2 telecommunications companies, Wind Tre and Vodafone Italia, for selling mobile phones with pre-installed SIM cards that provided answering and internet services without informing consumers at the point of transaction. The Court found that selling mobile phones with SIM cards that included pre-loaded and pre-activated internet and voicemail services without first sufficiently informing consumers would be conduct falling within the term 'inertia selling', thereby constituting a prohibited aggressive practice under point 29 of Annex I.<sup>45</sup>

### Facebook<sup>46</sup>

In November 2018, the Italian Competition Authority imposed a fine of €10 million on Facebook for exerting undue influence on registered consumers through the transmission of their data from Facebook to third-party websites and apps for commercial purposes without their express and prior consent. The Italian Competition Authority alleged that undue influence had been caused by the pre-selection of the broadest consent to data sharing, which was detrimental to consumers, who then faced significant restrictions on the social network if they limited their data consent.

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43 Autorità Garante della Concorrenza e del Mercato, '[Italian Competition Authority fines Samsung 3.1 million euros for misleading and aggressive commercial practices in promoting products](#)' (Press Release, 25 January 2017) (English translation); Eleftheria Papadimitriou, 'Protection of Users' in Ioannis Iglezakis, *Legal Issues of Mobile Apps: A Practical Guide* (2020, Kluwer Law International).

44 Consiglio di Stato (Council of State, Italy), *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA, formerly Wind Telecomunicazioni SpA (C-54/17) and Vodafone Italia SpA, formerly Vodafone Omnitel NV (C-55/17)* (Court decision, 13 September 2019).

45 European Union, *Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market* (29 December 2021), p. 127.

46 Autorità Garante della Concorrenza e del Mercato, '[Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes](#)' (Press Release, 7 December 2018) (English translation); ACCC, *Digital Platforms Inquiry (Final Report, June 2019)*, p. 440.

## United Kingdom – Combined general and specific prohibition

Similar to the European Union's UCPD, part 2 of the *Consumer Protection from Unfair Trading Regulations 2008* (CPR) contains a **general prohibition** against 'unfair commercial practices'. The *Consumer Rights Act 2015* and the *Enterprise Act 2002* also provide more specific protections for unfair contract terms and notices.

The 3 main categories of unfair commercial practices under the CPRs are categorised similarly to the UCPD but are defined differently:

- Misleading actions
- Misleading omissions
- Aggressive commercial practices

### 1. Misleading actions

- commercial practices that contain false information, are untruthful or in any way deceive or are likely to deceive the average consumer
- commercial practices concerning any marketing of a product (including comparative advertising) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor
- commercial practices concerning any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with.

### 2. Misleading omissions

- commercial practices that omit material information
- commercial practices that hide material information
- commercial practices that provide unclear, unintelligible, ambiguous or untimely material information
- commercial practices that fail to identify its commercial intent, unless this is already apparent from the context, and as a result causes (or is likely to cause) the average consumer to undertake a transaction decision they would not have taken otherwise.

### 3. Aggressive commercial practices

- commercial practices that impair, or are likely to impair, the average consumer's freedom of choice or conduct due to harassment, coercion, physical force or undue influence, and causes the consumer to undertake a transactional decision that they would not have taken otherwise.

The CPR contains a **specific prohibition** approach which includes a schedule of 31 specific commercial practices that are considered unfair commercial practices.

The schedule broadly covers code of conduct matters, displaying trust marks or quality marks without authorisation, wrongfully claiming endorsement or authorisation by a public or private body, bait advertising, 'bait and switch', limited offers, language barriers, selling illegal products, 'advertorials', false or inaccurate claims or impressions, pyramid schemes, medical cures, offering fake prizes, and unsolicited selling.



## United Kingdom – Enforcement actions under the CPR framework

### Hotel booking sites<sup>47</sup>

In February 2019, booking sites such as Expedia, Booking.com, Agoda, Hotels.com, ebookers and trivago were the subject of enforcement action by the UK Competition and Markets Authority (CMA) due to serious concerns about pressure selling, misleading discount claims, and hidden charges. The CMA took action because it was concerned that practices such as giving a false impression of a room's popularity or not displaying the full cost of a room upfront could mislead people, which could limit consumer options and lead to potential breaches of consumer protection law. The booking sites agreed to cooperate with the CMA and voluntarily agreed to the following:

- **Search results** – making it clearer how hotels are ranked after a customer has entered their search requirements. For example, telling people when search results have been affected by the amount of commission a hotel pays the site.
- **Pressure selling** – not giving a false impression of the availability or popularity of a hotel or rushing customers into making a booking decision based on incomplete information. For example, when highlighting that other customers are looking at the same hotel, making it clear they may be searching for different dates. The CMA also saw examples of some sites strategically placing sold out hotels within search results to put pressure on people to book more quickly. Sites have now committed not to do this.
- **Discount claims** – being clearer about discounts and only promoting deals that are actually available at that time. Examples of misleading discount claims may include comparisons with a higher price that was not relevant to the customer's search criteria. For example, some sites were comparing a higher weekend room rate with a weekday rate or comparing the price of a luxury suite with a standard room.
- **Hidden charges** – displaying all compulsory charges such as taxes, booking or resort fees in the headline price. Sites can still break that price down, but the total amount the customer has to pay should always be shown upfront.

### Apple Inc<sup>48</sup>

In 2018, the CMA raised consumer law concerns with Apple after finding people were not being warned clearly that their phone's performance could slow down following a 2017 software update designed to manage demands on the battery. The CMA became concerned that people might have tried to repair their phone or replace it because they were not aware the software update had caused the handset to slow down. In addition, people were not able to easily find information about the health of their phone's battery, which can degrade over time.

In May 2019, the CMA secured an undertaking by Apple to make a formal commitment to always notify consumers when issuing a planned software update if it is expected to materially change the impact of performance management on their phones. This includes providing clear and comprehensible information to consumers about lithium-ion batteries, unexpected shutdowns and performance management of their devices. Apple webpages must now provide guidance to consumers on steps they can take to maximise battery health and notify consumers in future iOS updates about material changes and impacts on device batteries, such as its maximum capacity and peak performance capability.

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47 Competition and Markets Authority, '[Hotel booking sites to make major changes after CMA probe](#)' (Press Release, 6 February 2019).

48 Competition and Markets Authority, '[Apple pledges clearer information on iPhone performance](#)' (22 May 2019); Competition and Markets Authority, '[Apple iPhones: consumer protection case](#)' (22 May 2019).

## Singapore – Combined general and specific prohibition

In Singapore, the *Consumer Protection (Fair Trading) Act 2003* (CPFTA) contains a **general prohibition** against ‘unfair practices’ if a supplier of goods or services has engaged in an act or omission before, during or after a consumer transaction through the following broad categories of conduct:

- Misleading or deceptive conduct
- False claims
- Taking advantage of consumers

### 1. Misleading actions

The CPFTA prohibits ‘unfair practices’ in consumer transactions if a supplier has done or said anything, or omitted to do or say anything, resulting in a consumer being reasonably deceived or misled.

### 2. False Claims

The CPFTA prohibits ‘unfair practices’ in consumer transactions if a supplier has made a false claim. In some cases, this has been enforced in conjunction with the Singapore Code of Advertising Practice to uphold the principle of ‘truthful presentation’ to ensure advertisements do not mislead in any way by inaccuracy, ambiguity, exaggeration or omission.

### 3. Taking advantage of consumers

The CPFTA prohibits ‘unfair practices’ in consumer transactions if a supplier has taken advantage of a consumer if the supplier knew (or ought to reasonably know) that the consumer was:

- not in a position to protect his or her own interests
- not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction
- anything specified in the Second Schedule.

The Second Schedule contains a **specific prohibition** approach which includes a non-exhaustive list of 27 specific practices that broadly covers specific misrepresentations, false or misleading representations, estimated prices, misrepresentations about rights, remedies or obligations, misrepresentations about authority to negotiate final terms of agreement, undue pressure, undue influence, and representations about supply that cannot be supplied.

Other specific practices also include free prizes, advertorials, omitting or misleading material facts (including small print concealment), bait advertising, accepting payment without intention to supply, unsolicited supplies, supplying copies of an agreement upon request, and harsh, oppressive or excessively one-sided terms and conditions so as to be unconscionable.

## Singapore – Enforcement actions under the CPFTA framework

### Lenovo Singapore & Want Join Information Technology<sup>49</sup>

In April 2022, the Competition and Consumer Commission of Singapore (CCCS) announced an ongoing investigation that revealed Lenovo Singapore and Want Join Information Technology had engaged in unfair practices under the CPFTA by making false or misleading claims about the screen refresh rate of certain models of the Lenovo Legion Y540 gaming laptop.

In the course of investigations, the CCCS ascertained that Lenovo Singapore had, between April 2019 and June 2020, stated on its website that the screen refresh rate of its Legion Laptops could achieve a screen refresh rate of up to 144 Hz. However, in a model comparison table for the full range of models of the Legion Laptop, only 2 specific models were stated to have a screen refresh rate of 60 Hz. In fact, 4 other models of the Legion Laptop could only achieve a screen refresh rate of up to 60 Hz. As a result of the investigation, both companies provided the CCCS with an undertaking to cease the unfair practices and not engage in any other unfair practices under the CPFTA.

### Mobile Air<sup>50</sup>

In November 2014, the Consumers Association of Singapore (CASE) sought an injunction against a Mobile Air shop owner after they refused to sign a Voluntary Compliance Agreement to pledge to stop their unfair practices. In November 2015, a district judge sentenced the shop owner to a 33-month jail sentence and fined him S\$2,000 for cheating 26 customers into paying S\$16,599 for mobile devices between January 2014 to October 2014.

It was alleged that the owner would sell low-priced mobile devices to attract customers, and after sales deals were made, would alter the invoices to cheat victims into handing over more money. The district judge also noted the elaborate nature of the scam, which involved the collection of payments in separate tranches and the use of seemingly innocuous documents couched as warranty agreements and invoices.

### Fashion Interactive<sup>51</sup>

In January 2020, the CCCS obtained an order from the State Court to declare an e-commerce retailer selling shoes, Fashion Interactive, had engaged in unfair trade practices under the CPFTA, and ordered them to cease an unfair practice known as a subscription trap. In Singapore, a subscription trap is a practice by suppliers to mislead consumers into signing up for a recurring subscription by giving consumers the impression that they are only making a one-off purchase of goods or services. Subsequently, if consumers do not cancel such subscriptions, typically within a grace period, they would be liable for recurring charges.

CCCS's investigations revealed that Fashion Interactive had not sufficiently disclosed key information to consumers who were misled into purchasing a membership subscription with recurring monthly fees. The use of subscription traps contravenes the CPFTA as an unfair trade practice because it omits to provide a material fact to a consumer and uses small print to conceal a material fact from the consumer or mislead a consumer as to a material fact, in connection with the supply of goods or services.

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49 Competition and Consumer Commission Singapore, '[Lenovo Singapore and Want Join Provide Undertakings to CCCS in View of Past Unfair Practices Involving Screen Refresh Rate of Certain Models of Lenovo Legion Y540 Gaming Laptop](#)' (Press Release, 14 April 2022).

50 Today Online, '[Jover Chew gets jail, fine for 'audacious' cheating schemes](#)' (Media article, 30 November 2015); The Straits Times, '[Case turns to court to bring Mobile Air to heel](#)' (Media article, 13 November 2014).

51 Competition and Consumer Commission Singapore, '[E-Commerce Retailer Fashion Interactive Ordered to Cease Unfair Trade Practices and Stop Using "Subscription Traps"](#)' (Press Release, 17 January 2020).

# Appendix B – Inquiries and reports on unfair trading practices

## ACCC inquiries and reports

Speech by former chair of the ACCC, Rod Sims for the ACCC's enforcement and compliance policy update 2022–23 at the Committee for Economic Development of Australia (CEDA) on 3 March 2022:

*'The ACCC considers that introducing a prohibition on unfair practices, to apply economy wide, is necessary to ensure that consumers are not harmed by such practices, and well as to address other manipulative practices across the economy.'*

Speech by former chair of the ACCC, Rod Sims at the 2021 National Consumer Congress on 22 March 2021:

*'While we have had some success with the unconscionable conduct provisions, the courts are showing us clearly the limitations of this provision, in part due to how it is named.*

*I will have more to say on this at our panel session at our next meeting. Suffice to say here that a principles-based prohibition would allow the law to keep up with evolving unfair trading practices, particularly as technology creates new opportunities for unfair conduct.'*

## ACCC Digital Platforms Inquiry

ACCC Digital Platforms Inquiry – Final report, p. 26:

*'The ACCC has also observed a range of practices that are significantly detrimental for consumers but which may not neatly fit under existing consumer laws. These practices are driven in part by the significant increase in the amount of consumer data now collected and the increased sophistication in data analysis and consumer targeting, which also creates the potential for significant consumer harm...*

*Accordingly, the ACCC recommends that the Australian Consumer Law be amended to include a prohibition on certain unfair trading practices, noting that such prohibitions have been used to address similar practices overseas.'*

## ACCC Digital Advertising Services Inquiry

ACCC Digital advertising services (DAS) inquiry – Final Report, p. 41:

*'In the DPI Final Report we recommended that the Australian Consumer Law (ACL) should be amended to introduce a prohibition on certain unfair trading practices. We remain of the view that such a prohibition would enable the ACCC to undertake strategic enforcement action to address the risk of ad tech providers, advertisers, publishers, and digital platforms collecting or using data in ways that have the potential to result in substantial consumer harm, but is conduct not captured by the existing provisions of the ACL.'*

## ACCC Digital Platform Services Inquiry

ACCC Digital Platform Services Inquiry – First interim report (online private messaging services), p. 74:

*‘Due to the impact of potentially unfair clauses in the terms and conditions of large digital platforms on businesses, and particularly small businesses, the ACCC reiterates the recommendations in the DPI Final Report that unfair contract terms be prohibited (including penalties applying to their use) and there be a prohibition on certain unfair trading practices (recommendations 20 and 21).’*

ACCC Digital Platform Services Inquiry – Second interim report (app marketplaces), p. 11:

*‘The ACCC remains concerned with the tracking of consumers through apps. Many consumers express strong preferences for limitations on tracking, yet the data practices of apps available on the App Store and Play Store often do not align with those preferences ...*

*The ACCC continues to support the DPI Final Report recommendations regarding amending the Competition and Consumer Act 2010 to prohibit unfair contract terms (recommendation 20) and certain unfair trading practices (recommendation 21) which will benefit the many consumers who use apps.’*

ACCC Digital Platform Services Inquiry – Third interim report (search defaults and choice screens), p. 67:

*‘Some dark pattern conduct may be covered by existing prohibitions in the ACL, including prohibitions on misleading or deceptive conduct, false or misleading representations, unfair contract terms, and, in the case of extremely harmful or manipulative dark pattern practices, unconscionable conduct. However, many dark pattern and nudge practices, even those that cause considerable consumer harm, would fall outside existing prohibitions...*


*For the reasons outlined above, the ACCC reiterates its support of a prohibition on unfair trading practices. Such a prohibition would result in greater alignment between relevant legislation in Australia and overseas.’*

ACCC Digital Platform Services Inquiry – Fourth interim report (general online retail marketplaces), p. 5:

*‘The ACCC continues to support the introduction of a prohibition on certain unfair trading practices to cover harmful conduct that is currently not captured by existing provisions of the Australian Consumer Law. Such a prohibition may help address issues raised in relation to data collection and use, as well as potential dark patterns or nudges on online marketplaces (which may confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions). The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.’*

ACCC Digital Platform Services Inquiry – Fifth interim report (regulatory reform), p. 16:

*‘Recommendation 1: Economy-wide consumer measures... The ACCC continues to recommend the introduction of new and expanded economy-wide consumer measures, including an economy-wide prohibition against unfair trading practices and strengthening of the unfair contract terms laws.*



*These reforms, alongside targeted digital platform specific obligations, would assist in addressing some of the consumer protection concerns identified for digital platform services.'*

ACCC Digital Platform Services Inquiry – Sixth interim report (social media services), p. 143:

*'The ACCC has concerns about unfair trading practices on social media platforms as they often require users to agree to onerous contract terms in order to access their services. This may leave consumers vulnerable to harms arising from extensive data collection and dark patterns, discussed below.*

*We envisage any unfair trading practice prohibition would address problematic conduct arising from power imbalances which is currently unlikely to breach the ACL.'*

## ACCC Perishable Agricultural Goods Inquiry

ACCC Perishable Agricultural Goods Inquiry, p. xvii:

*'Recommendation 2: An economy-wide prohibition on unfair trading practices should be introduced into the ACL... The findings of this report provide further evidence that an economy-wide unfair trading practices provision is needed. Introducing a prohibition on unfair trading practices to the ACL is necessary to reduce the significant harms that are not currently captured by the provisions of the ACL, and which will not be covered by the proposed reforms to unfair contract terms laws.'*

# Appendix C – Defining dark patterns

## Categories of dark patterns

The OECD lists the following practices as dark patterns:<sup>52</sup>

- **Forced action:** forcing the consumer to do something in order to access a specific functionality. For example, forcing consumers to provide more personal information than desired (email/ phone number), requiring access to consumers' contacts in order to use a service.
- **Interface interference:** privileging specific actions from the consumer favourable to the online business through framing of information. For example, visually obscuring important information, preselection of options by default, ambiguity or trick questions (double negatives), and 'confirmshaming' (manipulating consumers towards a particular option using emotive language/framing).
- **Nagging:** repeated requests to consumers to do something thereby exploiting the consumers willpower or time e.g. requests to turn on notifications, or location tracking.
- **Obstruction:** aim to make tasks or interactions more difficult than they need to be, exploiting consumer inertia or willpower e.g. making it easy to sign up to a service, or opt in for privacy intrusive settings, but hard to cancel the service or change privacy settings, or making it hard to delete an account (termed immortal accounts).
- **Sneaking:** seek to hide or disguise the information relevant to the consumer's decision such as costs, and this may exploit sunk cost fallacy in consumers (i.e., the phenomenon whereby a person chooses not to abandon a strategy or course of action because they have invested heavily in it, even when changing the decision/action would clearly be more beneficial to them).
- **Social proof:** triggering a decision based on observations of other consumer's behaviour. For example, notifications about other consumers activities and testimonials about recent purchases.
- **Urgency:** real or fake temporal or qualitative limits on deals in order to pressure consumers to make a purchase, for example, language such as 'low stock', 'high demand', or countdown timers.

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52 See Organisation for Economic Co-operation and Development (OECD), 'Dark commercial patterns – OECD Digital Economy Papers – No. 336' (Report, October 2022), p. 8; See also Consumer Policy Research Centre, 'How Australia can stop unfair business practices – A comparative analysis of unfair trading laws in international jurisdictions' (Report, September 2022).



## Endnotes

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- i *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369.
  - ii *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2015] FCA 399.
  - iii *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2015] FCA 399, Annexure A.
  - iv Australian Competition and Consumer Commission, ‘[ACCC takes action against Medibank for alleged misleading and unconscionable conduct](#)’ (Press release, 16 June 2016).
  - v *Australian Competition and Consumer Commission v Medibank Private Limited* [2017] FCA 1006 [24]-[36] (O’Callaghan J).
  - vi Australian Competition and Consumer Commission, ‘[ACCC takes action against Medibank for alleged misleading and unconscionable conduct](#)’ (Press release, 16 June 2016).
  - vii *Australian Competition and Consumer Commission v Medibank Private Limited* [2017] FCA 1006 [31]-[36] (O’Callaghan J).
  - viii *Australian Competition and Consumer Commission v Medibank Private Limited* [2017] FCA 1006 [302] (O’Callaghan J).
  - ix *Australian Competition and Consumer Commission v Medibank Private Limited* [2018] FCAFC 235 [353] (Beach J); Australian Competition and Consumer Commission, ‘[Full Federal Court dismisses ACCC appeal against Medibank](#)’, (Press release, 20 December 2018).
  - x Australian Competition and Consumer Commission, ‘[Mazda in court for alleged unconscionable conduct and false or misleading representations](#)’ (Press release, 31 October 2019).
  - xi Australian Competition and Consumer Commission, ‘[Mazda in court for alleged unconscionable conduct and false or misleading representations](#)’ (Press release, 31 October 2019).
  - xii *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493 [282], [400], [510], [594], [774], [855], [956] (O’Callaghan J).
  - xiii Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493 [855] (O’Callaghan J).
  - xiv Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493 [265] (O’Callaghan J).
  - xv Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493.
  - xvi Australian Competition and Consumer Commission, ‘[Court dismisses appeals against Mazda judgment](#)’ (Press release, 23 March 2023).
  - xvii *Australian Competition and Consumer Commission v Mazda Australia Pty Limited* [2023] FCAFC 45 [547]-[548].
  - xviii *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [12]-[13].
  - xix *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [23]-[30].
  - xx *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [16].
  - xxi *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [44]-[47].
  - xxii *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [53].
  - xxiii *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [54].
  - xxiv *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [67]-[68].
  - xxv *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [202].
  - xxvi *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [212].
  - xxvii *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 [255].